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Textile labelling

A concern for the EU consumer?

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Chapter 3

Textile & Horizontal legislation

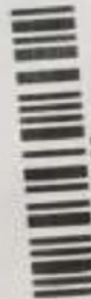
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3.1 Introduction

As mentioned in the previous chapters, the central piece of legislation in the T&C industry is the Textile Regulation²⁹¹. This Regulation lays down harmonised provisions with regard to textile fibre names and the indications that appear on labels, markings and documents which accompany textile products at the various stages of their production, processing and distribution. Thus, it concerns not just labelling of the final textile product but identification across the entire supply chain.

In addition, horizontal legislation such as the UCPD and the GPSD apply to the labelling of these products. The preamble of the Textile Regulation refers to the prohibition in the UCPD on misleading commercial practices²⁹². The UCPD is the legal framework applicable to unfair commercial practices in business-to-consumer transactions and applies as horizontal legislation to all sectors. The Directive, in general, aims to ensure that consumers are not misled and that any claim made by traders in the EU is clear, accurate and substantiated, enabling consumers to make informed and meaningful choices²⁹³. Therefore, the UCPD is relevant for this study with regard to the labelling of misleading textile products.

Additionally, in the context of textile labelling, the GPSD should be considered. This Directive aims to contribute to product traceability and, ultimately, to improving product safety²⁹⁴ as the GPSD obliges distributors to keep and make available the documentation necessary for tracing the origin of their product. The primary goal is to provide consumers with all relevant safety information for safe use of products. However, an obligation to label the products with, for instance, country of origin information is lacking.

While the GPSD obliges distributors to keep and make available the documentation necessary for tracing the origin of dangerous products, the UCPD prohibits factually incorrect indication of product origin, if there is a possibility that it might influence consumer decision-making. Especially with reference to 'commercial', i.e. non-mandatory, labelling, the UCPD may be used as a tool to contribute to uniform and correct application of the labelling requirements.

3.2 Objective

In this chapter, European textile legislation and horizontal legislation, e.g. the UCPD and GPSD, and their relevance to T&C labelling are set out. This chapter thus contributes to answering the sub-question about the way in which textile and horizontal legislation safeguards consumer's rights to accurate information on textile and clothing labelling.

²⁹¹ *OJ L 272*, 18.10.2011, p. 01-03.

²⁹² See the Preamble to the Directive, Recital 19, *OJ L 272*, 18.10.2011.

²⁹³ See the Preamble to the Directive, Recital 06, *OJ L 149*, 11.06.2005.

²⁹⁴ See the Preamble to the Directive, Recital 18-21, *OJ L 11*, 15.01.2002.

It first introduces the Regulation and Directives in general, including a brief introduction to the relevant case law, with special emphasis on the 'labelling doctrine' as introduced in case law. In addition, a more detailed discussion follows on the substantive provisions of the Directives, their individual scope, and the role of the CJEU in interpreting the UCPD as far as these concern (textile) labelling.

As mentioned in Chapter 1, a discussion of the regulation of aggressive commercial practices falls outside the scope of this study. The provisions of the UCPD and case law are set out, insofar these concern (textile) labels. The provisions of the GPSD are outlined as far as they concern product traceability and product safety. Moreover, on 13 February 2013, the Commission proposed a Product Safety and Market Surveillance Package, which included a new Consumer Product Safety Regulation. This includes provisions on the indication of origin of manufactured non-food consumer products, such as T&C products. Article 7 of the proposed Regulation would oblige manufacturers and importers to ensure that either these products or their packaging or accompanying documents bear an indication of the country of origin²⁹⁵. The Product Safety and Market Surveillance Package is set out in the last subsection. This chapter concludes with an answer to the aforementioned sub-question of this study.

3.3 Textile Legislation

The current Textile Regulation, adopted in 2011²⁹⁶, represents *"an opportunity to simplify and improve the regulatory framework for the development and uptake of new fibres, and to enhance the transparency of the process of adding new fibres to the list of fibre names"*.

In other words, the Textile Regulation aims to introduce more flexibility to adapting legislation in line with the technological developments expected in the industry. It is based on Article 95 of the EC Treaty²⁹⁷ and aims to establish an internal market for textile products while ensuring that consumers receive accurate information. It may be regarded as the codification in one single legal instrument of all the directives that existed previously in the area of textile names and labelling.

These are:

1. Directive 73/44/EEC of 26 February 1973 on the approximation of the laws of the Member States relating to the quantitative analysis of ternary fibre mixtures.²⁹⁸ This Directive provided uniform methods for sampling and analysis to be used in Member States for the purpose

²⁹⁵ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee more Product Safety and better Market Surveillance in the Single Market for Products, Brussels 13.02.2013. COM (2013) 74 final.

²⁹⁶ Textile Regulation (EU) No 1007/2011 on fibre names and related labelling and marking of the fibre composition of textile products, *OJ L 272*, 18.10.2011, p. 1-64.

²⁹⁷ Treaty establishing the European Community, *OJ C 325*, 24.12.2002, p. 69-70. Now: Article 115 Treaty on the Functioning of the Union (TFEU), *OJ C 326*, 26.10.2012, p. 47-199.

²⁹⁸ *OJ L 83*, 30.03.1973, p. 1-18.

- of determining the fibre composition of ternary textile fibre mixtures²⁹⁹. Furthermore, the Directive specifies the methods of analysis to be used to check whether the composition of textile products is in compliance with the label information (fibre composition).
2. Directive 96/73/EC of 16 December 1996 on certain methods for the quantitative analysis of binary textile fibre mixtures³⁰⁰ and Directive 96/74/EC of 16 December 1996 on textile names requires the labelling of the fibre composition of textile products using only the harmonised names listed in Annex I to the Directive³⁰¹.
 3. Directive 2006/2/EC of 6 January 2006 amending for purposes of its adaptation to technical process, Annex II to Directive 96/73/EC of the European Parliament and of the Council on certain methods for quantitative analysis of binary textile fibre mixtures.
 4. Directive 2007/4/EC of 2 February 2007 amending for purposes of its adaptation to technical process, Annex II to Directive 96/73/EC of the European Parliament and of the Council on certain methods for quantitative analysis of binary textile fibre mixtures³⁰².
 5. Directive 2008/121/EC of 14 January 2009 on Textile Names³⁰³.

Directive 96/74/EC on textile names required the labelling of the fibre composition of textile products using only the harmonised names listed in Annex I to the Directive³⁰⁴. The Directive aimed to provide accurate consumer information throughout the EU by harmonising the use of fibre names and ensuring the proper functioning of the Internal Market. Therefore, in its provisions the Directive described in details the conditions and rules for labelling of textiles and the procedures for adaptation of the Directive to technical progress. Since Directive 96/74/EC had been substantially amended several times and since further amendments had to be made, a recast of the directive was deemed necessary in the interest of clarity. The recast regulation, Directive 2008/121/EC on textile names, also required the labelling of the fibre composition of textile products. It required a check as to whether the composition of textile products was in conformity with the information supplied in Directive 96/74/EC of the European Parliament and of the Council of 16 December 1996. The new elements introduced into the latter Directive concern the Committee for Directives relating to textile names and labelling. The establishment of the Committee ensured that changes to the list of fibre names no longer required a change of the Directive through the ordinary legislative procedure. Instead, the comitology procedure could be applied³⁰⁵.

²⁹⁹ The Directive gave among others rules for the preparation of test samples, rules were set up in case of non-uniform method and proceedings for the adaptation to technical progress were specified. Three new fibres had been added to Annex I over the past years, by way of amendments to Directive 96/74/EC: Commission Directive 2004/34/EC of 23 March 2004, which added polylactide; Commission Directive 2006/3/EC of 9 January 2006, which added elastomultiester; and Commission Directive 2007/3/EC of 2 February 2007, which added elastolefin. The relevant test methods for quantitative analysis of these fibres were added by Commission Directive 2006/2/EC (elastomultiester and polylactide); and Commission Directive 2007/4/EC (elastolefin). Prior to this, four new fibres (cashgora, aramid, polyimide, lyocell) had been added to Annex I by Commission Directive 97/37/EC of 19 June 1997.

³⁰⁰ *OJ L* 32, 03.02.1997, p. 01-37.

³⁰¹ *OJ L* 32, 03.02.1997, p. 38-55.

³⁰² *OJ L* 28, 03.02.2007, p. 14-18.

³⁰³ *OJ L* 19, 23.01.2009, p. 39.

³⁰⁴ *OJ L* 32, 03.02.1997, p. 38-55.

³⁰⁵ Commission Staff working document. Simplification of EU legislation in the field of textile names and labelling. Impact assessment report on 30 January 2009. COM (2009) 31 final, p. 41.

With a view to improving the functioning of the Internal Market and providing accurate information to consumers, the Textile Regulation³⁰⁶ lays down rules concerning:

“The use of textile fiber names and related labelling and marking of fiber composition of textile products and the labelling or marking of textile products containing non-textile parts of animal origin and rules concerning the determination of the fiber composition of textile products by quantitative analysis of binary and ternary textile fiber mixtures” (Article 1).

The main part of the Regulation contains the naming of fibres of textiles products as follows from Directives 2008/121/EC and 96/73/EC. As it includes a rather ‘technical Directive’ (96/73), it contains annexes which are less relevant for this study, such as:

- Textile fibre names (in general) (Article 5 and Annex I);
- Application for new textile fibre names (Article 6 and Annex II);
- Pure textiles products (Article 7);
- Fleece wool or virgin wool products (Article 8 and Annex III);
- Multifibre textile products (Article 9);
- Decorative fibres and fibres with antistatic effect (Article 10);
- Multi-component textile products (Article 11);
- Textile products containing non-textile parts of animal origin (Article 12);
- Labelling and marking of textile products listed in Annex IV (Article 13);
- Derogations (Article 17 and Annexes V and VI).

Furthermore, a few new elements are introduced. The first is the introduction of a general obligation to provide complete information on the fibre composition of textile products. In addition, the rules regarding labels and marks indicating fibre composition are clarified and a requirement is introduced to indicate the presents of non-textile parts of animal origin. Finally, the exemption for customized products made up by self-employed tailors is clarified³⁰⁷.

Moreover, the indication of the fibre composition is mandatory in the supply chain and commercial activities of the textile product. The names and descriptions of the fibres are listed in Annex I of the Regulation, which contains almost 50 fibre names and their description. The Regulation does not regulate other types of labelling, such as size, care, country of origin and CSR labelling. However, according to Article 16(2), if the name of the manufacturer is provided, it may and in some cases must appear immediately before or after the fibre composition.

Pursuant to Article 3(1)(a), a textile product is defined as being:

“Any raw, semi-worked, worked, semi-manufactured, manufactured, semi-made-up or made-up product which is exclusively composed of textile fibres, regardless of the mixing or assembly process employed”.

³⁰⁶ OJ L 272, 18. 10.2011, p. 1-2.

³⁰⁷ OJ L 272, 18. 10.2011, p. 3.

In addition, a number of other products are treated as textile products (Article 2(2) of the EU Regulation), such as products containing at least 80% by weight of textile fibres.

For the purpose of the Regulation, 'labelling' means:

"Affixing the required information to the textile product by way of attaching a label" (Article 3 (1)(g)), and 'inclusive labelling' is defined as "the use of a single label for several textile products or components" (Article 3 (1)(i)).

Annex VI of the Textile Regulation provides a list of textile products for which inclusive labelling is sufficient, such as floor cloths, cleaning cloths, belts and ribbons. Additionally, according to Article 14(1):

"... the labelling and marking of textile products shall be durable, easily legible, visible and accessible and, in the case of a label, securely attached".

Unlike the previous Textile Directives, it is not necessary to provide a sewn-in label or print directly onto the textile product. Hangtags, such as swing tickets labels or gummed labels, are adequate. Moreover, if the products are offered for sale in packaging (i.e. pre-packed), it is sufficient to indicate the fibre composition on the packaging only. In addition, if a piece of textile is being supplied from a roll, it is sufficient to indicate fibre composition on the roll only although the indication should be easily accessible to the consumer.

In addition, Article 16(3) requires *"the labelling or marking to be provided in the official language(s) of the Member State on the territory of which the product is made available to the consumer, unless that country provides otherwise"*.

On 29 October 2014, the European Commission published a report on the application of Regulation 1007/2011 on textile fibre names and on related labelling and marking of the fibre composition of textile products³⁰⁸. The Commission report, which covers the period since the Textile Regulation's application (2012) until June 2014, provides an overview of the Regulation's core provisions and how it has been functioning. In general, the report states that the majority of Member States observed an increase in the number of requests for information – mainly from businesses – following the adoption of the Regulation³⁰⁹.

The report states that *"the requirement to indicate non-textile parts of animal origin and the requirement to label or mark textile products in the languages of the Member States in which the products are marketed"*, in accordance with Article 16(3), were said to be ambiguous by both the Commission and the relevant authorities in Member States³¹⁰.

³⁰⁸ OJ L 175, 14.06.2014, p. 6–8.

³⁰⁹ OJ L 175, 14.06.2014, p. 6.

³¹⁰ This requirement has also led to most enquiries from businesses regarding to whether small parts of animal origin, such as (pieces of) bone, pearl or horn, have to be indicated on labels. The answer is positive; ergo such information has to be indicated. See also OJ L 175, 14.06.2014, p. 6.

Moreover, several stakeholders stated that the requirement involves substantial costs, while others considered them rather limited. As for the Article 16(3) requirement, the Commission reported that the benefits to consumers (of more information being conveyed to them in their own language) outweigh the costs and burdens to businesses, and that it is therefore legitimate to require that the information is provided. Also, businesses are free to provide any additional information they consider useful, provided that such additional information is not misleading for consumers.

Although Articles 5 to 13 are considered the technical part of the Textile Regulation – and therefore less interesting for this study – special attention should be given to Article 12 of the Textile Regulation. According to Article 12, the presence of non-textile parts of animal origin in textile products shall be indicated by using the phrase “*Contains non-textile parts of animal origin*” on the labelling or marking of the products.

The use of this phrase does not require a detailed description of particular materials or parts although businesses are free to disclose more details about the materials used (e.g. cowhide, lambskin or goatskin) as long as this information is not false or misleading and are provided in such a way that the consumer can easily understand it. However, the disclosure of the additional information may not replace the mandatory phrase “*Contains non-textile parts of animal origin*”.

Concerns have also been raised in the Member States regarding the application or understanding of some provisions, in particular Article 14(2), which allows economic operators within the supply chain to replace labels or markings by accompanying commercial documents; the reference to Annex VII in Article 19 ‘Items not to be taken into account for determining the fibre composition’; the ‘exceptions’ under Annex V ‘Products for which labelling or marking is not mandatory’; and the special provisions for certain textile products in Annex IV³¹¹. An exception has been made for products which are being supplied to businesses within the supply chain, such as assembled textile products, or which are delivered as part of a public procurement procedure (Article 14(2))³¹². In this situation, accompanying commercial documents can replace or supplement labels or marking.

It has been noted that there is a lack of adequate checks and controls on the fibre composition of textile products. This compromise the risk of consumers purchasing a product labelled as, e.g. silk (a costly fibre) even though the product is actually made of polyester (a less costly fibre). This appears to be borne out by a random check in a Member State, which revealed that about 70% of tested products had incorrect fibre content, and/or incorrect fibre labelling³¹³. Since the provided false (fibre) information could cause consumers to make a transactional decision that they would

³¹¹ OJ L 175, 14.06.2014, p. 7.

³¹² In this respect, Article 14(2) of the Textile Regulation refers to a public procurement procedure within the meaning Article 1 of the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, OJ L 134, 30.04.2004.

³¹³ OJ L 175, 14.06.2014, p. 9.

not have otherwise made, this constitutes an unfair commercial practice³¹⁴. This brings us to the first horizontal instrument relevant to labelling in the T&C industry, namely the UCPD.

3.4 Unfair Commercial Practices Directive

This Directive was adopted on 11 May 2005³¹⁵ as a full harmonisation directive and aims to provide a high level of consumer protection in all sectors³¹⁶. The scope of the Directive is broad as commercial practice is defined as:

“Any act, omission, course of conduct or representation, commercial communication including advertising and marketing by a trader directly connected with the promotion, sale or supply of a product to consumers”³¹⁷.

The broad scope of the application of the UCPD is also emphasised in case law³¹⁸. Therefore, labelling of textile products would also be likely to be classified as a commercial practice since labelling is directly connected with the promotion, sale or supply of textile products to consumers and the Directive provides general rules ensuring that labels do not mislead consumers.

According to Stuyck³¹⁹, the Directive contains what he describes as a three-tier system for the appraisal of the unfairness of a commercial practice. Firstly, at a ‘grand general level’, Article 5 gives a general definition of unfair practices. Secondly, at a ‘small general level’ the Directive defines misleading, respectively, aggressive practices (Articles 6 to 9) requiring, again, that the practice is likely to cause the consumer to make a transactional decision that he would not have otherwise made. The UCPD test in this regard turns on whether the information materially distorts or is *likely* to materially distort the economic behaviour of ‘the average consumer’. Finally, at a third level, Annex I contains the list of those commercial practices which are in all circumstances to be regarded as unfair (blacklist). The latter provisions are set out further in this chapter in so far as they are relevant for labelling in the T&C industry.

The Directive neglects to harmonise enforcement systems. Under Article 11 and Article 13 of the UCPD, Member States can choose the enforcement mechanisms which best suit their legal tradition and can decide what type of penalties should be applied as long as these are *effective*,

³¹⁴ See recital (19) in the preamble to the Textile Regulation.

³¹⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), OJ L 149, 11.06.2005, p. 22–39.

³¹⁶ Sibony, A-L. ‘Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive.’ *European Review of Private Law* 22.6 (2014), p. 901–941.

³¹⁷ Article 2 (d) UCPD, OJ L 149, 11.06.2005, p. 22–39.

³¹⁸ For example see CJEU 23 april 2009, joined cases C-261/07 and C-299/07, EU:C:2006:585 (*VTB-VAB v. Total/Galateav Sanoma*) and CJEU 14 January 2010, Case C-304/08, EU:C:2010:12 (*Plus*).

³¹⁹ Stuyck, J. ‘The Court of Justice and the unfair commercial practices directive.’ *Common Market Law Review* 52.3 (2015), p. 726.

*proportionate and dissuasive*³²⁰. Member States need to ensure that adequate and effective means exist in order to prevent unfair commercial practices³²¹.

According to the Commission, the UCPD upholds the principle of self-regulation as self-regulatory bodies can actively help in the enhancement of compliance with legal standards contained in the UCPD and ease the burden on public enforcement bodies³²². Moreover, Member States should facilitate out-of-court dispute settlements for the enhancement of the level of consumer protection and to optimize compliance with the legislation and best market practices³²³. As mentioned in Chapter 1, the T&C industry has set voluntary rules and standards in cooperation with the industry organisations (codes of practice) relating to the labelling requirements and the conduct of the T&C firms in the industry³²⁴. Moreover, governments have been involved in setting the standards within the T&C industry, viz. environmental standards and the EN13402 standard on size designation of clothes. These codes of conduct and standards, e.g. care labelling (GINETEX), size labelling (ISO standards and standards by national standardization organisations) are voluntarily accepted rules and are supplementary to both legislation and jurisprudence³²⁵. With regard to size and care labelling, governments of the Member States have been involved in the establishment of these standards³²⁶. The standards are soft laws, such as non-binding declarations, codes of conducts and recommendations³²⁷.

It can be presumed that codes that are devised in consultation with or approved by a public authority must be fair, although, compliance with a public approved code does not guarantee for passing the fairness standard³²⁸.

As mentioned above, Member States can rely on self-regulatory dispute settlements to enhance the level of consumer protection and to maximise compliance with the legislation and best market practices. Furthermore Van Boom et. al. noted that the UCPD leaves it up to Member States whether they rely primarily on public and/or private enforcement in the event of a dispute³²⁹.

³²⁰ Articles 11 and 13 UCPD, OJ L 149, 11.06.2005, p. 22–39.

³²¹ First report from the Commission on the application. COM (2013) 139 final, 14 March 2013, p. 26.

³²² Ibidem.

³²³ Ibidem.

³²⁴ See Chapter 1.

³²⁵ Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* (2012-4), p. 268-288.

³²⁶ European Commission, Matrix Insight, 'Study of the need and options for the harmonisation of the labelling of textile and clothing products' (2013), p. 32. <<http://www.industrialleurope.eu/Sectors/TCL/2013/Study%20labelling%20textile%20products%20-%20final%20report%20Matrix.pdf>> last viewed on 15 March 2017.

³²⁷ European Commission, Matrix Insight, 'Study of the need and options for the harmonisation of the labelling of textile and clothing products(2013), p. 31-32.<<http://www.industrialleurope.eu/Sectors/TCL/2013/Study%20labelling%20textile%20products%20-%20final%20report%20Matrix.pdf>> last viewed on 15 March 2017.

³²⁸ Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* (2012-4), p. 268-272.

³²⁹ Van Boom, W.H Garde, A. & Akseli, O. 'Introduction to'The European Unfair Commercial Practices Directive", *Van Boom, Garde & Akseli, the European Unfair Commercial Practices Directive-Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014) 2014, p. 6.

The full harmonisation character of the UCPD has been criticised because it allegedly forces Member States to abandon more beneficial measures of consumer protection³³⁰. Contrary to this point of view, however, Struyck³³¹ notes that there is no evidence for this negative effect of the full harmonisation and that the measures Member States have so far had to abandon can hardly be seen as genuine measures of consumer protection. In his opinion, all national prohibitions that were found to go beyond what the Directive allows concerned regulations on sale promotions that does not serve the consumer interest, or at least were not (primarily) designed to protect consumers, but rather other business interests. Thus, on unfair commercial practice regarding textile labelling the UCPD also leaves it up to the Member States to decide what type of penalties should be applied as long as the penalties are 'effective, proportionate and dissuasive'³³².

The consumer organisation BEUC noted in a position paper that, in general, the UCPD has shown its potential to protect consumers against misleading commercial practices via different enforcement actions. As an example, the *Apple* case³³³ is given in which consumer organisations coordinated actions to fight against misleading information given by the multinational company (operating in different Member States) to consumers in relation to their legal guarantee rights (see Section II, point 1)³³⁴. However, this case also showed the downsides of the Directive, for example, a lack of clarity as regards the consumer information that has to be given on the legal guarantee rights (Article 6 (1) (g)). The *Apple* case also brought to light the fact that full harmonisation of substantive law can still lead to different results in different Member States as regards decision-making by national authorities. Thus, traders still face 28 national proceedings and possibly 28 different interpretations of EU consumer protection rules that are mostly principle-based. The CJEU has confirmed in several rulings³³⁵ that the UCPD precludes national legislation from prohibiting commercial practices per se where these practices are not listed in the annex of the Directive, even if the intention behind the introduction of an additional prohibition was to protect consumer interests. However, in the joined cases *Wamo*³³⁶ and *Inno*³³⁷ the CJEU ruled that the Directive does not stand in the way of Member States maintaining or introducing prohibitions which go beyond the annex of the Directive if the aim is primarily the protection of

³³⁰ See Howells, G. 'Unfair commercial practices directive—A missed opportunity', *The Regulation of Unfair Commercial Practices Under EC Directive 2005*, p. 103-114.

³³¹ Stuyck, J. 'The Court of Justice and the unfair commercial practices directive.' *Common Market Law Review* 52.3 (2015), p. 728.

³³² The Member States have put in place a wide variety of enforcement regimes. In some countries enforcement is mainly carried out by public authorities such as consumer ombudsmen (e.g. Denmark, Sweden and Finland), consumer/competition authorities (e.g. Italy, Ireland, the Netherlands, Romania and the UK) and dedicated departments of ministries (e.g. Portugal and Belgium). Other Member States run a private enforcement scheme led by competitors (e.g. Austria and Germany). Most systems, however, combine elements of public and private enforcement.

See First report from the Commission on the application of Directive 2005/29/EC, COM (2013)139 final, p. 26.

³³³ In the Decision of 21 December 2011, the Italian Competition Authority (Autorità garante della concorrenza e del mercato) fined the US-based company Apple for misleading practices and information as to the guarantee on its hardware products. This case was initiated by the Italian consumer association Altroconsumo who had received complaints from consumers that Apple was in breach of consumer protection rules. <http://www.agcm.it/trasp-statistiche/doc_download/3042-ps7256chiusura.html> last viewed on 17 March 2017.

³³⁴ BEUC position paper European Commission's report on the application of the Unfair Commercial Practices Directive. BEUC position paper, Ref.: X/2013/049 (24/06/2013). <<http://www.beuc.eu/publications/2013-00457-01-e.pdf>> last viewed on 17 March 2017.

³³⁵ See joined cases C-261/07 and C-299/07, (EU:C:2009:244) *VTB-VAB v. Total/Galateav Sanoma*; C304/08 (EU:C:2010:660) *Plus*; C-540/08 (EU:C:2010:282).

³³⁶ C-288/10, ECLI:EU:C:2011:443.

³³⁷ C-126/11, ECLI:EU:C:2011:851.

competition³³⁸ (and the ensuing protection of consumers is therefore not the primary aim of the prohibition). According to BEUC, this approach illustrates the absurdity of eliminating national protection measures, which are aimed at protecting consumers due to the full harmonisation character of the Directive while at the same time they could be upheld in case only competitors are protected through their application.

3.4.1 Consumer & average consumer

The UCPD protects the 'average consumer'. Article 2 of the UCPD defines the consumer as any natural person who, in commercial practices covered by the Directive, is acting for purposes, which are outside his trade, business, craft or profession, but it provides no definition of the average consumer. However, express reference to the average consumer is made in Articles 5(2)b, 6(1), 7(1) and 8 of the UCPD³³⁹. The notion of the 'average consumer' introduces a fictitious consumer standard, that is to say, a consumer that is reasonably well informed and reasonably observant and circumspect³⁴⁰. Recital 18 of the UCPD³⁴¹ underlines that the average consumer test is not a statistical test but rather one based on the principle of proportionality. Therefore, national courts and authorities are expected to form their own judgment by taking into consideration case law of the Court of Justice in order to determine the standard reaction of the average consumer, without in principle, having to commission an expert's report or a consumer research poll³⁴². However, authorities and courts of the Member States may take various specific factors into account, such as social, linguistic and cultural factors, to complement the average consumer test³⁴³. In this context, it is relevant to note that the EC Guidance on the UCPD does refer to some of the trademark cases and explicitly argues that the notion of 'average consumer' made by the CJEU might also be applicable³⁴⁴ in the context of textile labels.

This notion of 'average consumer' has been developed in the case law of the Court of Justice. As Recital 18 of the UCPD explains, it refers to the "reasonably well-informed and reasonably observant and circumspect consumer, taking into account social, cultural, and linguistic factors"³⁴⁵. In the *Cassis de Dijon* case³⁴⁶, the judgment of the CJEU implicitly shows the assumption that consumers do not base a decision to buy a product solely on the first impression of the product. So, consumers are well protected if it was ensured that: "... suitable information is conveyed to

³³⁸ BEUC position paper European Commission's report on the application of the Unfair Commercial Practices Directive. BEUC position paper, Ref.: X/2013/049 (24/06/2013), p. 5. <<http://www.beuc.eu/publications/2013-00457-01-e.pdf>> last viewed on 17 March 2017.

³³⁹ Incardona, R. & Poncibò, C. 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', *Journal of Consumer Policy* 2007-1, p. 21-38.

³⁴⁰ Case C-210/96 (Gut Springenheide), EU:C:1998:369, para 31. See also C-122/10, ECLI:EU:C:2011:299 (*Konsumentombudsmannen v Ving Sverige AB*).

³⁴¹ Recital 18 UCPD, OJ L 149/22, 11.06.2005.

³⁴² Ibidem. See also Case C-611/14, ECLI:EU:C:2016:800 (*Canal Digital Danmark*), see paragraph 39.

³⁴³ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009)1666, p. 26.

³⁴⁴ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009)1666, p. 26-27.

³⁴⁵ See also C-122/10, ECLI:EU:C:2011:299 (*Konsumentombudsmannen v Ving Sverige AB*).

³⁴⁶ CJEU 20 February 1979, Case C-120/78, EU:C:1979:42 (*Cassis de Dijon*), paragraph 13 of the judgement.

the purchaser by requiring the display of an indication of origin and to the alcohol content on the packaging of the products”.

In this case, the CJEU was not yet applying an explicit ‘average consumer’ notion but the judgment can be seen as a starting point for the development thereof³⁴⁷.

The argument that the consumer may be well protected by the information provided on the product’s label has been confirmed by the CJEU in numerous cases and has become known as the ‘labelling doctrine’³⁴⁸. The labelling doctrine is important in the creation of the Internal Market as it restricts Member States in their power to keep foreign products off their markets.

According to Duivenvoorde; *“the labelling doctrine can be seen as part of the information paradigm in EU consumer law, i.e. the view that consumers are, at least in principle, sufficiently protected if they are supplied with the relevant information. The CJEU, in this context, requires the consumer to be sufficiently attentive in order not to be misled by (foreign) products due to their different composition, naming and packaging”*³⁴⁹.

In this respect, the CJEU pointed out that the average consumer, whose purchasing decisions depend on the composition of a product, would first read the list of component raw materials³⁵⁰. Similarly, in the *Douwe Egberts* case, AG Geelhoed concluded that before acquiring a given product (for the first time), a consumer would take note of the information on the label and assess the value of that information. According to the AG:

*“... the consumer is sufficiently protected if he is safeguarded from misleading information on products and that he does not need to be shielded from information whose usefulness with regard to the acquisition and use of a product he can himself appraise”*³⁵¹.

Moreover, specifically regarding labelling, according to the Court of Justice:

*“... among the factors to be taken into account in order to assess whether the labelling at issue in the main proceedings may be misleading, the length of time for which a name has been used is an objective factor which might affect the expectations of the reasonable [average] consumer”*³⁵².

³⁴⁷ Duivenvoorde, B. B. *The consumer benchmarks in the Unfair Commercial Practices Directive*, (2014), p. 31 and p. 49.

³⁴⁸ See CJEU 21 May 1987, Joined cases C-133-136/85, EU:C:1987:244 (*Walter Rau*), CJEU 12 March 1987, Case C-178/84, EU:C:1987:126 (*Reinheitsgebot*) and CJEU 14 July 1988, Case C-407/85, EU:C:1988:401 (*Drei Glocken*).

³⁴⁹ Duivenvoorde, B. B. *The consumer benchmarks in the Unfair Commercial Practices Directive*, (2014), p. 32.

³⁵⁰ *Verein gegen Unwesen in Handel und Gewerbe Ko’* in v. Adolf Darbo AG, judgement of the Court of First Instance (First Chamber) of 4 April 2000, case C-465/98, EU:C:2000:184, § 22.

³⁵¹ *Douwe Egberts NV v. Westrom Pharma NV* and Christophe Souranis, judgement of case C-239/02, judgement of the CJEU of 15 July 2004, EU:C:2004:445. *Douwe Egberts NV v. Westrom Pharma NV* and Christophe Souranis, opinion of Advocate General Geelhoed of 11 December 2003 at § 54. I THINK THE REFERENCE IS NOT CORRECT

³⁵² Case C-446/07, judgement of the Court of Justice of 10 September 2009, EU:C:2009:530 (*Alberto Severi v Regione Emilia-Romagna*) para 62.

As mentioned above, the *Gut Springenheide* case is used as an indicator for the introduction of the average consumer notion in European law as the CJEU gives its views on which consumer is to be taken as the benchmark regarding potentially misleading commercial communication³⁵³.

The following year, in the *Lloyd Schuhfabrik* case, the CJEU made it clear that the average consumer “being reasonably well informed and reasonably observant and circumspect”, should also serve as the benchmark for the application of trademark law³⁵⁴.

In this case on trademark law, a German producer of shoes argued that the Dutch company Klijsen, a vendor of shoes under the name of ‘Lloint’s’, had infringed its trademark. The CJEU clarified that the likelihood of confusion should be determined on a global level, taking into account ‘*the visual, aural or conceptual similarity of the marks in question*’.

Particular emphasis was given to the “*average consumer who cannot compare the marks directly, and to the fact that the level of attention of the average consumer depends on the type of good or service*”³⁵⁵.

This is in contrast with the labelling doctrine stating that consumers are assumed to analyse labels and the characteristics of the product before purchasing a product. Moreover, the average consumer’s level of attention varies depending on the product. More specifically, the attention is relatively low with respect to everyday consumer products, e.g., basic textile products such as underwear, socks, etc. (also see by analogy, the judgment in the case *Orange colouring of the toe of a sock*³⁵⁶). *A contrario*, in my opinion, it might be argued that for high-fashion clothing the average consumer’s level of attention should be high as consumers do not buy designer clothing regularly³⁵⁷.

The Court of Justice indicated some factors that might influence the level of knowledge, as well as the behaviour of the average consumer, in assessing the likelihood of confusion of certain trademarks³⁵⁸. According to the Court:

*“... the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details It should also be borne in mind that the average consumer’s level of attention is likely to vary according to the category of goods and services in question”*³⁵⁹.

As regards the clothing sector, in *New Look Ltd v. Office for Harmonisation in the Internal Market (OHIM)*, in relation to possible confusion of trademarks, the Court of Justice explained³⁶⁰:

³⁵³ CJEU 16 July 1998, Case C-210/96, EU:C:1998:369 (*Gut Springenheide*).

³⁵⁴ CJEU 22 June 1999, Case C-342/97, EU:C:1999:323 (*Lloyd Schuhfabrik*).

³⁵⁵ Case C-342/97 (*Lloyd Schuhfabrik*).

³⁵⁶ Case T-547/08, EU:T:2010: 235, para 43 (*Orange Colouring of the toe of a sock*).

³⁵⁷ Mosca, F. (Ed.). *Global Marketing Strategies for the Promotion of Luxury Goods*. IGI Global, (2016), p. 244-261.

³⁵⁸ See e.g. Joined Cases T-183/02 and T184/02, EU:T:2004:79 (*Mundicolor*), para 68.

See also Case T- 20/02, EU:T:2004:95, (*Happydog*), para 37.

³⁵⁹ *Ibidem*.

³⁶⁰ *New Look Ltd v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, judgement of the Court of First Instance of 6 October 2004, joint cases T-117/03 to T-119/ 03 and T-171/03, § 20. EU:T:2004:293.

“The clothing sector ... comprises goods which vary widely in quality and price. Whilst it is possible that the [average] consumer is more attentive to the choice of mark where he or she buys a particular item or clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector”³⁶¹.

Furthermore, it follows from case law that the average consumer, in buying an expensive and high-end (textile) product, pays more attention to the trademark of the product, such as watches as in the case of *Leclerc*³⁶².

The European Commission has argued in its EC Guidance on the UCPD that the arguments made by the CJEU on what may be expected from the ‘average consumer’ in trademark cases may also apply with regard to the UCPD³⁶³. However, the application of either the *Gut Springenheide* rule or the approach taken in trademark law does lead to different results in the case of T&C labelling. For example, care labels include information about the main characteristics of the product. Among these are its fitness for purpose, results expected from its use and other material features³⁶⁴. For a regular consumer, it may be difficult or impossible to assess the correctness of the wash instructions on the care label. The question is whether textile manufacturers should consider this difficulty when designing their labels or whether they could assume that the ‘average consumer’ would be able to understand wash instructions given on a label, even if these are complex, if they are sufficiently clear. The answer to this question is not straightforward and will therefore be intensively discussed in Chapter 4.3.4.

As mentioned above, the competent authority or court may, in certain cases, interpret the information conveyed in the commercial practice differently as Member States have social, linguistic and cultural features peculiar to them. Thus, despite the full harmonisation character of the Directive and based on the average consumer test it might be justified to require from the foreign trader to provide an additional piece of information. The Court in its case law on trademark law confirmed the latter:

“The possibility of allowing 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”³⁶⁵.

AG Jacobs observed in paragraph 10 of his opinion in this case that it is possible that as a consequence of linguistic, cultural and social differences among Member States, a trademark which is not liable to mislead a consumer in one Member State may be liable to do so in another.

³⁶¹ *New Look Ltd v. Office for Harmonisation in the Internal Market* (Trade Marks and Designs) (OHIM), quoted above, para 43.

³⁶² GC 12 January 2006, Case T-147/03, ECLI:EU:T:2004:95 (*Leclerc*). See also GC 10 October 2007, Case T-460/05, ECLI:EU:T:2007:304 (*Bang & Olufsen*).

³⁶³ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 26.

³⁶⁴ Articles 2 and 7 UCPD, OJ L 149, 11.06.2005, p. 22-39.

³⁶⁵ Case C-313/94, EU:C:1996:450 (*Graffione*), para 22.

Therefore, national law should determine whether and the extent to which the use of a revoked trademark is prohibited³⁶⁶.

In this context, the CJEU considered in *Verlados-Calvados*³⁶⁷ that in order to assess whether there is an 'evocation' within the meaning of the provision of a regulation, the national court is required to refer to the perception of the average consumer who is reasonably well-informed and reasonably observant and circumspect. Thus, this is being understood as covering all European consumers and not only consumers of the Member State in which the product giving rise to the evocation of the protected geographical indication is manufactured.

Thus, the fact that a commercial practice is regularly employed in other Member States, and does so without clashing with consumer protection aspects, might be just one aspect in determining whether such a practice is unfair in a different Member State³⁶⁸.

The obvious reason for compelling a business to provide information to consumers is to ensure that the consumer is sufficiently equipped with information to engage in a rational purchase decision³⁶⁹. As mentioned above, the standard test for defining the 'average consumer' is based on the case law of the Court of Justice³⁷⁰.

The introduced average consumer standard seems to be fictitious since, at the same time, scholarly work stresses that most consumers may have an imperfect understanding of a purchase and even of the attributes of the purchased product³⁷¹. Furthermore, the scholars critically reviewed that the high standard of attention to information that is required from consumers by the UCPD is artificial, and that scope for regulators and national courts must be created to supplement the (average) consumer standard and make it more meaningful, realistic, precise and unambiguous³⁷². According to BEUC, the notion of the 'average consumer' in the Directive does not always correspond to the reality of consumers. Consumer choices are defined by personal (emotions), economic (incomes, wealth) and social (culture, education) backgrounds³⁷³. Thus, in the view of BEUC, a behavioural economics based approach would be necessary to assess how consumers make transactional choices. Furthermore, consumers are usually exposed to confusing situations, which are not taken into account in the parameters provided by the Directive. For example, this occurs in the area of CSR labelling where due to the diversity of the labelling schemes consumer

³⁶⁶ Case C-313/94, EU:C:1996:450 (*Graffione*), para 10.

³⁶⁷ Case C75/15 ECLI:EU:C:2016:35, para 27 and 28.

³⁶⁸ Case C-313/94, EU:C:1996:450 (*Graffione*), para 26.

³⁶⁹ Howells, G., Micklitz, H.W. & Wilhelmsson, T. 'Towards a better understanding of unfair commercial practices', *International Journal of Law and Management* (2009-2), p. 69-90.

³⁷⁰ The standard test was among others developed in Case C-210/96, EU:C:1998:369 (*Gut Springenheide*).

³⁷¹ Incardona, R., & Poncibò, C. 'The average consumer, the unfair commercial practices directive, and the cognitive revolution', *Journal of consumer policy*, 30.1 (2007), p. 21-38.

³⁷² Weatherill, S. 'Recent Case Law concerning the Free Movement of Foods: Mapping the Frontiers of Market Deregulation.' *Common Market L. Rev.* 36 (1999), p. 58.

See also Waddington, L. 'Reflections on the Protection of 'Vulnerable' Consumers Under EU Law', *Maastricht Faculty of Law Working Paper* (2014/2013-2), p. 14-15.

³⁷³ BEUC position paper European Commission's report on the application of the Unfair Commercial Practices Directive. BEUC position paper, Ref.: X/2013/049 (24/06/2013), p. 6. <<http://www.beuc.eu/publications/2013-00457-01-e.pdf>> last viewed on 17 March 2017.

choices are affected³⁷⁴. When a specific group of consumers is targeted by a given practice (Article 5(2)(b) of the UCPD), so whether they are children, the elderly or even motorcyclists, national authorities and courts must assess the impact of such a practice from the perspective of the average member of the targeted group (see also Article 5(3) of the UCPD).

However, it can be noted that in *Miles Handelsgesellschaft International GmbH v. OHIM*, the Court of First Instance (now the General Court) measured the response of the average consumer as being that of the whole mass of consumers in general and not that of the precise group of motorcyclists targeted by the clothing product. The CFI held that³⁷⁵:

“... since persons other than motorcyclists may also purchase clothing for motorcyclists, the relevant consumer target group consists of all “average” consumers who are considered to be reasonably well informed and observant”.

The Court further noted that the textile goods in question are primary consumer goods; the average consumer test take an average degree of consumer attention for granted”. The Court found that *“even if the relevant consumer (target) group consisted only of motorcyclists, that group of consumers would be no more observant than average consumers when they purchase the clothing in question, which can be used both for riding a motorcycle and as winter clothing. If a product is aimed at all consumers, the average consumer should be taken as a benchmark”.*

Article 5(3) of the Directive defines vulnerable consumers as those who are *“more exposed to a commercial practice or a product because of their mental or physical infirmity, age or credulity”*. The vulnerable consumer test applies if the practice affects the economic behaviour of a vulnerable group of consumers *‘in a way which the trader could reasonably be expected to foresee’*.

According to the Commission, *“introduction of this criterion to the UCPD allows there to be a balance of the effects of a commercial practice on vulnerable consumers and the standard of professional diligence which can reasonably be expected from a trader”*³⁷⁶.

The need for this balance justifies increasing the trader’s responsibility towards vulnerable consumers insofar as the negative impact of a commercial practice on vulnerable consumers is foreseeable³⁷⁷.

³⁷⁴ European Commission, Matrix Insight, ‘Study of the need and options for the harmonisation of the labelling of textile and clothing products(2013), p. 76-84. <<http://www.industrial-europe.eu/Sectors/TCL/2013/Study%20labelling%20textile%20products%20-%20final%20report%20Matrix.pdf>> last viewed on 15 March 2017.

³⁷⁵ *Miles Handelsgesellschaft International mbH v. Office for Harmonisation in the Internal Market*, judgement of the Court of First Instance (Fourth Chamber) of 7 July 2005, Case T-385/03, paragraph 15.

³⁷⁶ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 31.

³⁷⁷ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 31-32.

It should be kept in mind, however, that some consumers, due to their imperfect knowledge or ignorance, may be misled by, or otherwise act irrationally no matter how fair the commercial practice in fact was³⁷⁸. For example, there may be consumers who would be so naïve to believe that ‘Chantilly Lace’ is actually made in Chantilly in France or to believe that ‘Designed in Italy’ on a clothing label indicates that the country of production is Italy.

Nevertheless, it is not always easy to understand which benchmark – the average consumer or the vulnerable consumer – is to be applied. To give an example in the area of textile and clothing, a marketing strategy of placing CSR labels on children’s clothing products, in general, may be aimed at both vulnerable consumers and the public at large, e.g., at children as well as at their parents. What would be the benchmark in such circumstances for assessing the claim that the products, for instance, have environmental properties – the average consumer from the vulnerable group or the average consumer in general? Whether children could be influenced by environmental concerns in their purchasing decision-making is also likely to depend on their age. Similarly, who is the benchmark consumer in the case of children’s clothing products that are offered with a gift such as a puzzle or a keychain?³⁷⁹

In such cases, the gift is intended as a direct exhortation to children to buy the advertised products or to persuade their parents to buy the clothing products and thus to collect the puzzle or keychain for them. In doing so, the marketing strategy might either influence the average consumer’s (parents) transactional decision through manipulating vulnerable consumers (such as children and teenagers) or be directly effective on vulnerable consumers themselves.

Children are by nature much more likely to believe certain exaggerated claims than their parents. According to Duivenvoorde, the wording of Article 5(3) seems to indicate that only a particular vulnerable group must be affected while other consumers are not affected by these exaggerated claims³⁸⁰. Thus, the commercial practice would have to affect children and/or teenagers only³⁸¹. Furthermore, as the Commission noted, it should be taken into consideration that the aim of the provision is to protect consumers against dishonest business practices (e.g. outright frauds or scams) but in reality these are devised to exploit the weaknesses of certain specific consumer groups³⁸². In other words, that the particular vulnerable group is harmed is the reasonably foreseeable result of the commercial practice of the trader³⁸³. In such cases, it seems that the vulnerable consumer benchmark should be applied rather than the average consumer benchmark.

³⁷⁸ Ibidem.

³⁷⁹ Interview Scotch & Soda, see Appendix IV.

³⁸⁰ Duivenvoorde, B.B. *The consumer benchmarks in the Unfair Commercial Practices Directive* (2014), p. 25-26.

³⁸¹ Ibidem.

³⁸² Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 31.

³⁸³ Duivenvoorde, B.B. *The consumer benchmarks in the Unfair Commercial Practices Directive* (2014), p. 26.

Regarding the concept of the “vulnerable consumer” discussions³⁸⁴ began as it was unclear what the impetus was that moved the EC to resort to a new variant of the prototypical consumer. Questions were raised, such as: Is the vulnerable consumer merely an exception to the average consumer? Or, is this vulnerable consumer a type of person representing a specific category of consumers, among whom one can detect a particular average (vulnerable) consumer? Should everyone who has a below average intelligence be individually taken into account by the trader? Are consumers more vulnerable merely because of their age, educational, economic or minority status?

To settle this, the European Consumer Consultative Group (ECCG)³⁸⁵ suggested the adoption of a two-fold approach to the definition of vulnerable consumers. This should consider:

1. consumer groups which is more ‘structurally vulnerable’ (such as children, people with poor numeracy and literacy skills, elderly, people at risk of poverty and people with disabilities). This is categorised as ‘the personal dimension or horizontal approach’ of the definition of vulnerable consumers. It depends on the personal characteristics of consumers and it is valid in all situations; and
2. the ‘situational vulnerability’ or ‘sectorial approach’ for consumers who are exposed to situations of vulnerability due to complex market conditions and are in a difficult position to make informed consumption choices. For example, in the finance sector or electricity market.

This twofold approach would broaden the protective scope of the UCPD and would be in line with the criticism expressed by legal scholars and by BEUC with regard to the criteria used to define the average consumer and the use of these criteria in the situation of vulnerability of the consumer in the T&C market.

3.4.2 Trader

The UCPD defines ‘trader’ as any natural or legal person who, in the commercial practices covered by the Directive, is acting for purposes related to his trade, business, craft or profession and anyone acting in the name of or on behalf of a ‘trader’. Article 2(d) of the Directive provides a very broad definition of a commercial practice and defines the trader in relation to the related but diametrically opposed concept of a ‘consumer’. The trader, therefore, seems to be any person who has a consumer as a counterpart, provided that it carries out a gainful activity (pure C2C relations, therefore, appear to be excluded). Stuyck notes that CJEU case-law in the form of *BKK Mobil*³⁸⁶

³⁸⁴ Stuyck, J., Terry, E., & Van Dyck, T. ‘Confidence through Fairness-The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market’, *Common Market Law Review* (2006), p. 107–152.

³⁸⁵ European Consumer Consultative Group Opinion on Consumers and Vulnerability, 7 February 2013, see <http://ec.europa.eu/consumers/empowerment/docs/eccg_opinion_consumers_vulnerability_022013_en.pdf> last viewed on 17 March 2017.

³⁸⁶ Case C-59/12, EU:C:2013:634 (*BKK Mobil*).

The Court of Justice interpreted the term ‘trader’ in *BKK Mobil*. BKK is a health insurance fund established as a public law body which is part of the German statutory system. The CJEU stressed that according to standing case-law the terms of a Directive have to be given an autonomous interpretation independent of national law. The Court rightly focuses on the definitions in Article 2(b) of the Directive (‘trader’) and on Article 2(d) (‘commercial practice’) and stressed the necessity, in the interest of a high level of consumer protection, of a broad definition. In the Court’s view the prohibition of misleading practices in the UCPD applies where misleading information is circulated by such a person preventing the consumer from making an informed choice and leading him to take a

regarding the definition of a trader is in line with the generally accepted view that the notion of traders should be a wide one in order to guarantee consumers effective protection not only in the traditional commercial sectors but also against the liberal professions, public enterprises, cultural organisations and all entities that provide goods or services on the market³⁸⁷. In this regard, it is important to mention, for instance, the status of non-profit organisations such as the Salvation Army. In the T&C industry, the Salvation Army is one of the leading textile recycling and clothing collection organisations³⁸⁸ and sells products to consumers. In the context of the UCPD, the Salvation Army is regarded as a 'trader' as the UCPD covers any transactions that consumers might enter into as long as there is some commercial flavour to them.

3.4.3 Transactional decision

According to Article 2(e) of the Directive, 'material distortion of the consumer's behaviour' entails that "*a commercial practice impairs the average consumer's ability to make an informed decision and, in addition, that such impairment is significant enough to change the decisions the average consumer makes*"³⁸⁹.

One of the key elements of the unfairness test is the concept of 'transactional decision', which is defined in Article 2(k) of the UCPD. The wording ("*any decision ...*") in this provision indicates that the concept of transactional decision covers all or almost all decisions a consumer may make in relation to a product or a service. At this point, as the Commission³⁹⁰ noted, a purchasing decision taken by a consumer would be qualified as a transactional decision even if the decision does not lead to the conclusion of a binding purchase. This follows from Article 3 of the UCPD, which stipulates that the Directive applies "*to unfair business-to-consumer commercial practices... before, during and after a commercial transaction in relation to a product*".

In *Trento Sviluppo*, the CJEU provided an even broader definition in stating that transactional decisions should always be understood in a very broad manner as referring not only to a decision to acquire or not to acquire a particular product but also to decisions to enter or not to enter into a shop in which the product could be purchased, for example³⁹¹. This judgment confirmed an earlier point of view expressed in the doctrine³⁹², which is that, the words '*before, during and*

decision he would not have taken in the absence of such information. In those circumstances, whether the body at issue or the specific task it pursues are public or private is irrelevant.

³⁸⁷ Willett, C. 'Fairness and consumer decision making under the unfair commercial practices directive.' *Journal of consumer policy* 33.3 (2010), p. 248-251.

³⁸⁸ <<http://www.salvationarmy.org.uk/clothing-bank>> last viewed on 25 november 2016.

³⁸⁹ See Article 2 (1) (e). See also Trzaskowski, J. 'Lawful Distortion of Consumers' Economic Behaviour—Collateral Damage under the Unfair Commercial Practices Directive.' *European Business Law Review* 27.1 (2016), p. 26-28.

³⁹⁰ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 22-24.

³⁹¹ CJEU 19 Dec. 2013, C-281/12, *Trento Sviluppo srl, Centrale Adriatica Soc. Coop. arl*, para.

A first case on the notion of 'misleading' practice in Article 6(1) of the Directive is *Trento Sviluppo* where the Court extends the concept of a 'transactional decision' to cover not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop.

³⁹² Willett, C. 'Fairness and consumer decision making under the unfair commercial practices directive.' *Journal of consumer policy* 33.3 (2010), p. 247-273.

after' of Article 3 of the UCPD indicate a wide spectrum of transactional decisions³⁹³, taken by the consumer.

As such, a transactional decision taken by the consumer at any time between the moment the consumer is exposed for the first time to a product's marketing activities and a product's life cycle may lead to actions without legal consequences under national contract law.

Following this approach, the Commission³⁹⁴ noted that "*a commercial practice may be considered unfair not only if it is likely to cause the average consumer to purchase or not to purchase a product but also if it is likely to cause the consumer to enter a shop, spend more time on a web shop engaged in a purchase decision or decide not to switch to another trader or product*".

For example, the issue of under-labelling is highlighted as the T&C industry quite often refers to labelling care instructions below what is theoretically possible (or even desirable, in terms of adequate care for the textile). An example of under-labelling is a T-shirt which could be washed at 60 degrees but the care label indicates that it should be washed at 30 degrees in order for the producer to avoid liability for lack of conformity where the defect in fact is caused by the consumer exercising improper care³⁹⁵. Such improper care could result from the consumer washing the T-shirt at 60 degrees for reasons of hygiene but stuffing the washing machine too full as a result of which the T-shirt is more subject to wear and tear than normal. Whereas a consumer might have held the seller of the T-shirt liable for a lack of quality if the label had been correct, there is a good chance the consumer will not hold the seller accountable if he/she has ignored the (false) care instruction and therefore believes that this was the cause of excessive tear and wear. In other words, even though the trader's care label may be factually correct – washing the T-shirt at 30 degrees does not damage it – the average consumer would nevertheless have been misled as to what the adequate wash instruction of the textile product was in a way likely to cause him to make a different transactional decision, in this case, whether or not to take legal action against the seller on the basis of a lack of conformity. This might be substantiated by the fact that the majority of consumers indicate that better consumer information regarding care symbols would impact their purchasing behaviour and would ensure appropriate treatment of the textile product³⁹⁶.

³⁹³ Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices of 25 May 2016, SWD (2016), p. 91. <http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf> last viewed on 15 March 2017.

³⁹⁴ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 23-24.

³⁹⁵ Kidmose Rytz, B., Sylvest, J. & Brown, A., 'Study on Labelling of Textile Products' (2010), p. 16. <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/429992/IPOL-IMCO_ET\(2010\)429992_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/429992/IPOL-IMCO_ET(2010)429992_EN.pdf)> last viewed on 15 March 2017.

³⁹⁶ European Commission, Matrix Insight, 'Study of the need and options for the harmonisation of the labelling of textile and clothing products(2013), p. 84-86. <<http://www.industrial-europe.eu/Sectors/TCL/2013/Study%20labelling%20textile%20products%20%20final%20report%20Matrix.pdf>> last viewed on 15 March 2017.

See also Shin, S. 'Consumers' use of care-label information in the laundering of apparel products', Journal of the Textile Institute (2000-1), p. 20-28.

Moreover, a key element in conducting the material distortion test is the ‘average consumer’ benchmark. As such, the Directive does not limit this test to the analysis of as to whether a given consumer’s economic behaviour (i.e. its transactional decisions) has actually been distorted. More specifically, it requires an assessment of whether the commercial practice of the trader is used (i.e. ‘likely’) to appreciably impair the ability of the average consumer to make an informed choice.

A key question that this thesis does not answer but considers crucial to pose for further investigation of this area is about how the notion of the ‘average consumer’ is interpreted: as someone whose transactional decision-making is readily, or not so readily, influenced? It is important to remember that the commercial practice must also be contrary to the requirements of professional diligence (unfair) and not only be likely to materially distort the economic behaviour of the average consumer as elaborated on in the previous section. This is not a very concrete test since what is contrary to the requirements of professional diligence depends on what can be reasonably expected from the trader in the T&C industry.

In the original proposal for the Directive, the concept of professional diligence was elaborated on more extensively. According to the proposal, the requirement of ‘professional diligence’ aims to ensure that regular business practices, which are in line with ordinary custom and usage of the T&C industry, such as providing size indications on labels although not mandatorily required, would not be considered as unfair under the Directive, even if they were capable of influencing the economic behaviour of the consumer³⁹⁷. The focus of the unfairness test under the Directive is thus on the care that traders should exercise towards consumers. Moreover, Article 5(3) indicates that insofar as exaggerated statements or statements are made in advertising, this is not contrary to the standard of professional diligence as such statement should no be taken literally by consumers and they are expected to be aware thereof.

Finally, it is up to the enforcers in the Member States, not only to review the factual circumstances of each case (i.e. *in concreto*) but also assess the influence of the ‘likelihood’ of the concrete practice on the transactional decision of an average consumer (i.e. *in abstracto*).

3.4.4 Misleading actions or omissions

A substantial part of the Directive (Article 6) aims at ensuring that information on the main characteristics of a product or service, price and key conditions is provided to consumers in a truthful, complete and timely manner³⁹⁸. The latter article has a direct impact on the marketing and advertising techniques, which include the use of T&C labels, as developed by traders. The Commission noted that online commercial practices that appear on social media or comparison websites are covered by the definition of a commercial practice. This is relevant for the T&C industry,

³⁹⁷ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 6-8.

³⁹⁸ Van Boom, W. et. al. ‘Introduction to’ The European Unfair Commercial Practices Directive’, *Van Boom, Garde & Akseli, the European Unfair Commercial Practices Directive-Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014), p. 1-18.

as e-commerce, which includes all types of e-commerce such as blogs and social networking sites, has created channels for providing additional information to consumers alongside labelling. Currently, traders frequently use these new channels to promote their T&C products but as the focus of this thesis is on the more traditional information provision, through labelling, these new channels will not be further elaborated on³⁹⁹.

For textile labelling, it is important to examine how the UCPD regulates misleading commercial practices in the form of misleading actions (Article 6) by providing untrue or deceitful information on a label, or in the form of misleading omissions (Article 7) by not placing relevant information on the label. The potentially deceptive nature of the information (whether false or factually correct) is important in the test for misleading commercial practices but it is also still required to prove the link to material distortion of the economic behaviour of 'average' consumers, i.e. whether the average consumer makes a transactional decision he would not have otherwise made (Article 6). A good example can be found in research from Consumer Market Study on environmental claims for non-food products⁴⁰⁰. It considers a 'CSR production' claim (by means of labelling) found on jackets.

On the jackets, a label and hangtag were attached, indicating the company's general CSR awareness and objectives. The CSR characteristic of the product itself was not found on the label and hangtag of the jacket. On the website of the textile company, detailed information was available about the spring/summer collection which indicated that *"22% of all fabrics will be made from recycled materials and 18% will use, under a certification scheme approved- fabrics and that the aim is to gradually increase these proportions"*.

Based on these facts, the Consumer Market Study on environmental claims for non-food products noted that the whole production process might not be considered as 'environmentally-friendly' as 60% is not covered. As such, the claim 'environmentally-friendly production' of the jackets could eventually be regarded as incorrect or as an exaggerated environmental marketing claim, but only regarding the 60% of the jackets.

The latter makes clear that misleading commercial practices have to be viewed against the background of what consumers would otherwise do, i.e. what their purchase decisions would look like when no potentially misleading commercial practices are in place⁴⁰¹.

In this regard, case law should be considered. In *CHS Tour Services GmbH v Team4 Travel GmbH* the Court of Justice of the EU considered the interpretation of Article 6(1) of the UCPD and the nature

³⁹⁹ Commission Staff Working document, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, Brussels, 3 December 2009, SEC (2009) 1666, p. 8.

⁴⁰⁰ Consumer Market Study on environmental claims for non-food products, Justice and Consumers, July 2014, p. 123. <http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/green-claims-report.pdf> last viewed on 15 March 2017.

⁴⁰¹ Gidlöf, K, et al. 'Material Distortion of Economic Behaviour and Everyday Decision Quality', *Journal of Consumer Policy* (2013-4), p. 389-402.

of its relationship with Article 5(2). The facts of the case were as follows. CHS Tour Services (CHS) had accused Team4 Travel (T4T) of engaging in an unfair commercial practice by publishing sales brochures in which it claimed to offer rooms at certain hotels on certain dates on an exclusive basis. In reality, CHS offered rooms with the same hotels on the same dates.

The Court noted that the definition of an unfair commercial practice in Article 5(2) is cumulative, i.e. both conditions must be met, namely, the practice is contrary to the requirements of professional diligence (Article 5(2)(a)) and it materially distorts or is likely 'to materially distort' the economic behavior, in relation to the product, of the average consumer (Article 5(2)(b)). However, while Article 6(1) on misleading commercial practices repeats the second condition regarding material distortion of the consumer's economic behaviour, it does not refer to the requirements of professional diligence. Further, the wording of Article 5(4) suggests that the question of whether a commercial practice is misleading (rather than merely unfair) depends only on the criteria set out in Article 6⁴⁰².

Subsequently, the main general clause prohibiting unfair commercial practices may in practice be less important than the two more concrete subcategories of misleading and aggressive practices. So, if a particular practice fits the description of either of these two, there is no need to further test whether the practice is also unfair according to the main general clause of unfairness⁴⁰³.

Interestingly, Gidlöf et al. note that the definition of a misleading action from the Directive initially took the decision-making process of consumers in the consumer market into account. For instance, as some scholars⁴⁰⁴ note, insights of behavioural economics show that besides the content of the information provided, the presentation of the information can have a serious effect on how consumers respond to it.

Notwithstanding, the UCPD contains explicit provisions on practices, which are capable of misleading consumers "in any way, including overall presentation even if the information provided is factually correct"⁴⁰⁵. A good example is, as given above, a T-shirt with a care symbol indicating that it should be washed at 30 degrees where 60 degrees is the proper wash instruction. As such, although 30 degrees is factually correct as a care instruction, the indication of 30 degrees may nevertheless be misleading as long as it would make the consumer make a different transactional decision, e.g., with regard to taking legal action against traders.

⁴⁰² Case C-435/11, EU:C:2013:574 (CHS Tour Service).

⁴⁰³ Van Boom, W.H., Garde, A. & Akseli, O. 'Introduction to 'The European Unfair Commercial Practices Directive', Van Boom, Garde & Akseli, *the European Unfair Commercial Practices Directive-Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014), p 3.

⁴⁰⁴ Gidlöf, K, et al. 'Material Distortion of Economic Behaviour and Everyday Decision Quality', *Journal of Consumer Policy* (2013-4), p. 389-402.

See also Bettman, J.R., Payne J.W & Staelin, R. 'Cognitive considerations in designing effective labels for presenting risk information.' *Journal of Public Policy & Marketing* (1986), p. 1-28.

⁴⁰⁵ Ibidem Gidlöf, K, et al., p. 389-402.

Another example concerns a range of product characteristics, including in particular the 'geographical or commercial origin' of the T&C product. The current legal system allows consumers to be deceived by origin labels indicating 'Made in the EU' when production is actually outsourced to a third country. This is discussed in detail in subsection 3.2.

Collins notes that the Directive does not endorse a general requirement that the burden of proof should be placed on the trader to demonstrate the truthfulness of claims as one might expect in a Directive aimed at consumer protection. Instead, the issue remains up in the air as such a requirement may be imposed when 'appropriate' in the circumstances of a particular case on a national law level⁴⁰⁶. As mentioned earlier, this is relevant with regard to the textile labelling issues, which focus on country of origin labelling in as far as certain uses of such labels can be misleading to consumers⁴⁰⁷. The provisions of the UCPD do not provide for a clear definition of geographical or commercial origin and so leave scope for autonomous interpretation on a national level⁴⁰⁸. This means that as long as the CJEU does not declare the national interpretation of the country of origin as non-compliant with the UCPD and specifies it further, this notion may differ across Member States.

Article 7 of the UCPD concerns misleading practices by omission and creates an obligation on traders to convey the 'material' information which the average consumer needs to make an informed choice although Articles 7(1), (2) and (3) do not define in explicit terms the concept of material information. Also, in the context of labelling, it is therefore misleading "*to omit material information that the average consumer needs to take an informed transactional decision*" and hide or provide "*material information in an unclear, unintelligible, ambiguous or untimely manner*"; this includes, inter alia, the product characteristics⁴⁰⁹. For instance, the trader omits to present care instructions which results in the consumer being left uncertain as to what the proper care instruction is.

According to Van Boom et al., the decisive question is how much information and education a consumer can expect from the trader. *De lege lata*, there is no general obligation for the trader to inform the consumer comprehensively by means of labelling⁴¹⁰. Having said that, the trader is under an obligation to disclose certain information that the average consumer needs to take

⁴⁰⁶ Collins, H. 'The unfair commercial practices directive', *European Review of Contract Law* (2005-4), p. 417-441.

⁴⁰⁷ European Commission, Matrix Insight, 'Study of the need and options for the harmonisation of the labelling of textile and clothing products (2013)', p. 72-76. <<http://www.industrial-europe.eu/Sectors/TCL/2013/Study%20labelling%20textile%20products%20-%20final%20report%20Matrix.pdf>> last viewed on 15 March 2017.

⁴⁰⁸ Under Article 6(1) (a) and (b) of the UCP Directive: '*a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct (...) and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise*', in relation to one or more of the following elements: '(a) (...) the nature of the product; (b) the main characteristics of the product such as its (...) benefits, risks, composition, (...) method (...) of manufacture, (...) fitness for purpose, (...) geographical or commercial origin or the results to be expected from its use, or the results and material features or tests or checks carried out on the product'.

⁴⁰⁹ Collins, H. 'Harmonisation by example: European laws against unfair commercial practices', *The Modern Law Review* (2010-1), p. 89-118.

⁴¹⁰ See the discussion in Micklitz, H-W. 'Unfair commercial practices and misleading advertising', *Micklitz, H-W., Reich, N. & Rott, P., Understanding Consumer law* (2009), p. 98-100.

an informed transactional decision. A failure to provide such information could then constitute a misleading omission.

3.4.5 The Blacklist

The annex of the Directive contains a list of 31 commercial practices deemed abusive in all circumstances (blacklist). For these listed practices, there is no need to apply the general unfairness test or the small unfairness clauses; they are prohibited per se⁴¹¹. No case-by-case assessment against other provisions of the Directive is required. According to the specific provisions of Annex 1, the following practices are always considered unfair and therefore prohibited, regardless of the impact they have on the consumer's behaviour:

n°1: a trader claiming to be a signatory of a code of conduct when it is not the case.

For example, a trader falsely displaying on his website that he is a signatory of the code of the Clean Clothes Campaign⁴¹².

n°2: displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

For example, without authorisation indicating any Community or national label, like the Eco-label for Textiles.

n°3: claiming that a code of conduct has an endorsement from a public or other body which it does not have.

For example, a trader claiming that the code of conduct of his company is endorsed by the national environment agency, ministry or a consumers' organisation, such as the 'Gedragscode eerlijke handelspraktijken'⁴¹³, when this is not the case.

n°4: claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

For example, falsely claiming that an environmental agency, an NGO or a standardisation body has approved a product.

Considering the full harmonisation character of the UCPD, the Member States are prevented from prohibiting other unfair commercial practices without a case-by-case assessment of their

⁴¹¹ Communication from the Commission on the application of the Unfair Commercial Practices Directive, 14.03.2013, COM (2013) 138 final.

⁴¹² The Campaign seeks to provide consumers with accurate information concerning the working conditions under which the apparel and sportswear they purchase are made.

The code, which is a concise statement of minimum standards with respect to labour practices, is meant to be accompanied by a commitment by the companies adopting it to take positive actions in applying it. Companies are expected to insist on compliance with the code by any of their contractors, subcontractors, suppliers and licensees, organising production that would fall under the scope of the code. See <<https://cleanclothes.org/>> last viewed on 18 March 2017.

See also Hamm, B. 'Challenges to Secure Human Rights through Voluntary Standards in the Textile and Clothing Industry', Wesley Cragg (Hg.): Business and Human Rights. Cheltenham: Edward Elgar (2012), p. 220-242.

⁴¹³ See <www.eerlijkehandelspraktijk.nl> , last viewed on 25 oktober 2015.

unfairness. This may appear problematic also in the T&C industry with regard to certain seemingly popular commercial practices, which could be misleading. According to BEUC⁴¹⁴, problems have been found in relation to misleading environmental claims in breach of the UCPD, due to the fact that Member States are unable to introduce specific legislation on the use of certain terms, which are vague and difficult to substantiate, such as environmentally friendly, eco-friendly, carbon neutral, green and sustainable. The full harmonisation effect of the Directive does not allow Member States to deviate from the UCPD and to introduce more consumer protection in the field of T&C. In particular, general prohibitions on using certain terms in environmental claims, which can be considered misleading, are not allowed under the Directive as apart from practices listed on the blacklist all other commercial practices must be evaluated on a case-by-case basis. Thus, as environmental claims specifically do not appear in Annex I to the UCPD, they cannot be prohibited in all circumstances but can only be prohibited following a specific assessment that allows the unfairness of these practices to be established⁴¹⁵.

3.4.6 Code of conduct

Article 2(f) of the UCPD defines a 'code of conduct' as *"an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State, which defines the behaviour of traders, who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors"*.

Pursuant to the Commission, the Directive recognises the importance of self-regulation mechanisms and sets out the role that code owners and self-regulatory bodies may fulfil in enforcement⁴¹⁶. Based on Articles 10 and 11 of the Directive, Member States may, in addition, ensure effective enforcement of the Directive by encouraging code owners to control unfair commercial practices. Several provisions of the Directive aim at preventing traders from dishonestly exploiting the trust of consumers through the application of self-regulatory codes⁴¹⁷. The Directive does not specifically provide for rules on the validity of a code of conduct but *"relies on the assumption that misleading statements about a trader's affiliation, or about the endorsement from a self-regulatory body, may not only per se distort the economic behaviour of consumers, but also undermine the trust that consumers have in self-regulatory codes"*⁴¹⁸.

⁴¹⁴ Articles 6 and 7 UCPD and according to the circumstances, several provisions of the black list in Annex I UCPD. OJL 149, 11.06.2005, p. 22–39. BEUC Position paper European Commission's report on the application of the Unfair Commercial Practices Directive. BEUC position paper, Ref: X/2013/049 (24/06/2013), p. 5-6. <<http://www.beuc.eu/publications/2013-00457-01-e.pdf>> last viewed on 17 March 2017.

⁴¹⁵ Joined Cases C-261/07 and C-299/07, EU:C:2006:585, (*VTB-VAB NV v Total Belgium NV*) and (*Galatea BVBA v Sanoma Magazines Belgium NV*), paras 53 e.s.; Case C-304/08, EU:C:2010:12 (Plus), paras 42 e.s.; Case C-540/08, ECLI:EU:C:2010:660, (*Mediaprint*) paras 31 e.s.; Case C-288/10, ECLI:EU:C:2011:443 (*Wamo & Modemakers Fashion NV*) paras 34 e.s.

⁴¹⁶ Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices of 25 May 2016, SWD (2016) 163 final, p. 28. <http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf> last viewed on 15 March 2017.

⁴¹⁷ Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices of 25 May 2016, SWD (2016) 163 final, p. 28.

⁴¹⁸ Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices of 25 May 2016, SWD (2016) 163 final, p. 61.

In addition to Article 6(2), the trader has to comply with the code of conduct chosen by him, which is the one that he has committed himself to in a commercial communication⁴¹⁹. Moreover, the Directive contains specific 'blacklisted' provisions, which aim at ensuring that traders make responsible use of codes of conduct in their marketing activities⁴²⁰.

The T&C industry has set voluntary rules and standards in cooperation with the industry organisations (codes of conduct) relating to the labelling requirements and the conduct of the T&C firms in the industry⁴²¹. The codes of conduct and standards, e.g. care labelling (GINETEX), size labelling (ISO standards etc.) are voluntarily accepted rules and are supplementary to both legislation and jurisprudence⁴²². Some of these intergovernmental standards are soft law, such as non-binding declarations, codes of conduct and recommendations⁴²³. For example, the ISO standard 3757/GINETEX for care instruction per se is not legally binding on any of the parties although many adopt it within a national framework of standards that is used voluntarily by businesses operating in a Member State. In a third party certification scheme, there is no relationship between the companies, which the third party audits and certifies, or with the standard's owners. The standard-setting organisations are usually contracted to supply certification and assessment services, and usually operate according to internationally recognised standards⁴²⁴. For a full understanding, in the private/self-certification schemes, producers themselves, non-governmental bodies, trade associations or retail companies establish standards and undertake assessment and monitor the standards and the use of any adopted logos, such as 'organic cotton', and 'Naturally HEMA'⁴²⁵.

It should be noted that, under the UCPD, conformity with a code of conduct (e.g. self-certification scheme) does not exempt the trader from any claims of an unfair commercial practice. It does not even assume a 'presumption of conformity' with the legal standard, as there is no legislation that lays down criteria for 'fair' codes of conduct. Neither are there any provisions that define unfair codes⁴²⁶. It has been suggested that a presumption of conformity would not be applicable to codes of conduct since controlling and taking measures for compliance with open-textured standards of a code would be difficult⁴²⁷. However, the opposite is true. Where a trader falsely states that he complies with a code of conduct when in fact he does not, this is a blacklisted misleading practice under n^o. 1 of the Annex to the UCPD. Moreover, as the consumer may rely on the expectations triggered by the trader's statement that he complies with the code of conduct, so in my view the derogation thereof may imply that the T&C products offered by that trader do

⁴¹⁹ Commission Staff Working Document Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices of 25 May 2016, SWD (2016) 163 final, p. 61-62.

⁴²⁰ Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* 2012-4.

⁴²¹ See Chapter 3 and 4.

⁴²² Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* (2012-4), p. 268-288.

⁴²³ Krut, R. & Gleckman, H., *ISO 14001: A missed opportunity for sustainable global industrial development*, Routledge (2013), p. 36.

⁴²⁴ Krut, R. & Gleckman, H., *ISO 14001: A missed opportunity for sustainable global industrial development*, Routledge (2013), p. 37.

⁴²⁵ Interview Hema, see Appendix III.

⁴²⁶ ISO 14021:1999 Environmental labels and declarations-Self-declared environmental claims (Type II environmental labelling).

⁴²⁷ Micklitz, H-W. 'Unfair commercial practices and misleading advertising.' (2009), p. 113-115. See also Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* (2012-4), p. 268-288.

not meet the consumer's reasonable expectations. In such a case, the T&C products are not in conformity with the contract⁴²⁸.

Pavillon pointed out that existing codes might need to be modified in accordance with the Directive. According to her, the Directive has not attained the ideal of "*having Europe-wide codes in particular areas*" and instead national schemes may be subject to various interpretations of what constitutes 'unfair', 'misleading' and 'aggressive' practices⁴²⁹. The UCPD leaves the decision to apply legal instruments and measures against a code owner to the individual Member States (Article 2(g)), if the relevant code promotes non-compliance with legal requirements (Article 11(1) paragraph 2(b)).

By leaving enforcement to the Member States, the EC intended to avoid the risk that trade associations would become reluctant to draft codes of conduct⁴³⁰. In that respect, a Member State may be more flexible in assessing what measures should be most effective on a national level. This does not imply that Member States would not offer the possibility to stop the existence or emergence of such 'unfair' codes. Under Article 11(2) UCPD, the procedures available to persons and organisations that have a legitimate interest must at least offer the possibility of demanding the prohibition of ongoing unfair commercial practices⁴³¹. Moreover, under Article 13 UCPD, the Member States must provide for effective, proportionate and dissuasive penalties for unfair commercial practices and must ensure that such penalties are in fact enforced. This suggests that at least *some* remedy must be available in case a code owner promotes the infringement of legal requirements.

3.5 General Product Safety Directive

As mentioned earlier, in the context of textile labelling, alongside the UCPD the GPSD should also be considered. This Directive⁴³² is intended to ensure a high level of product safety throughout the EU for consumer products that are not covered by industry-specific legislation. Ultimately, the GPSD aims to contribute to product traceability and, therefore, to improving product safety⁴³³. Therefore, its provisions may, for example, impact on the practice of producers trying to withhold information concerning product origin, which would interfere with product traceability. Producers must inform consumers clearly and comprehensively on product safety, and must employ appropriate measures to prevent safety risks. In addition, they must enable consumers

⁴²⁸ Ibidem.

⁴²⁹ Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* (2012-4), p. 280-282.

⁴³⁰ See also Collins H., ed., *The forthcoming EC directive on unfair commercial practices*, Kluwer Law International (2004), p. 30.

⁴³¹ Van Boom, W.H., Garde, A. & Akseli, O. 'Introduction to 'The European Unfair Commercial Practices Directive', *Van Boom, Garde & Akseli, the European Unfair Commercial Practices Directive-Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014), p. 5

⁴³² Directive 2001/95, OJ L 11, 15.01.2002, p. 4-17.

⁴³³ Report from the Commission to the European Parliament and to the Council on the implementation of the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety. OJ L11, 15.01.2002, p 4-17.

and authorities to trace the origin of the products especially if these cause safety concerns⁴³⁴. In the field of the T&C industry, safety labelling is required from producers as well. They are, for example, obligated to use symbols and safety phrases on Biocidal textile products⁴³⁵ and to supply comprehensive information on them⁴³⁶. In this respect, Article 5.2 GPSD establishes that:

'[Distributors] shall participate in monitoring the safety of products placed on the market, especially by ... providing the (commercial) documentation necessary for tracing the origin of products ...'

Another aspect regarding the safety of textile products, in particular with regard to clothing, is their flammability. There is no specific EU legislation on the flammability of clothing. This implies that the general safety requirements of the GPSD apply also with regard to this matter⁴³⁷.

Regarding market surveillance and enforcement, the Directive provides an alert system known as RAPEX, which ensures that the relevant authorities are rapidly informed about dangerous products⁴³⁸. The Directive sets out that, in the absence of other EU legislation, national rules or codes of practice, the safety of the product needs to be assessed according to, among others, European standards. This is relevant to this study on textile labelling, as the Directive constitutes a framework that regards CEN standards, referred to in the Official Journal (OJ) of the EU, as quasi mandatory⁴³⁹. As mentioned in Chapter 2, CEN prepared the EN13402 standard. The EN13402 standard for labelling clothes sizes is based on body dimensions measured in centimetres and aims to replace many older national clothing-size systems.

In its report on the GPSD, the EC noted that the identification of the producer of the product on its packaging is an important element for ensuring its traceability⁴⁴⁰. However, such a requirement has not been introduced as mandatory in all Member States. Consequently, this may lead to unsatisfactory results when the market surveillance authority is unable to trace the manufacturer or importer of a product that is found to be dangerous and, therefore, cannot employ fully effective measures to prevent placing such products on the market.

⁴³⁴ Commission Decision of 16 December 2009 laying down guidelines for the management of the Community Rapid Information System 'RAPEX' established under Article 12 and of the notification procedure established under Article 11 of Directive 2001/95/EC (the General Product Safety Directive). OJ L 22, 26.01.2010, p 14.

⁴³⁵ Biocidal products are used to protect humans, animals, materials or products against harmful organisms like pests or bacteria, by the action of the active substances contained in the biocidal product. See Biocidal Products Regulation (EU 528/2012).

⁴³⁶ Labelling: competitiveness, consumer information and better regulation for the EU, DG Sanco Consultative Document (February 2006). <https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition_better-reg_competitiveness-consumer-info_en.pdf> last viewed on 25 January 2017.

⁴³⁷ Hyde, R. 'Why separate the regulatory regimes applicable to food safety and product safety?', *Legal Studies* (2013-4), p. 509-531.

⁴³⁸ <http://ec.europa.eu/consumers/archive/safety/rapex/docs/rapex_guid_26012010_en.pdf> last viewed on 25 January 2017.

See also Pisanello, D. 'Food Safety in Europe. Law Bases.' *Chemistry of Foods: EU Legal and Regulatory Approaches*. Springer International Publishing (2014), p. 1-13.

⁴³⁹ Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, OJ L 316, 14.11.2012, p. 12-33.

As mentioned in Chapter 2 in the field of Size labelling the European Commission works closely together with the European Committee for Standardization (CEN). The EN13402 for labelling clothes size is based on body dimensions, measured in centimetres and aims to replace many older national clothing-size systems.

⁴⁴⁰ Report from the Commission to the European Parliament and to the Council on the implementation of the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety. OJ L11, 15.01.2002, p 4-17.

On 13 February 2013, the Commission proposed a Product Safety and Market Surveillance Package including a proposal for a new Consumer Product Safety Regulation⁴⁴¹ (CPSR). According to the EC (DG Health and Consumers), recurrent product safety alerts have signalled the need for more effective product safety rules. Therefore, improving the traceability of consumer products throughout the supply chain that enabled a swift and effective response to safety problems (e.g. recalls of textile products) was deemed as essential.

More specifically, Article 7(2) of the CPSR states that non-preferential origin rules are set out in Articles 59-61 of the UCC, as discussed in paragraph 2.3.7. These provisions state that if only one country is involved in the production of a textile product, that country is deemed to be the country of origin. If more than one country is involved in production, its origin is generally determined according to the principle of last substantial transformation. To this end, Article 60 of the UCC provides⁴⁴²:

“Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture”.

Regarding the supply chain of the T&C industry, where textile fabrics and trimmings originate from different geographical regions, the country of production might be seen as an *‘important stage of manufacture’*⁴⁴³.

Therefore, Article 7 of the proposed CPSR would oblige manufacturers and importers to ensure that either products or their packaging, or accompanying documents, bear an indication of the country of origin based on the name and address of the manufacturer. So market surveillance authorities can re-trace the product. It may also enable contact with the authorities of the countries of origin, based on bilateral or multilateral cooperation on consumer product safety, for appropriate follow-up actions⁴⁴⁴.

⁴⁴¹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee more Product Safety and better Market Surveillance in the Single Market for Products, Brussels 13.02.2013. COM (2013) 74 final.

⁴⁴² Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code. OJ L 269, 10.10.2013, p. 30. The Customs Code includes provisions defining non-preferential rules of origin. Non-preferential rules can be used for commercial for origin marking.

⁴⁴³ Hamzaoui Essoussi, L. & Merunka, D. ‘Consumers product evaluations in emerging markets: does country of design, country of manufacture, or brand image matter?’ *International Marketing Review* 24.4 (2007), p. 409-426;

Ha-Brookshire, J. E. Country of parts, country of manufacturing, and country of origin: Consumer purchase preferences and the impact of perceived prices. *Clothing and Textiles Research Journal*, 30 1 (2012), p 19-34.

⁴⁴⁴ Report from the Commission on the implementation of Regulation (EC) No 765/2008.

The EC's DG Enterprise and Industry was commissioned to conduct a study on the implementation of the proposed Regulation⁴⁴⁵. The study aimed to address questions that emerged from discussions on the CPSR. Findings of the study reveal that the current T&C labelling practices are varied and so is the complex nature of the supply chains. There is no clear pattern with regard to the type of textile products that are more likely to carry origin labels although, overall, the higher-end market segments are more likely to attach an origin label to their textile products. At the same time, a number of mass-market clothing brands also consistently label their product with country of origin signage.

It must also be borne in mind that, while Article 7 would aim to satisfy consumer interests in origin marking, it would not necessarily provide the consumer with accurate information concerning the product's origin⁴⁴⁶ as the supply chain of textile products is complex. Moreover, according to the study, origin marking might be particularly valued by consumers of high-end products but these luxury products are likely to already carry origin labels.

Despite the GPSD having relevance to what origin labelling rules could be adopted, as previously mentioned, the UCPD may interfere in this as well. Pursuant to Article 6 of the UCPD, labelling is misleading if it contains false or factually correct information but that is presented in a way that can deceive an 'average consumer'. This information can refer to a range of product characteristics including, in particular, the 'geographical or commercial origin' of the T&C product.

Current case law reveals that Member States are divided as to the meaning of the term 'country of origin'. Some courts have held that this refers to the concept of 'geographical origin of the manufacturer', in accordance with provisions of the Community Custom Code, while others claim that the expression refers to the 'juridical origin' of a product, which is exclusively connected to the manufacturer having responsibility for the product itself⁴⁴⁷. For example, the expression '*designed and produced by Alfa srl Rovereto Italy*' on apparel products manufactured in Moldova has been deemed to be false and deceptive information provided to consumers about the geographical origin of the product as, while the country of design was Italy, the country of production was Moldova⁴⁴⁸.

⁴⁴⁵ Implementation of the new regulation on market surveillance: indication of origin. Final report 06.05.2015, VVA Europe Ltd. <http://ec.europa.eu/growth/toolsdatabases/newsroom/cf/itemdetail.cfm?item_id=8263&lang=en&title=Study%3A-Implementation-of-the-new-regulation-on-market-surveillance---indication-of-origin> last viewed on 15 January 2017.

The study aims to contribute to existing discussions concerning the indication of origin by collecting data on, among other things, the potential benefits to industry, consumers, and national authorities associated with the proposal.

⁴⁴⁶ European Commission, Matrix Insight, 'Study of the need and options for the harmonisation of the labelling of textile and clothing products (2013)', p. 90-111. <<http://www.industrial-europe.eu/Sectors/TCL/2013/Study%20labelling%20textile%20products%20-%20final%20report%20Matrix.pdf>> last viewed on 15 March 2017. It has been estimated that between 50% and 70% of textile products are labelled. This masks a substantial variation between Member States, specific sub-categories of products, and market segments.

⁴⁴⁷ See Legal Information Newsletter N° 4 03/09/2013 - The Made In Product Labelling. Overview on the EU and Domestic 'Made in' Product Labelling Rules and Regulations. <<http://www.cajola.com/newsletters/index.asp>> last viewed on 15 March 2017.

⁴⁴⁸ Ibidem.

The UCPD's legal database identifies a few cases relating to product origin, two of which directly concern the perception of origin by consumers. For example, in an Austrian ruling from 2008 (decision 4 of 42/08 from 08/04/2008)⁴⁴⁹, it was deemed misleading to claim that a company has produced a product itself when in fact the production was partially or fully outsourced to a third country manufacturer (in this case, a piano producer in China). Another example of misleading origin labels (or other potential indications of origin) is a decision by the German Federal Court of Justice (decision I ZR 16/14 from 27/11/2014)⁴⁵⁰. In this case, the Court ruled that labelling a product (condoms) that only undergoes quality control and packaging in Germany, as 'Made in Germany' is misleading. A product needs to undergo a manufacturing process within Germany to be able to bear such a label. Both these judicial decisions might be applied analogously in the T&C industry, as the production process of textiles products is mainly outsourced to third countries.

3.6 Conclusion

This chapter presents an analysis of provisions of the Textile Regulation, UCPD and GPSD (horizontal legislation) with special emphasis on the labelling doctrine as introduced in case law. Moreover, this chapter aimed to give an answer to the following sub-question: In what way does textile regulation and horizontal legislation safeguard consumers' rights to accurate information on textile and clothing labels?

As of 8 May 2012, Member States are required to apply textile fibres names and related labelling and marking of the fibre composition on textile products (Textile Regulation). The Textile Regulation is the sole sector-specific EU legislation applicable to textile products. The Commission concluded that the other labelling requirements such as care, size, origin, CSR and chemical substances do not need to be addressed in the Textile Regulation, given they are currently in place or being developed under other regulatory or non-regulatory frameworks⁴⁵¹. Therefore, currently other labels are not harmonised, which means that uncertainties among consumers may persist about the accuracy of the information conveyed on T&C labels. These uncertainties are an obstacle for consumers in their purchasing decision as accurate, relevant and comparable information about the textile product may be lacking. In addition, for a label to be effective, such information must be intelligible and meaningful to all consumers. According to the Commission, existing horizontal legislation could provide a solution to address the accuracy and reliable information disclosure in textile products⁴⁵².

On the other hand, horizontal legislation regarding textile labelling concerns certain types of textile labelling and leaves scope for further interpretation in the national implementing measures. More specifically, the GPSD touches on the questions of the country of origin labelling

⁴⁴⁹ <<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show>> last viewed on 15 Februari 2017.

⁴⁵⁰ See <<http://juris.bundesgerichtshof.de>> and <<http://www.cajola.com/newsletters/index.asp>> last viewed on 15 March 2017.

⁴⁵¹ COM (2013) 656 final, 25 September 2013, p. 8.

⁴⁵² COM (2013) 078 final, 13 February 2013, p. 5.

and chemical substances labelling with the aim of ensuring the safety of consumer products that are not covered by specific sectoral legislation. The GPSD obliges distributors to keep and make available the documentation necessary for tracing the origin of their products. Contextually, the UCPD touches on the questions of country of origin, chemical substances and CSR labelling as far as certain uses of such labels can be misleading to consumers.

A challenge under the UCPD is that, for national authorities to take action and prohibit or penalise the practice, they need to evaluate on a case-by-case basis whether the incorrect or misleading label is capable of distorting the economic behaviour of the 'average consumer'. Nevertheless, the report cited on the application of the UCPD noted that Member States did not face particular challenges with regard to the application of Article 6 (misleading commercial practices) of the UCPD. In fact, the report provides contextually little insight into the issue of the UCPD's control of labels⁴⁵³. This may have confirmed the Commission's point of view, as expressed above, that horizontal legislation may indeed suffice to safeguard consumers' rights to accurate information. According to BEUC and scholars, however, there are a number of issues with the application of horizontal legislation, which needs to be clarified or further considered in the Guidance document or in an eventual revision of the Directive. Consumer protection and consumer responsibility are unbalanced as on the one hand the objective of the Directive is to protect consumers against unfair practices, while on the other hand the responsibility of the individual is based on the benchmark of the average consumer. It follows from case law that the '*reasonably well informed and reasonably observant and circumspect consumer*' should make the effort to collect and understand the available relevant information on the characteristics of the product before making a transactional decision. Thus, according to Boom et al. the 'average consumer' is not easily impressed or quickly deceived by anything. By employing this standard, national courts might offer relatively less protection to consumers compared to what they were used to under pre-existing national protective frameworks⁴⁵⁴.

In sum, it will be more difficult for consumers to claim that they have been misled by inaccurate information as they might be seen as having considered its accuracy and relevance in advance. It needs to then be considered whether or not such a high standard undermines the effectiveness of horizontal legislation in protecting consumers' rights to accurate information.

Regarding CSR (environmental) labelling, the Commission noted that the UCPD is currently the only general instrument of EU legislation in place to assess environmental claims (or aggressive practices) and has been used by national consumer protection watchdogs to curb and penalise a wide variety of unfair business practices. T&C companies are tempted to use sustainable and environmental labels merely to increase sales. As environmental and sustainability issues are complex, it is also easy to mislead consumers by green claims, especially when companies use

⁴⁵³ COM (2013) 139 final, 14 March 2013, p. 26.

⁴⁵⁴ Van Boom, W.H., Garde, A., & Akseli, O. 'Introduction to 'The European Unfair Commercial Practices Directive'', Van Boom, Garde & Akseli, *the European Unfair Commercial Practices Directive-Impact, Enforcement Strategies and National Legal Systems* (Ashgate 2014), p. 6.

sustainability as a 'marketing ploy'; thus 'green washing'. While horizontal legislation may protect consumers against inaccurate environmental information to a certain extent, it seems that additional measures would strengthen consumer rights in this field.

It might be interesting to finish by mentioning the critique by Stuyck and Pavillon. These scholars are of the opinion that the UCPD should stimulate self-regulation by increasing its role in the enforcement of codes of conduct, such as ISO code of conduct 3758 on Care symbols that integrate the UCPD. Code owners need to be held responsible for the compliance of traders with their codes⁴⁵⁵. It could be asked whether a greater reliance on the codes of conduct and on ensuring their enforcement would not increase consumer rights to accurate information on T&C products.

⁴⁵⁵ Pavillon, C. 'The Interplay Between the Unfair Commercial Practices Directive and Codes of Conduct', *Erasmus Law Review* (2012-4), p. 268-288. Stuyck, J. 'The Court of Justice and the unfair commercial practices directive.' *Common Market Law Review* 52.3 (2015), p. 728.