

# eUVR

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# The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive

Bram Duivenvoorde

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## Zusammenfassung

Lassen sich ältere Verbraucher leichter in die Irre führen als jüngere? Sind bestimmte gesellschaftliche Gruppen schutzbedürftiger als andere? Dieser Beitrag behandelt den Schutz gefährdeter Verbraucher in der Richtlinie über unlautere Geschäftspraktiken und erörtert, in welcher Weise die Richtlinie auf die Gefährdungsanfälligkeit abstellt. Es wird dargelegt, dass eine Definition der Schutzbedürftigkeit in Abhängigkeit von Zugehörigkeit zu einer bestimmten Gruppe schwierig und es zweifelhaft ist, ob die Richtlinie eine wirksame Ausrichtung auf schutzbedürftige Verbraucher enthält.

## 1. Introduction

Do some groups of consumers, such as the elderly, need more protection against unfair commercial practices than others? This paper discusses how vulnerable consumers are protected under the Unfair Commercial Practices Directive (2005/29/EC), and how this protection relates to actual consumer vulnerability.

In principle, the Unfair Commercial Practices Directive protects the *average consumer* rather than more vulnerable consumers. Yet, at the same time, the Directive sets the objective to ‘prevent the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.’<sup>1</sup> In particular, this is achieved by assessing a commercial practice from the perspective of the

<sup>1</sup> See the Preamble of the Unfair Commercial Practices Directive, recital 18.

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*average member of a target group* if a specific group is targeted, or from the perspective of the *average member of a vulnerable group* if such a group is particularly affected.

As will be shown below, it is often unclear how these standards or ‘consumer benchmarks’ are to be applied. Moreover, apart from their practical applicability, the protection of vulnerable consumers through these benchmarks also raises questions as to the relationship of this approach to reality. What is consumer vulnerability in reality? And to what extent is it covered by the Directive?

This paper, therefore, addresses two questions. Firstly, it deals with the question how vulnerable consumers are protected under the Directive, with its system of consumer benchmarks (paragraph 2). Secondly, and most importantly, the paper addresses how this relates to actual consumer vulnerability, as understood in the behavioural sciences (paragraph 3).<sup>2</sup> It is argued that it is difficult to define vulnerability in terms of groups and that it is questionable whether the protection of vulnerable groups in the Directive is effective in addressing consumer vulnerability.

## 2. The Directive’s approach to protection of vulnerable consumers

### 2.1 Introduction

The Unfair Commercial Practices Directive prohibits misleading, aggressive or otherwise unfair commercial practices. According to Article 5.2, a commercial practice is unfair if:

<sup>2</sup> Please note that the scope of this article is limited to a discussion of the Directive’s approach to vulnerability with its system of consumer benchmarks. It will not discuss more generally how European consumer law deals with vulnerability. Moreover, the discussion in this article is limited to the general framework in which the Directive deals with vulnerability and does not deal with the detailed application of the Directive in the Member States.

‘(a) it is contrary to the requirements of professional diligence,  
and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.’

This section illustrates two of three so-called ‘benchmarks’ of the Directive: the *average consumer benchmark* and the *target group benchmark*. What is meant by benchmark in this context is the (fictitious) consumer against whom the commercial practice is tested.

## 2.2 The average consumer

The average consumer benchmark was established prior to the Directive in the case law of the European Court of Justice (CJEU) and was codified in the Unfair Commercial Practices Directive, with reference to the CJEU case law.<sup>3</sup> The average consumer is assumed to be ‘reasonably informed, observant and circumspect’.

This benchmark was introduced to challenge the national laws of some Member States, which were seen as overly protective for consumers and thus obstacle-forming for free trade within the EU. This case law was directed in particular against Germany, where it was common practice to assess commercial practices from the point of view of a superficially observing and generally uncritical consumer.<sup>4</sup> This did not correspond well to the information-driven consumer protection policy of the European Union, with at its heart the *information paradigm*, ie, the idea that the consumer is sufficiently protected if he is supplied with information.<sup>5</sup>

Setting the standard at the average has the consequence that particularly vulnerable consumers are generally not protected, at least not as long as the average consumer is not affected by the trade practice. Courts and enforcement au-

thorities in Member States should, therefore, determine the typical reaction of an average consumer, rather than taking into account the reaction of vulnerable groups.

## 2.3 Target groups

However, this does not mean that commercial practices are *always* assessed from the point of view of this average consumer. As we have seen above, Article 5.2 of the Unfair Commercial Practices Directive also provides for the opportunity to take into account specific target groups. The *target group benchmark* applies if a commercial practice is directed at a particular group of consumers. If that is the case, the average member of that group functions as the standard. This means that if, for example, advertising for toys is broadcasted between children’s television shows, this is to be judged from the point of view of the children targeted.

From this example it becomes clear that this benchmark can be an important method to protect vulnerable consumers: if a commercial practice is aimed at a group consisting of consumers who are less than averagely informed, observant or circumspect, the average member of that group (rather than the average consumer) is taken as the standard. For example when dealing with children’s television advertising, the public addressed may be less critical and less knowledgeable of influencing practices, leading to a stricter assessment of the advertising involved.

An important question for the target group benchmark is: when can a group be regarded as ‘targeted’ by a commercial practice? It is most likely that ‘targeting’ refers to the addressees of the commercial practice. So, for example, if an advertisement is placed in a children’s magazine, the benchmark is set at the average child reading this magazine. However, how this rule should work in practice is unclear. For example, what if there is a mixed audience, including one or more groups that, for whatever reason, do not qualify as average? And what about advertising that reaches the public in general, but is specifically aimed at a particular group?

## 2.4 Vulnerable groups

Apart from protection through the target group benchmark, vulnerable consumers can also profit from additional protection through the *vulnerable group benchmark*. Rather than concentrating on who is *targeted*, this benchmark focuses on who is *affected* by the commercial practice.

This benchmark was only included in the Directive after criticism of the original proposal, amongst others by the Economic and Social Committee. It expressed concerns that the average consumer benchmark would make the Unfair Commercial Practices Directive lose its protective nature.<sup>6</sup>

<sup>3</sup> CJEU 16.07.1998 Case C-210/96 (Gut Springenheide) ECR 1998 I-4657. See also eg, CJEU 28.01.1999 Case C-303/97 (Sektellerei Kessler) ECR 1999 I-513 and ECJ 16.09.1999 Case C-220/98 (Lifting) ECR 2000 I-117. See also recital 18 of the Preamble of the Unfair Commercial Practices Directive.

<sup>4</sup> Köhler/Bornkamm, Gesetz gegen den unlauteren Wettbewerb (2010), 122 (§ 1, nr 29).

<sup>5</sup> For a critical assessment of the average consumer standard, see Incardona/Poncibò, The average consumer, the unfair commercial practices directive, and the cognitive revolution, JCP 2007, 21 et seqq. On the same topic, see also Trzaskowski, Behavioural economics, neuroscience, and the Unfair Commercial Practices Directive, JCP 2011, 377 et seqq. See also Collins, Harmonisation by example: European laws against unfair commercial practices, MLR 2010, 99 et seq and Willet, Fairness and consumer decision making under the Unfair Commercial Practices Directive, JCP 2010, 268 et seqq.

<sup>6</sup> OJ C 108/17 30.04.2004, par. 3.6.

These criticisms were shared by the European Parliament.<sup>7</sup> In the end, this led to the introduction of the vulnerable group standard in Article 5.3, which reads as follows:

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

This vulnerable group benchmark exists alongside the average consumer and target group benchmarks and aims to provide additional protection to groups such as the elderly, adolescents, children and mentally or physically infirmed, but also to other vulnerable groups. Although the provision mentions a limited number of causes of vulnerability, both the preamble and the Directive’s guidelines make clear that this list is non-exhaustive.<sup>8</sup> Although the vulnerable group benchmark is meant to give additional protection to vulnerable groups and to prevent exploitation by traders, it is unclear what cases it is exactly intended to cover. As mentioned above, Article 5.2 protects vulnerable groups if a commercial practice is targeted at that group. This means that Article 5.3 only has added value if the vulnerable group is not targeted, ie, in cases in which the commercial practices are not aimed specifically at them, but rather at a broader public.<sup>9</sup> It is difficult to envisage examples that the European legislature would have had in mind.

In fact, the wording of the provision risks that Article 5.3 covers either practically everything or practically nothing. The vulnerable consumer benchmark could cover practically everything in the sense that for all commercial practices aimed at the public in general, one can imagine that some consumers are misled because they do not correctly perceive or understand its message. In this way, the vulnerable consumer benchmark would become the rule rather than the exception, and every commercial practice would have to be – unkindly expressed – ‘idiot proof’. Clearly, this is not what the European legislature has in mind. This interpretation would obstruct the purpose underlying the average consumer benchmark (ie, not disproportionately limiting

trade within the EU) and would make mass media marketing practically impossible.<sup>10</sup>

If we look more into detail at Article 5.3, we may also come to the conclusion that the vulnerable consumer benchmark, due to the obstacles posed by the different requirements of the provision, in fact covers very few cases.

In particular, this applies to the requirement that the vulnerable group must be *clearly identifiable*. What can be regarded as clearly identifiable and to whom the group must be clearly identifiable remains unclear. Moreover, it is important to note that it may often be difficult to determine whether and why certain groups of consumers are particularly vulnerable to a commercial practice, and whether these groups are sufficiently homogeneous in order to be identified.<sup>11</sup> This is investigated in more detail below (paragraph 3), when the Directive’s approach to vulnerability is discussed in relation to vulnerability as seen by the behavioural sciences.

A further barrier may be that the commercial practice must materially distort the economic behaviour of the vulnerable group *only*. It must be noted that it is unclear whether this is meant as an actual requirement within Article 5.3, or whether it merely indicates the role of the vulnerable consumer benchmark compared to the other benchmarks. In the latter case, it only makes clear that Article 5.3 does not address the economic behaviour of the average consumer or target group consumer, but rather of a vulnerable group. However, it could also be regarded as expressing the view that *only* that particular vulnerable group must be affected and not also other consumers. In that case the commercial practice would have to affect the vulnerable group, eg, children, *exclusively*. If other consumers are also affected, the vulnerable consumer benchmark cannot be applied. Seen in this way, this requirement may also prove to be complicated to satisfy; it will be difficult to ascertain that the commercial practice only affects a particular group of vulnerable consumers and not also other consumers - including other vulnerable groups. For example, if a practice mainly affects vulnerable elderly persons, but also some non-elderly adults who do not qualify as vulnerable consumers in the context of Article 5.3, does that mean that the elderly do not receive additional protection through the application of the vulnerable consumer benchmark? Alternatively, if a commercial practice affects people with mental infirmity, but also elderly persons, does that mean that neither is protected? These examples show that if the word “only” is regarded as a requirement, it would be difficult (if not impossible) to satisfy, without a clear reason why this should be the case. It, therefore, seems unlikely that the Di-

<sup>7</sup> Howells/Micklitz/Wilhemsson, European fair trading law; the Unfair Commercial Practices Directive (2006). See also Collins, MLR 2010, 100.

<sup>8</sup> Preamble of the Unfair Commercial Practices Directive, section 19 and European Commission, Commission staff working document: guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, SEC(2009) 1666, 29. The latter is a Commission staff working document which has no formal legal status.

<sup>9</sup> Howells, The scope of European consumer law, ERCL 2005, 367.

<sup>10</sup> Scherer, Ende der Werbung in Massenmedien?, WRP 2008, 563 et seqq.

<sup>11</sup> See also Howells/Micklitz/Wilhemsson (n 7), 113 et seq.

rective should be interpreted in this way. This seems to be supported by most literature, be it implicitly: most authors do not discuss this as a separate requirement.

Finally, Article 5.3 requires that the fact that a particularly vulnerable group is harmed by the commercial practice must be *reasonably foreseeable* to the trader. In other words, the benchmark only applies if the trader knows or should have known that the vulnerable group was going to be affected.

Taking all of this into consideration, it is difficult to say at this moment what the practical meaning is of Article 5.3. As a matter of fact, it is difficult to give a clear example of the application of Article 5.3 that would not also lead to application of the target group benchmark of Article 5.2.<sup>12</sup> The requirements of Article 5.3 do not seem to be effective in identifying which groups receive additional protection under what circumstances.

## 2.5 Concluding remarks

In summary, the Unfair Commercial Practices Directive generally aims to protect the average consumer rather than vulnerable consumers. However, in some cases a possibility exists to protect more vulnerable consumers, by application of either the target group benchmark or the vulnerable group benchmark.

The target group benchmark allows for deviation from the average consumer benchmark if there is a particular target group, while the vulnerable group benchmark allows for protection of vulnerable groups even if the group is not specifically targeted. In order for the vulnerable consumer benchmark to apply, the vulnerable group has to be 'easily identifiable', and their vulnerability must be reasonably foreseeable to the trader. These requirements may pose significant barriers for the protection of vulnerable consumers, although it must be noted that a great deal of uncertainty still surrounds the application of this benchmark.<sup>13</sup> It is however, apparent that the requirements of Article 5.3 do not provide sufficiently clear direction with regard to which groups are to receive additional protection and under what circumstances.

<sup>12</sup> The Guidelines to the Directive (*European Commission* (n 8), 29–30) do provide a few examples, but these tend to concern situations in which either the vulnerable group is targeted or in which it is questionable whether the group concerned is really more vulnerable in the sense that they are less capable to make a decision. See on the latter distinction also paragraph 3.2 of this paper.

<sup>13</sup> See also *Stuyck*, The notion of the empowered and informed consumer in consumer policy and how to protect the vulnerable under such a regime, *The yearbook of consumer law 2007*, 178

## 3 Consumer vulnerability: Directive versus reality

### 3.1 Introduction

Although much remains uncertain about how the protection of vulnerable consumers will operate in practice under the Directive, several points can be highlighted about how the Directive views vulnerability.

First of all, a central issue in the Directive is that consumer vulnerability is understood in terms of groups of consumers. Only the presence of specific target groups or of particularly affected vulnerable groups can justify an exception to the average consumer benchmark. In line with this approach, the Directive has a number of specific assumptions regarding which groups are vulnerable. The Directive assumes that, due to their age, children, adolescents and elderly are vulnerable. Similarly, it assumes that people with mental or physical infirmity are vulnerable, and the same applies to what the Directive refers to as 'credulous consumers'.

The following sections will be devoted to a discussion of how these various points of view of the Directive on vulnerability relate to actual consumer vulnerability. It discusses to what extent groups of consumers can be regarded as vulnerable, whether the groups mentioned in the Directive are indeed more vulnerable and whether the Directive really covers consumer vulnerability. There are two reasons to go into these questions. Firstly, by testing whether the Directive's approach accords with reality, we can determine whether the Directive is able to address true vulnerability and thus whether the Directive is able to reach its own objectives. Secondly, this exercise can help establishing guidelines for the application of the Directive, by assessing which consumers are more vulnerable in which situations and for what reasons.

This paper draws on knowledge from the field of *consumer behaviour studies*, as well as a number of consumer surveys on unfair commercial practices that have been conducted by government agencies in different countries.<sup>14</sup> This paper presents the main insights from the discipline of consumer behaviour on this topic, but is by no means an exhaustive overview of all that is known on consumer vulnerability.

### 3.2 Consumer vulnerability: different perspectives

Before delving into further detail with respect to consumer vulnerability, it is important to avoid confusion by pointing out that consumer vulnerability is a broad phenomenon, and

<sup>14</sup> In itself the discipline of consumer behaviour is already a blend of different fields of knowledge, most notably psychology, sociology and economics.

that the Unfair Commercial Practices Directive only addresses one particular perspective of vulnerability. Vulnerability can be viewed from the point of view of the *limited abilities* of consumers to deal with commercial practices, but vulnerability may also lie in the *degree of exposure* to certain commercial practices, or to the *consequences* of those practices for different consumers.

If one focuses on vulnerability due to *limited abilities*, one concentrates on the competences of consumers to deal with unfair commercial practices. So, for example, children may be more vulnerable due to their limited cognitive development, making them less able to understand information and making them more open to the influence of traders.

However, apart from focusing on the abilities of certain groups of consumers to deal with dangers such as unfair commercial practices, one can also focus on the *degree of exposure* to those dangers. This is not necessarily linked to the abilities of the consumer. For example, unemployed people and people who stay at home (eg, child-care providers and pensioners) may be more likely to be exposed to door-to-door sales than people who work full-time, simply because they are at home more often. This does not make them less able to deal with these practices, but the chance that they become a victim may be higher because they are exposed to the practices more often.

A third approach looks at the *consequences* of unfair commercial practices. This perspective on vulnerability is often taken in the context of consumer credit and other financial services for consumers. For example, poor consumers may be more vulnerable to predatory lending than consumers with higher incomes, because they will be less able to cope with the consequences of debt. In other words: regardless of their susceptibility to the commercial practices, they will be the victims who are hit hardest.

For the protection of vulnerable consumers under the Unfair Commercial Practices Directive, it is the *limited abilities* perspective that matters the most: the issue of the consumer benchmark (ie, the average consumer, the target group consumer or the vulnerable consumer) addresses the question which consumer should be taken as the standard to determine whether a commercial practice influences the economic behaviour of consumers. Hence, it is about the consumer's understanding of and reaction to commercial practices, which depends on his or her ability to deal with unfair commercial practices, rather than the degree of exposure or the consequences of those practices. Despite this, the Directive's guidelines in some cases confusingly refer to examples that reflect the vulnerability as a consequence of high exposure or gravity of the consequences.<sup>15</sup>

<sup>15</sup> *European Commission* (n 8). See also the discussion in paragraph 3.6 below.

### 3.3 Thinking about vulnerability in terms of groups

One of the main lessons from studies on consumer vulnerability is that it is context-specific and that the vulnerability of groups is sometimes overstated, leading to stereotypes.<sup>16</sup> Possible indicators of consumer vulnerability, such as age, income or other characteristics may show a relationship with vulnerability, but the relationship tends to be limited. This means that thinking about vulnerability in terms of groups of consumers clearly has its restrictions.

This is supported by four recent survey studies dealing with consumers' experiences with unfair commercial practices. It concerns studies in the United Kingdom, the Netherlands, the United States of America and Canada, all commissioned by the consumer enforcement authorities in the respective countries (ie, the Office of Fair Trading, the Dutch Consumer Authority (*Consumentenautoriteit*), the Federal Trade Commission and the Competition Bureau Canada respectively).<sup>17</sup>

The studies are similar in their methods. Consumers were questioned regarding their experiences with common forms of unfair commercial practices, such as misleading lotteries, misleading health claims and pyramid schemes. So, for example, consumers in the American study were asked whether in the past year they had been told by anybody that they had won a prize or a lottery, followed by questions about whether they responded to this, whether they had been required to make payments and so on.

What is interesting about these studies is that they investigate relationships between being a victim of unfair commercial practices and several characteristics of consumers, such as age, income, gender and social class. The studies show that some of these characteristics are indeed linked to consumer vulnerability. For example, the Dutch study shows that low-income consumers are more likely to be vic-

<sup>16</sup> *Baker/Gentry/Rittenburg*, Building understanding of the domain of consumer vulnerability, *Journal of macromarketing* 2005, 128 et seq.

<sup>17</sup> *Office of Fair Trading*, Research on the impact of mass marketing scams: a summary of research into the impact of scams on UK consumers (2006), available at [http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/oft883.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft883.pdf) (last accessed 15.03.2013); *Intomart GfK*, Oneerlijke handelspraktijken (OHP's) in Nederland: geïntegreerde rapportage van kwalitatief en kwantitatief onderzoek onder consumenten naar oneerlijke handelspraktijken (report commissioned by the Dutch Consumer Authority) (2008), available at <http://www.consumentenautoriteit.nl/sites/default/files/redactie/onderzoeksrapport-oneerlijke-handelspraktijken.pdf> (last accessed 15.03.2013); *Federal Trade Commission/Synovate*, Consumer fraud in the United States: the second FTC survey (2007), available at <http://www.ftc.gov/opa/2007/10/fraud.pdf> (last accessed 15.03.2013); *Competition Bureau Canada/Enviro-nics Research Group*, 2007 Canadian consumer mass marketing fraud survey (2008), available at [http://www.ic.gc.ca/eic/site/icgc.nsf/vwapj/Enviro-nics-CompetitionBureau-MMF-FinalRRReport-Feb2008.pdf/\\$file/Enviro-nics-CompetitionBureau-MMF-FinalRRReport-Feb2008.pdf](http://www.ic.gc.ca/eic/site/icgc.nsf/vwapj/Enviro-nics-CompetitionBureau-MMF-FinalRRReport-Feb2008.pdf/$file/Enviro-nics-CompetitionBureau-MMF-FinalRRReport-Feb2008.pdf) (last accessed 15.03.2013).

tims of unfair commercial practices than higher income groups (see also paragraph 3.7 below). However, the differences between the income groups are limited, as is also the case for the other characteristics. This indicates that one has to be careful when drawing a conclusion that a group as such is vulnerable. Everyone can be a victim of unfair commercial practices and all consumers can expect to be vulnerable at some point in their lives.<sup>18</sup>

Why are the differences only limited? Part of the answer lies in the fact that characteristics that are commonly linked to vulnerability (such as age, income and social class) often do not directly address the cause of vulnerability. So, for example, the mere fact that a consumer is old does not necessarily mean that he or she is inept at making good decisions. Rather, to better address the vulnerability of elderly we should, as we will see more in detail below, look at specific reasons for vulnerability that may be connected with old age, such as diminished cognitive abilities and social isolation.

A second reason is that within vulnerable groups, differences exist between the individuals of those groups. Once again, this makes it more difficult to characterise vulnerability in terms of groups. People have different abilities, different knowledge, different past experiences and different personalities. It does not follow that people who have a certain characteristic in common (eg, old age) will exhibit the same behaviour as a consumer. Within groups differences also exist because the individuals differ as to the identifying characteristic. For example, the group of 'elderly consumers' contains very old consumers (eg, 90+) but also 'younger' elderly consumers (eg, 65 year-old).<sup>19</sup>

Finally, it is important to point out that members of a vulnerable group are usually not vulnerable to all practices: vulnerability is highly context specific. One has to beware of stereotyping. It is important not to label certain groups as vulnerable *per se*. Rather, one should ask whether certain consumers are vulnerable to a certain practice. For example, people with physical infirmity are unlikely to be more vulnerable than other consumers when it comes to, say, buying mortgages. To put it more bluntly: being in a wheelchair does not necessarily affect your intelligence.

What follows is a discussion of the question to what extent allegedly vulnerable groups are indeed vulnerable. Attention will be paid to children and adolescents (paragraph 3.4), the elderly (paragraph 3.5), mental and physical infirmed (paragraph 3.6) and credulous and otherwise vulnerable consumers (paragraph 3.7). The discussion on these

<sup>18</sup> See also *Mansfield/Pinto*, Consumer vulnerability and credit card knowledge among developmentally disabled citizens, *Journal of consumer affairs* 2008, 425.

<sup>19</sup> See on individual differences between elderly consumers also *Yoon/Cole/Lee*, Consumer decision making and aging: current knowledge and future directions, *Journal of consumer psychology* 2009, 4 et seqq.

specific groups further illustrates the general points made here.

#### 3.4 Vulnerability by virtue of age: children and adolescents

Children and adolescents are often seen as vulnerable consumer groups. As we have seen above, this is also the case in the Unfair Commercial Practices Directive. Common sense suggests that children and teenagers may be more vulnerable as they lack experience as consumers and are less able to resist the influence of others.

There is a considerable body of research, developed mainly in the 1970s and 1980s, on what is often referred to as *consumer socialisation*, ie, the development of consumer knowledge, skills and values of children and adolescents.<sup>20</sup> Not surprisingly, studies indeed show that skills, knowledge and attitudes of children develop during their childhood, making them gradually ready to function as consumers on the marketplace. This is clear from experiments on various subjects, such as understanding of advertising and persuasion knowledge, product and product pricing knowledge and decision-making skills.<sup>21</sup>

For example, research on children's understanding of TV advertising indicates that especially younger children do not comprehend the persuasive intent of advertising. From age seven or eight, children begin to understand the persuasive intent of advertising and recognise that ads may lie or contain bias or deception.<sup>22</sup> From age eleven, children develop a deeper understanding of the persuasive intent and specific tactics and appeals of advertising, and tend to be sceptical towards advertising.<sup>23</sup>

More in general, research suggests that young children use fewer sources and less information when comparing and selecting products than older children.<sup>24</sup> Children, especial-

<sup>20</sup> *Roedder John*, Stages of consumer socialization, the development of consumer knowledge, skills and values from childhood to adolescence, in *Haugtvedt/Herr/Kardes*, *Handbook of consumer psychology* (2008), 221 et seqq.

<sup>21</sup> *Roedder John*, Consumer Socialization of children: a retrospective look at twenty-five years of research, *Journal of consumer affairs* 1999, 183 et seqq.

<sup>22</sup> *Roedder John* in *Haugtvedt/Herr/Kardes* (n 20), 226; *Roedder John*, *Journal of consumer affairs* 1999, 183 et seqq; *Roosendaal/Buijze/Valkenburg*, Children's understanding of advertisers' persuasive tactics, *International journal of advertising* 2011, 329 et seqq.

<sup>23</sup> *Boush/Friestad/Rose*, Adolescent skepticism toward TV advertising and knowledge of advertiser tactics, *Journal of consumer research* 1994, 165 et seqq; *Roedder John*, *Journal of consumer affairs* 1999, 183 et seqq. See on the topic of adolescents' skepticism towards advertising also *Mangleburg/Bristol*, Socialization and adolescents' scepticism toward advertising, *Journal of advertising* 1998, 11 et seqq.

<sup>24</sup> *Capon/Kuhn*, A developmental study of consumer information-processing strategies, *Journal of consumer research* 1980, 225 et seqq. *Roedder John/Cole*, Age differences in information processing: understanding deficits in young and elderly consumers, *Journal of consumer*



ly if they are young, also lack product knowledge and knowledge of product pricing.<sup>25</sup>

As a consequence of these limitations, children have more difficulty making decisions, especially if they involve large quantities of information. Moreover, the mode of presentation of information is highly relevant in this context.<sup>26</sup>

At the same time, it is important to point out that much depends on the age of the child. While younger children may struggle making even basic decisions, adolescents may easily be able to fulfil the same tasks.<sup>27</sup> In fact, adolescents in many ways have similar abilities as adults.<sup>28</sup> Unlike younger children, who often struggle even with relatively simple decision-making processes, adolescents can often cope well with persuasion attempts.<sup>29</sup>

It should be taken into account, however, that adolescents still have little experience as consumers. In particular, they are likely to have less product knowledge, have less experience in making complex decisions and have less knowledge about unfair commercial practices.<sup>30</sup> The ability to deal with persuasion attempts, therefore, continues to develop well beyond the period in which information-processing skills have stabilised.<sup>31</sup> In this context it is important to note that children may be particularly vulnerable with regard to on-line advertising, where persuasive intent is often unclear and advertising techniques change quickly.<sup>32</sup>

Besides their limited experience, adolescents – even though their cognitive skills often do not differ much from adults – tend to engage more often in risky behaviour. Steinberg points out that this is not caused by adolescents' bad risk assessment, but rather by their limited impulse control. Adolescents were found to know as well as adults that certain types of behaviour are risky, but in practice they do not seem to act accordingly. Steinberg attributes this to the timing of the development of self-regulation capabilities: while several drives or impulses strengthen in early adolescence,

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research 1986, 297 et seqq; *Roedder John*, in *Haugtvedt/Herr/Kardes* (n 20), 226 et seqq.

<sup>25</sup> *Roedder John/Cole*, *Journal of consumer research* 1986, 297 et seqq; *Roedder John*, *Journal of consumer affairs* 1999, 183 et seqq.

<sup>26</sup> *Roedder John/Cole*, *Journal of consumer research* 1986, 297 et seqq.

<sup>27</sup> *Capon/Kuhn*, *Journal of consumer research* 1980, 225 et seqq; *Roedder John* in *Haugtvedt/Herr/Kardes* (n 20), 226 et seqq.

<sup>28</sup> *Steinberg*, *Risk taking in adolescence. What changes, and why?*, *Annals New York Academy of Sciences* 2004, 51 et seqq; *Steinberg*, *Risk taking in adolescence: new perspectives from brain and behavioural science*, *Current directions in psychological science* 2007, 55 et seqq.

<sup>29</sup> *Roedder John*, *Journal of consumer affairs* 1999, 183 et seqq.

<sup>30</sup> *Idem*.

<sup>31</sup> *Friestad/Wright*, *The persuasion knowledge model: how people cope with persuasion attempts*, *Journal of consumer research* 1994, 7.

<sup>32</sup> See eg *Calvert*, *Children as consumers: advertising and marketing. The future of children* 2008, 205 et seqq.

self-regulation capacities such as impulse control, emotional regulation, delay of gratification, planning and resistance to peer influence continue to develop until late adolescence and young adulthood. Hence, adolescents are faced with a 'gap' between the strengthening of drives, on the one hand, and capacities to deal with those drives, on the other.<sup>33</sup> While little is known of the impact of this on adolescents' behaviour as consumers, it may suggest increased vulnerability for certain trade practices, as well as vulnerability to exploitation by traders. For example, Steinberg's theory may suggest that adolescent consumers tend to focus more on immediate gains and ignore future costs.

In conclusion, it is understandable that children are seen as a vulnerable group in the Unfair Commercial Practices Directive. Especially young children are easily persuaded and have limited decision-making abilities. However, as children grow older, they may in many senses have the same abilities as adults, yet lack the experience and self-control capabilities making them vulnerable to exploitation. It is, therefore, important to examine the age of the group involved, and to determine whether this group is vulnerable to the practice at hand. A standardised approach is, however, difficult to maintain.

### 3.5 Vulnerability by virtue of age: elderly consumers

Such as children and adolescents, elderly consumers are mentioned in the Directive as a vulnerable group. Common sense indeed suggests that at least some elderly consumers will be more vulnerable to unfair commercial practices due to their age. As will be discussed in more detail below, several theories and experiments in the field of consumer behaviour indeed suggest that elderly consumers may be more vulnerable than other consumers. Surprisingly though, the surveys on consumers' experiences with unfair commercial practices (already discussed in paragraph 3.3 above) suggest that elderly consumers in fact fall victim to unfair commercial practices less rather than more often than other age groups.

An analysis of the consumer behaviour literature reveals that the most likely reason for vulnerability of elderly consumers concerns diminishing decision-making skills due to cognitive impairment.

Some cognitive abilities, such as memory retrieval, diminish as a result of aging, causing cognitive impairment. Elderly consumers may, therefore, be less likely than younger consumers to accurately process information and make 'good' decisions, if they are faced with new information.<sup>34</sup>

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<sup>33</sup> *Steinberg*, *Annals New York Academy of Sciences* 2004, 51 et seqq; *Steinberg*, *Current directions in psychological science* 2007, 55 et seqq.

<sup>34</sup> *Roedder John/Cole*, *Journal of consumer research* 1986, 297 et seqq; *Cole/Balasubramanian*, *Age differences in consumers' search*

Experiments also show that elderly consumers take longer to process information and have trouble processing information if the information is presented at a relatively high pace.<sup>35</sup> Whether they have control over the pace in which information is presented, therefore, seems relevant for their ability to make good decisions.<sup>36</sup> Elderly consumers also seem less able to remain attentive and alert over longer periods of time, in particular when they face many new stimuli.<sup>37</sup>

Moreover, experiments suggest that elderly consumers have more trouble than younger consumers making judgments if they are faced with irrelevant information. Accordingly, elderly consumers seem to be less able to discriminate between relevant and irrelevant information.<sup>38</sup>

Roedder John and Cole point out that elderly consumers, compared to non-elderly adult consumers, have particular problems processing larger amounts of information, and that the way in which information is presented is particularly important for their understanding.<sup>39</sup> These factors are relevant for all age groups, but are especially crucial for the elderly.

These cognitive limitations suggest that elderly consumers may be more vulnerable to unfair commercial practices, as they struggle gathering and processing information. This makes it more difficult to evaluate the potential advantages and disadvantages of decisions.

Apart from cognitive impairment, elderly consumers may also be vulnerable due to *social isolation*.<sup>40</sup> As people become older, they are more likely than other people in so-

ciety to become socially isolated. They are likely to have fewer social interactions due to retirement and the increased chance of losing their spouse or partner, as well as friends.<sup>41</sup> They may also become isolated as a consequence of physical impairments.<sup>42</sup> As a result of a lack of mobility, they may not have the possibility to leave their homes independently when they wish to. Since elderly consumers are more likely than other consumers to become socially isolated, this may make them more vulnerable to certain unfair commercial practices.<sup>43</sup>

Social interaction with others makes consumers familiar with unfair commercial practices, and how to deal with them. More specifically, people who are socially isolated may be less likely to consult friends and family in the process of making decisions,<sup>44</sup> which may increase the chance that they fall victim to consumer fraud. It is also suggested that people who are socially isolated may satisfy their social needs by commercial interactions. Commercial interactions may in that way provide a functional equivalent for social support.<sup>45</sup> Consumers who are socially isolated may be more willing to listen to somebody coming to their door or calling them to sell something, simply because they have the need to interact with others.<sup>46</sup> Moreover, it is suggested that people who are socially isolated may be highly vulnerable to persuasive communication as they are not accustomed to argue and are unsure about their own opinions.<sup>47</sup>

Against the background of the literature on vulnerability by virtue of cognitive impairment and social isolation, one may expect that elderly consumers fall victim to unfair commercial practices more often than other consumers. Surprisingly, however, the surveys on experiences of consumers

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for information: public policy considerations, *Journal of consumer research* 1993, 157 et seqq; *Sorce*, Cognitive competence of older consumers, *Psychology and marketing* 1995, 467 et seqq; *Yoon/Cole/Lee*, Consumer decision making and aging: current knowledge and future directions, *Journal of consumer psychology* 2009, 2 et seqq; *Moschis/Mosteller/Fatt*, Research frontiers on older consumers' vulnerability, *Journal of consumer affairs* 2011, 467 et seqq.

<sup>35</sup> *Cole/Gaeth*, Cognitive and age-related differences in the ability to use nutritional information in a complex environment, *Journal of marketing research* 1990, 175 et seqq; *Yoon/Cole/Lee*, *Journal of consumer psychology* 2009, 6; *Phillips/Sternthal*, Age differences in information processing: a perspective on the aged consumer, *Journal of marketing research* 1977, 477; *Yoon/Cole*, Aging and consumer behavior, in *Haugtvedt/Herr/Kardes*, *Handbook of consumer psychology* (2008), 247 et seqq.

<sup>36</sup> *Roedder John/Cole*, Age differences in information processing: understanding deficits in young and elderly consumers, *Journal of consumer research* 1986, 297 et seqq.

<sup>37</sup> *Phillips/Sternthal*, *Journal of marketing research* 1977, 477.

<sup>38</sup> *Yoon/Cole/Lee*, *Journal of consumer psychology* 2009, 6; *Phillips/Sternthal*, *Journal of marketing research* 1977, 444 et seqq; *Cole/Gaeth*, *Journal of marketing research* 1990, 176; *Yoon/Cole* in *Haugtvedt/Herr/Kardes* (n 35), 247 et seqq.

<sup>39</sup> *Roedder John/Cole*, *Journal of consumer research* 1986, 297 et seqq. See also *Yoon/Cole* in *Haugtvedt/Herr/Kardes* (n 35), 247 et seqq.

<sup>40</sup> *Moschis/Mosteller/Fatt*, *Journal of consumer affairs* 2011, 470.

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<sup>41</sup> *Kang/Ridgway*, The importance of consumer market interactions as a form of social support for elderly consumers, *Journal of public policy and marketing* 1996, 110; *Lee/Soberon-Ferrer*, Consumer vulnerability to fraud: influencing factors, *Journal of consumer affairs* 1997, 70 et seqq.

<sup>42</sup> *Lee/Geistfeld*, Elderly consumers' receptiveness to telemarketing fraud, *Journal of public policy and marketing* 1999, 209.

<sup>43</sup> *Kang/Ridgway*, *Journal of public policy and marketing* 1996, 108 et seqq; *Lee/Geistfeld*, *Journal of public policy and marketing* 1999, 208 et seqq.

<sup>44</sup> *Moschis/Mosteller/Fatt*, *Journal of consumer affairs* 2011, 467 et seqq. *Lee/Geistfeld*, *Journal of public policy and marketing* 1999, 208 et seqq.

<sup>45</sup> *Kang/Ridgway*, *Journal of public policy and marketing* 1996, 108 et seqq; *Kim/Kang/Kim*, The relationships among family and social interaction, loneliness, mall shopping motivation, and mall spending of older consumers, *Psychology and marketing* 2005, 995 et seqq.

<sup>46</sup> *Lee/Soberon-Ferrer*, *Journal of consumer affairs* 1997, 70 et seqq. This hypothesis is supported by an experiment by Lee and Geistfeld, which shows that elderly consumers are generally more willing to listen to telemarketers, see *Lee/Geistfeld*, *Journal of public policy and marketing* 1999, 208 et seqq.

<sup>47</sup> *Lee/Geistfeld*, *Journal of public policy and marketing* 1999, 208 et seqq.

with unfair commercial practices (see also paragraph 3.3 above) paint a different picture.

All four studies contradict the general assumption that mostly elderly consumers are the victims of unfair commercial practices. In fact, three out of four studies show that older consumers are victims of unfair commercial practices *less* often than consumers in other age groups; compared to the number of times elderly consumers are targeted by unfair commercial practices, they fall victim to these practices less than other groups.<sup>48</sup>

Why may this be the case? The reports do not give any answers on this point, although the UK study does suggest (without empirical back-up) that part of the result may be caused by elderly consumers' reluctance to admit to have been a victim of fraud.<sup>49</sup> However, even if this is the case, there seem to be more issues that have to be considered. In particular, researchers on the topic of elderly consumer vulnerability have indicated that the story of cognitive decline does not reveal the whole story of vulnerability. Although it is clear that elderly consumers face problems with memory for example, it is questionable whether this cognitive decline really makes the elderly to decide poorly. Even if elderly consumers encounter problems in processing information, it seems likely that they adapt to the situation (eg, by taking more time to make a decision or taking notes when confronted with larger amounts of information), or compensate for the deficit by prior knowledge and experience.<sup>50</sup> Hence, there is not necessarily a direct relationship between vulnerability in the sense of having limited cognitive abilities and actually being a victim of unfair commercial practices.

Hence, the vulnerability of elderly consumers should not be overstated, and it seems unjustified to label the elderly as generally vulnerable. Contrary to what is often assumed (and which is apparently also assumed by the European legislature, by qualifying elderly consumers as a vulnerable group), elderly consumers do not seem to be deceived more often than younger consumers. Still, there are reasons for elderly consumers to experience vulnerability, and adaptation strategies, prior knowledge and experience will not always compensate for declining decisions-making skills and social isolation. It is, however, questionable whether the vulnerable group standard can accurately account for these vulnerabilities.

<sup>48</sup> These findings are supported by earlier studies in the United States, see *Moschis/Mosteller/Fatt*, *Journal of consumer affairs* 2011, 472 et seq. The Dutch study (n 17) did not find any relationship between age and being a victim of unfair commercial practices.

<sup>49</sup> *Office of Fair Trading* (n 17), 28.

<sup>50</sup> *Yoon/Cole/Lee*, *Journal of consumer psychology* 2009, 2 et seq; *Moschis/Mosteller/Fatt*, *Journal of consumer affairs* 2011, 474 et seq; *Yoon/Cole* in *Haugtvedt/Herr/Kardes* (n 35), 247 et seqq.

### 3.6 Vulnerability by virtue of mental and physical infirmity

Mental and physical infirmity is mentioned as a ground for vulnerability in Article 5.3 of the Unfair Commercial Practices Directive. The guidelines on the implementation and application of the Directive refer in this context to 'sensory impairment, limited mobility and other disabilities'.<sup>51</sup> More specifically, the Directive's guidelines point to advertising claims concerning access for disabled people to holiday destinations or entertainment venues, and to claims about 'hearing aid compatibility' in phone advertisements.

At first, these examples may seem to be self-evident, but they are in fact somewhat puzzling. Although it is clear that only consumers in wheelchairs and consumers with hearing impairments will be affected by the claims concerned (they are after all the consumers for whom these practices matter), it is questionable that they are less informed, observant or circumspect than other consumers. Hence, they may be seen as vulnerable in the general meaning of the word, but they do not seem to be more vulnerable in the sense that they are less able to engage in these types of transactions (ie not from the *limited abilities* perspective, see the discussion on perspectives in paragraph 3.2 above). This makes it unclear why a different consumer benchmark (the *vulnerable consumer* rather than the *average consumer*) would be needed in order to protect these consumers from fraudulent claims.

This especially applies to physical infirmity. In fact, physical infirmity does not seem to cause vulnerability at all for most decision-making processes. As already remarked above: why would people facing physical infirmity be more vulnerable in the sense that they are less informed, observant and circumspect than other consumers? Perhaps in some situations they are forced to rely more on a sales person, or perhaps for some their physical infirmity causes them to be socially isolated, which may be a cause of vulnerability (see also the discussion on the vulnerability of elderly consumers above). Nonetheless, in most cases physically infirmed consumers do not seem to be less capable of making decisions.

In examining mental infirmity, it is not difficult to imagine that in some cases this indeed causes vulnerability. Mental disorders may limit the consumers' ability in making good purchasing decisions, for example as a result of limited cognitive abilities. Mental disorders come in many different forms, such as anxiety disorders, impulse-control disorders and mood disorders.<sup>52</sup> Discussing in detail the relationship between mental disorders and consumer vulnerability lies outside the scope of this paper, and it must be noted that little research has been done in this field. Nevertheless, it is important to stress that different mental disor-

<sup>51</sup> *European Commission* (n 8), 30.

<sup>52</sup> *Gleitman/Gross/Reisberg*, *Psychology* (2011), 644 et seqq.

ders come with different problems, causing different obstacles in the decision-making process. While mental disorders may make some aspects of decision-making difficult, they may leave other aspects untouched. It is, therefore, difficult to speak of people with mental infirmity as a homogenous group of vulnerable consumers, and the problems they face are highly context specific.

### 3.7 Credulity and other causes of vulnerability

The third cause of vulnerability mentioned in Article 5.3 of the Directive is, as we have seen above, vulnerability because of *credulity*. According to the Directive's guidelines, the category is meant to protect groups of consumers who are, more than others, open to be influenced by certain claims.<sup>53</sup> Unlike vulnerability due to age or mental or physical infirmity, vulnerability due to credulity does not refer to a specific reason for vulnerability. By their definition they are indeed more vulnerable than other consumers, but it is unclear who is exactly meant here. The definition is so broad that it could essentially include any vulnerable group.

However, whether a vulnerable group – other than those vulnerable because of age or mental or physical infirmity – falls within the category of credulity is not a pivotal point, as the causes mentioned in Article 5.3 are not limitative and the provision thus leaves room for the protection of other groups. It is more important that in order for these groups to be protected, they must be clearly identifiable as a group and their vulnerability must be reasonably foreseeable for the trader. As remarked earlier, this may pose significant barriers for the protection of vulnerable consumers.

What potentially vulnerable groups can be thought of? Vulnerability has been linked in literature to several characteristics, including race, income, gender and education.<sup>54</sup> Although some of these characteristics do seem to indicate some relationship with consumer vulnerability, the most important conclusion is that vulnerability is difficult to catch within these types of characteristics.

Despite this it is interesting to examine a few of these characteristics, one of them being *gender*. The survey studies on the experiences of consumers with unfair commercial practices (see above) offer some interesting results on this issue. Both the Dutch study and, to a lesser extent, the American study found that women fall victim to unfair commercial practices more often than men.<sup>55</sup> In contrast, the UK study did not find a significant difference between men and women.<sup>56</sup> The reason for these differences seems to be the

different commercial practices included in the studies. The UK study notes that for some scams there was a considerable difference depending on gender; while women were affected significantly more by miracle health claims, clairvoyant mailing scams and career opportunity scams, men are affected more by high-risk investment scams, property investment scams, African advance fee scams and internet-dialler scams.<sup>57</sup> Many of high-risk practices for men found in the UK study were not included in the Dutch study, causing the total number of victims in that study to consist of more women than men. Based on these outcomes it is difficult to say whether women are generally more prone to be victim of unfair commercial practices, let alone whether women are less capable to deal with unfair commercial practices than men are. Again, as remarked above for age, it is important to note that these results do not necessarily indicate a direct link between a group being over-represented amongst victims and actually being less capable to deal with the practices. Differences may well be explained by other factors such as preference for the underlying products or gains. This is supported by the finding of the study by Lee and Soberon-Ferrer, who found no significant differences between men and women in their study on consumers' attitudes towards potentially unfair practices.<sup>58</sup>

The only general characteristics that somewhat convincingly show a relationship to vulnerability are the – most likely related – characteristics of income, education and social class. This has been repeatedly suggested in literature<sup>59</sup> and is supported by the Dutch and the American survey studies, which include an analysis of the relationship between income and being a victim to unfair commercial practices. Both of these studies found that consumers with a low income are slightly more vulnerable than higher income groups and that people who are less educated are – albeit only slightly – overrepresented amongst victims.<sup>60</sup> The same conclusion can be drawn for social class: the two studies going into this issue, ie, the Dutch and the UK study, show that people in a lower social class are slightly more likely to be victim of unfair commercial practices than those in a higher social class.<sup>61</sup>

It must be noted that even though these variables seem connected with vulnerability, the differences between the groups mentioned (eg, low income, low education and low

<sup>57</sup> *Idem*.

<sup>58</sup> *Lee/Soberon-Ferrer*, Journal of consumer affairs 1997, 85 et seq.

<sup>59</sup> *Idem*, 71. See also *Baker/Gentry/Rittenburg*, Journal of macromarketing 2005, 129.

<sup>60</sup> *Intomart GfK* (n 17), 49; *Federal Trade Commission/Synovate* (n 17), 28 et seq.

<sup>61</sup> *Intomart GfK* (n 17), 49; *Office of Fair Trading* (n 17), 30. For the UK study it must be pointed out that this difference is only very slight. The difference between these studies may, like for gender, be explained by the different commercial practices included in the studies.

<sup>53</sup> *European Commission* (n 8), 30.

<sup>54</sup> *Baker/Gentry/Rittenburg*, Journal of macromarketing 2005, 128 et seqq.

<sup>55</sup> *Intomart GfK* (n 17), 51; *Federal Trade Commission/Synovate* (n 17), 28.

<sup>56</sup> *Office of Fair Trading* (n 17), 27.

social class) and other consumers tend only to be slight. Once again this raises the question whether these characteristics adequately identify the reason of vulnerability, and whether these characteristics justify the application of a different consumer benchmark for the entire groups, either by being labelled as “credulous” or by being recognized as vulnerable groups on their own. It shows once more that vulnerability is difficult to catch in these kinds of general categories.

#### 4 Concluding Remarks

As proven in this article, it is difficult in practice to identify vulnerable groups. Qualifying groups as inherently vulnerable is problematic, as vulnerability is highly dependent on the individual consumer and the specific situation. As Baker, Gentry and Rittenburg point out: “consumer vulnerability is multidimensional, context specific, and does not have to be enduring.”<sup>62</sup>

It is, therefore, questionable whether consumers facing vulnerability can be grouped in a way that makes them ‘clearly identifiable’ and for whom their vulnerability can be ‘reasonably foreseeable’ to the trader. There are strong suggestions that some groups (eg, children) are indeed generally more vulnerable, but it is important to realise that vulnerability takes different forms and has different causes.

Hence, this raises practical problems for the application of the Directive, as it will be difficult to meet the requirements for the protection of vulnerable consumers. At the same time, it also raises the question whether it is desirable to protect some groups of consumers, while others facing vulnerability are denied protection. Should it really matter whether someone is vulnerable by virtue of social isolation as a consequence of old age, or due to social isolation for other reasons? Should having limited cognitive abilities due to young age give a right to extra protection, while having

limited cognitive abilities for other reasons (eg, genetic, cultural or educational reasons) does not?

This raises the question whether the regime of consumer benchmarks in the Directive is effective in dealing with unfair commercial practices. The target group and vulnerable group benchmarks were meant to bridge the gap in consumer protection created by the introduction of the average consumer benchmark, but they do not seem to fix the problem.

Consequently, the question needs to be posed whether the Directive should indeed have such a strong focus on categorising the addressees of commercial practices. Perhaps it would be better to take a more pragmatic approach to vulnerability, eg, by asking whether a trader in a particular case exploits the vulnerabilities of consumers. In this way, other relevant considerations instead of the categorisation of vulnerable groups would become more decisive in determining whether certain consumers need protection. The emphasis of consumer vulnerabilities and the vulnerabilities of specific groups is still both relevant and useful in this context, but the identification of groups of vulnerable consumers for the application of a specific benchmark should perhaps be less decisive.

In fact, practice in some Member States already seems to indicate a trend in that direction. Enforcement authorities and courts do not always seem to be concerned with finding the appropriate benchmark, and, in this context, do not seem to apply the Directive very rigidly. Rather, they presume that the economic behaviour of the average consumer is affected as soon as it is felt that vulnerabilities are exploited.<sup>63</sup> This is done despite the fact that most consumers are not affected by the practice and that it thus seems questionable whether the ‘average consumer’ in such cases is affected.<sup>64</sup> This may not be the most accurate way to apply the Directive if one examines the exact wording, but it seems necessary in order to deal with consumer vulnerability when and where it is needed.

<sup>63</sup> See eg the English case *Office of Fair Trading v Purely Creative Ltd and others* [2011] EWHC 106 and the Dutch case *Rechtbank Haarlem* (District Court Haarlem) 02.04.2009, *LJN* BI1561.

<sup>64</sup> Also in Italy the average and vulnerable consumer benchmarks are applied rather flexibly in order to address exploitation of vulnerabilities, for example in the decisions of the *Autorità Garante della Concorrenza e del Mercato* (AGCM) on health related advertising. See eg AGCM 08.09.2010, n 21539 (PS1898), *Boll.* 37/2010 (Pool Pharma – Kilocal).

<sup>62</sup> *Baker/Gentry/Rittenburg*, *Journal of macromarketing* 2005, 128.