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The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration

Abstract

Transparency counts amid the most typical and inherent elements of the current consumer protection toolbox in EU law. For a long time, the exact premises of this requirement have been understood in a standardized way, taking the concept of an average consumer as the benchmark. The case of 93/13/EEC Directive (UCTD) is particularly striking in this regard. The necessary connection between the average consumer and transparency comes almost without saying in both the CJEU case law, and in the scholarship provisions on the UCTD. However, Articles 4(2) and 5 of the UCTD merely refer to a consumer. The focus on the average consumer therefore reduces the scope of application suggested by the plain meaning of these provisions. The article takes a critical stance towards the *communis opinio* that there is a necessary connection between the average consumer and transparency in the UCTD. Relying on both legal and economic reasons, the paper supports a twofold claim: (1) The system of EU law requires, sometimes, to assess the transparency of a term from the perspective of vulnerable consumers. (2) This more demanding standard shall be used when the average consumers operating on the market do not offer herd protection to the vulnerable consumers. The article shows that the *communis opinio* rests on a faulty assumption, namely that vulnerable consumers are protected when core terms are transparent for the average consumer. The article shows that this is not the case under common circumstances. Demanding core terms to be transparent for the vulnerable consumer in those circumstances contributes to reaching a high level of consumer protection.

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Article

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The Consumer Benchmark, Vulnerability, and the Contract Terms Transparency: A Plea for Reconsideration

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vulnerable consumers are protected when core terms are transparent for the average consumer. The article shows that this is not the case under common circumstances. Demanding core terms to be transparent for the vulnerable consumer in those circumstances contributes to reaching a high level of consumer protection.

Résumé: La transparence compte parmi les éléments les plus caractéristiques et les plus essentiels de la palette d'outils dont dispose actuellement le droit communautaire en matière de protection des consommateurs. Depuis longtemps, les fondements exacts de cette exigence ont été compris de manière homogène, en prenant comme référence le concept de consommateur moyen. La directive 93/13/CEE (UCTD) concernant les clauses abusives dans les contrats conclus avec les consommateurs est particulièrement révélatrice à cet égard. Le lien établi entre le critère du consommateur moyen et les exigences de transparence est considéré comme presque évident, tant dans la jurisprudence de la CJCE que dans les publications scientifiques relatives à la directive UCTD. Cependant, les articles 4(2) et 5 de la UCTD ne font référence qu'à un consommateur. La limitation à un consommateur moyen réduit donc le champ d'application de ces dispositions, sans que l'objectif de la réglementation ne l'exige. L'article adopte une position critique à l'égard de la *communis opinio* selon laquelle il existerait nécessairement un lien entre le critère du consommateur moyen et les exigences de transparence dans la directive UCTD. S'appuyant sur des considérations à la fois juridiques et économiques, l'article soutient une double revendication : (1) L'économie du droit de l'UE exige parfois que la transparence d'une clause soit évaluée du point de vue des consommateurs vulnérables. (2) Ce critère plus exigeant doit être appliqué lorsque l'approche par les consommateurs moyens opérant sur le marché n'offre pas une protection suffisante aux consommateurs plus vulnérables. L'article démontre que la *communis opinio* est fondée sur une hypothèse erronée, à savoir que le consommateur vulnérable est également protégé si les clauses substantielles sont transparentes pour le consommateur moyen. Ce n'est pas le cas dans des circonstances normales. Ainsi, exiger que les clauses principales soient suffisamment explicites pour le consommateur vulnérable dans ces circonstances contribue à atteindre un niveau élevé de protection des consommateurs.

Zusammenfassung: Transparenz ist eines der typischsten und inhärentesten Elemente des aktuellen Verbraucherschutzinstrumentariums im EU-Recht. Die genauen Anforderungen dieses Grundsatzes wurden lange Zeit in einer standardisierten Weise verstanden, welche auf das Konzept des Durchschnittsverbrauchers als Maßstab abstellte. Besonders aussagekräftig in dieser Hinsicht ist die Richtlinie 93/13/EWG (UCTD). Der notwendige Zusammenhang zwischen dem

Maßstab des Durchschnittsverbrauchers und den Anforderungen der Transparenz wird sowohl in der Rechtsprechung des EuGH als auch in den wissenschaftlichen Veröffentlichungen zur UCTD als nahezu selbstverständlich vorausgesetzt. Jedoch wird in den Artikeln 4(2) und 5 UCTD lediglich auf einen Verbraucher Bezug genommen. Die Beschränkung auf einen Durchschnittsverbraucher reduziert daher den Anwendungsbereich dieser Bestimmungen, ohne dass der Regelungszweck dies verlangt. Der Artikel nimmt eine kritische Haltung gegenüber der *communis opinio* ein, wonach notwendigerweise ein Zusammenhang zwischen dem Maßstab des Durchschnittsverbrauchers und den Anforderungen der Transparenz im UCTD besteht. Der Beitrag, gestützt auf rechtliche und wirtschaftliche Gründe, vertritt zwei zusammenhängende Forderungen: (1) Die Systematik des EU-Rechts erfordert mitunter, die Transparenz einer Klausel aus der Perspektive besonders schutzbedürftiger Verbraucher zu beurteilen. (2) Dieser anspruchsvollere Maßstab ist anzuwenden, wenn die auf dem Markt agierenden Durchschnittsverbraucher den schutzbedürftigeren Verbrauchern keinen Herdenschutz bieten. Der Artikel demonstriert, dass die *communis opinio* auf einer fehlerhaften Annahme beruht, nämlich dass auch der vulnerable Verbraucher geschützt ist, wenn die zentralen Klauseln für den Durchschnittsverbraucher transparent sind. Dies ist unter normalen Umständen nicht der Fall. Somit trägt die Forderung nach Transparenz einer AGB auch für den besonders schutzbedürftigen Verbraucher unter diesen Umständen zum Erreichen eines hohen Verbraucherschutzniveaus bei.

1 Introduction

EU consumer law strives to find a balance between opening national markets to increase competitiveness and protecting consumers against unfair dealing. A pivotal technique to achieve the desired level of operability and effectiveness is building on generalizations and models that permit avoidance of a case-by-case examination of each particular contract.

The concept of average consumer is a textbook example of such technique, offered by EU law to domestic courts, legislators, and administrative enforcers as a benchmark for the application of various norms of the EU consumer acquis. The detailed premises of this concept – that understands an average consumer as a model individual who is reasonably observant, attentive, and circumspect – have been formed and entrenched in the case law of the Court of Justice of the European Union (CJEU). This concept was originally introduced in the context of free movement law, where consumer protection was invoked to justify limits on the

exercise of the Treaty freedoms. In this context, the average consumer was used to find a proportionate compromise between the deregulatory ethos of the fundamental freedoms and the need to protect consumers.¹ Along similar lines, EU consumer law typically demands to assess whether an average consumer is in a need of a certain level of protection, or whether something less limiting of economic freedom (typically, information requirements) would be enough.

Over the past few decades, the concept of average consumer has largely conquered the imagination of judges and policymakers and became a pillar of EU private law. The concept of the average consumer has been elevated to a pivotal position in the UCPD,² which repeated and synthesized the formula developed earlier by the Court. At the same time, however, the UCPD included also a more protective image of the consumer – i.e. the vulnerable consumer. The vulnerable consumer standard rests on the assumption that under certain circumstances consumers are more susceptible to certain threats, which calls for a more intense protection. The UCPD offers only a hazy definition of consumer vulnerability, limited only to an exemplary (and not comprehensive) enumeration of consumers' features that may render them more prone to certain market practices.³

The argument construed in this paper focuses around the concept of core terms in the meaning of Article 4(2) of Unfair Contract Terms Directive (UCTD).⁴ Under this provision, core terms in a consumer contract, including the value/price ratio for goods and services, are exempted from the unfairness check as long as they were drafted in a plain and intelligible language. Against this background, the

1 See, for example, H.-W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 *Journal of Consumer Policy* 283; see also Ch. Twigg-Flesner, 'The Importance of Law and Harmonisation for the EU's Confident Consumer', in D. Leczykiewicz and S. Weatherill (eds), *The Images of the Consumer in EU Law. Legislation, Free Movement and Competition Law* (Oxford–Portland: Hart Publishing, 2016) 183.

2 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') (OJEC L 149, 11 June 2005, pp. 22–39).

3 Out of the current scholarship on consumer vulnerability see N. Helberger, O. Lynskey, H.-W. Micklitz, P. Rott, M. Sax, J. Strycharz, *Consumer protection 2.0. Structural asymmetries in digital consumer markets* (BEUC 2021), https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf, 7–24; C. Riefa, S. Saintier, 'Economic theory and consumer vulnerability: Exploring an uneasy relationship', in C. Riefa, S. Saintier (eds), *Vulnerable Consumers and the Law. Consumer Protection and Access to Justice* (Routledge: Abingdon, 2021) 17 *et seq.*

4 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEC L 95, 21 April 1993, p. 29–34).

choice of the consumer standard is of substantial importance for setting the boundaries for application of this exception – and consequently, for ascertaining whether or not a court is justified to intervene into the core elements of a contract (effectively, to carry out a price control).⁵ Framed in this way, Article 4(2) provides the most illustrative and the most meaningful instances of framing transparency through the prism of the average consumer idea. This article critically assesses the persuasiveness of the necessary connection between transparency and the average consumer standard in the application of the UCTD. More precisely, we support a twofold claim with legal and economic reasons. We argue that, under certain circumstances, the system of EU law requires an assessment of the transparency of a contract term by adopting the vulnerable consumer standard instead of the average consumer one. More precisely, under circumstance that we specify below⁶ 1) core terms should benefit from the shield granted by Article 4(2) of the UCTD only if they are transparent for the vulnerable consumer and 2) Article 5 of the UCTD imposes the obligation to draft terms that are transparent for vulnerable consumers.

In a first approximation, this higher standard shall be applied when the average consumers operating on the market do not offer herd protection to the vulnerable consumers. This may happen, in particular, if there are not enough average consumers operating on that market or their interests are not aligned with those of vulnerable consumers. In this way, we seek to construe an analytical framework for distinguishing between market settings where the average consumer and the vulnerable consumer benchmarks should be applied in transparency assessment. We develop this argument using the ‘core terms’ exception in Article 4(2) UCTD. In the conclusions we argue however, that our general claim about the link between transparency and the average/vulnerable consumer may have also a more universal dimension for consumer law in its entirety.

To support our claim, the article is structured as follows. In the first part, we offer a state-of-the-art account of transparency in EU law with particular focus on UCTD, as well as in the accompanying scholarship. Then, we proceed to a few introductory observations about the structure and function of Articles 4(2) and 5 UCTD, as our primary object of analysis. In the second part of the article we criticise the prevalent approach towards Article 4(2) and 5 UCTD and justify our alternative proposal. This critique relies on both doctrinal and economic reasons, the latter being articulated within the theoretical framework offered by the consumer harm approach to consumer law. This leads us to a conclusion that consumer law requires a more differentiated approach towards understanding the concept of

⁵ See Section 3.

⁶ See Section 4.

transparency, which would depart from the average consumer model and focus on a more contextual assessment through the prism of the vulnerable consumer concept.

Our claim is particularly timely since, having the EU Commission delivered its New Deal to consumers and with the attention being shifted towards enlisting consumers in the green transition, it is unlikely that a legislative reform will improve the state of the law in the foreseeable future. It follows that any improvement at the EU level will have to be interpretive. This article is a first step in this direction.

2 Transparency of Contract Terms: The State of the Art

As a preliminary step to articulate our interpretive proposal regarding Articles 4(2) and 5 UCTD, it is necessary to describe the state of the art, focusing on the relevant case law, as well as the academic discussions related to transparency and the average consumer standard. To this end, Section 2.1 introduces the average consumer and its connection to transparency; next, Section 2.2 focuses more specifically on the CJEU case law that adopts the average consumer standard as the sufficient benchmark for evaluating transparency in the application of the UCTD; finally, Section 2.3 reviews the topics that have been at the center of judicial decisions and academic debate concerning Articles 4 and 5 UCTD and, more generally, the average consumer standard in recent years.

2.1 The Conventional Framework

The formula of a consumer ‘who is reasonably well informed and reasonably observant and circumspect’ is a standard catchphrase in most of the CJEU judgments that tackle the issue of transparency in consumer agreements.⁷ Despite the doubts raised in the scholarship as to the actual meaning of this standard,⁸ it is clearly understood by CJEU as a one-size-fits-all formula that tries to encapsulate average features of consumers as a class. In this section we explain what

⁷ On the CJEU cases that refer to the average consumer concept see remarks in the further part of this section.

⁸ J. Waelkens, ‘Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts’, in I. Samoy and M.B.M. Loos (eds), *Information and Notification Duties* (Cambridge: Intersentia, 2015) 58 *et seq.*

consequences this entails for the overall concept of transparency in EU consumer law, and in relation to contract terms in particular.

The CJEU's notion of the average consumer has been 'codified' in the UCPD. Under Recital 18 of the Directive, the average consumer be understood as a person 'who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice'. This general formula serves as 'the measure of all things'⁹ in the UCPD. For instance, Article 7(2) of the UCPD makes a direct reference to this concept while defining the misleading omission. Under this provision, this unfair market practice occurs where 'the trader (...) provides in an unclear, unintelligible, ambiguous or untimely manner' the information significant for a consumer agreement. This provision expressly requires that the effects of such non-transparency be related to its possible impact on the average consumer.

Transparency is one of the pivotal elements of the classical system of consumer protection in EU law. It is first and foremost an essential element of the concept of 'protection by information' or 'information paradigm'. Transparency as a tool of consumer protection is deeply rooted in economic theory. For example, as early as 1983, Carl Shapiro claimed that '[t]he economics of information is the economics of consumer [policy]'.¹⁰ The idea is that information asymmetries are the root cause of consumer weakness and, accordingly, informing consumers is an extremely promising consumer policy tool. At the outset, we shall note how the notion of consumer weakness in the case law of the CJEU reflects the intrinsic connection between information asymmetries and consumer weakness.¹¹ In the information paradigm, the requirement of transparency is ancillary to the various types of information obligations that are commonly introduced not only in the provisions of individual types of consumer contracts, but also – in a slightly different form – in the more general EU *acquis*. In other words, transparency is the 'procedural' complement of information requirements. The latter establish what consumers shall be informed about; the former explains how.

⁹ H.-W. Micklitz, in N. Reich, H.-W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Cambridge: Intersentia, 2014) 94.

¹⁰ C. Shapiro, 'Consumer Protection Policy in the United States' (1983) 139 *Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics* 527, 528.

¹¹ *Ex pluribus*: 'it is settled case-law that the system of protection introduced by the [UCTD] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge' (Order of 14 November 2013, *Banco Popular Español SA v María Teodolinda Rivas Quichimbo and Wilmar Edgar Cui Pérez and Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume*, Joined Cases C-537/12 and C-116/13, ECLI:EU:C:2013:759, p. 40).

2.2 CJEU Case Law: Transparency for the Average Consumer Only is Enough

The UCTD relies heavily on transparency. Article 5 of the UCTD which requires that ‘[i]n the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.’ The wording of this provision does not indicate any more precise criteria for assessing transparency. In particular, it offers no indication about the relevant consumer benchmark. Such benchmark has been developed only *ex post* in the CJEU case law.

The idea of merging the average consumer paradigm with the transparency requirement has been developed by CJEU in a rather sketchy way and without any profound doctrinal background. All the decisions that refer to this concept of transparency rests on the standard laconic formulation that the clarity of a contract term should be assessed through the prism of the model consumer ‘who is reasonably well informed and reasonably observant and circumspect’. This formulation recurred in several CJEU decisions, such as *Kásler*,¹² *Bucura*,¹³ *Andriciu*,¹⁴ *OTP Bank*,¹⁵ *GT*,¹⁶ and, most recently, in *A SA*.¹⁷ In these decisions the Court adopted an eminent concept of the average consumer, applied as a benchmark model in assessing the fulfillment of the transparency requirement.

Kásler is the first judgment where the Court of Justice makes the connection between the average consumer and transparency in the application of the UCTD. Given that the CJEU relies on its case law to justify an argument previously formulated, *Kásler* is the decision where one could expect to find the justification for the said extension. *Kásler* is one of the many cases decided by the Court of Justice that have to do with loans indexed to a foreign currency. With the second question, the referring judge was asking for guidance in the interpretation of the transparency requirement enshrined in Article 4(2) UCTD. The average consumer

¹² Judgment of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, ECLI:EU:C:2014:282, p. 74.

¹³ Judgment of 9 July 2015, *Maria Bucura v SC Bancpost SA*, C-348/14, ECLI:EU:C:2015:447, p. 66.

¹⁴ Judgment of 20 September 2017, *Ruxandra Paula Andriciu and Others v Banca Românească SA*, C-186/16 ECLI:EU:C:2017:703, pp. 47, 51.

¹⁵ Judgment of 20 September 2018, *OTP Bank Nyrt and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss*, C-51/17, ECLI:EU:C:2018:750, p. 27.

¹⁶ Judgment of 5 June 2019, *GT v HS*, C-38/17, ECLI:EU:C:2019:461, p. 34, 54.

¹⁷ Judgment of 18 November 2021, *A SA*, C-212/20, ECLI:EU:C:2021:934, pp. 42–43.

makes its appearance in para 74 of the said decision; given the centrality of this passage for this article, we quote it in its entirety:¹⁸

As regards the particularities of the mechanism for conversion of the foreign currency such as those set out in Clause III/2, it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.

The reference to the average consumer benchmark in this case was not supported with any further elaboration. Such grounds are missing also in the AG Opinion.¹⁹ In other words, on 30 April 2014, when *Kásler* was decided, the consumer referred to in Article 4(2) UCTD simply became an average consumer. Subsequent case law has been repeating such conviction to this day.

This lack of in-depth case law is even more surprising once one realizes that bits and pieces of case law, with a textual grounding in the directive itself, point in a different direction. In fact, in a thread of cases, the Court of Justice prompts domestic courts to adopt more case-specific approach towards the transparency requirement – and to make it more oriented towards idiosyncratic features of a particular transaction and the understanding of the average consumers in such contexts.²⁰ In particular, domestic courts should carry out the transparency check with ‘regard to the particular circumstances of the case’ (*Kásler*)²¹ or giving attention ‘to all the circumstances of the particular case’ (*RWE Vertrieb*).²² Along

¹⁸ Judgment of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, ECLI:EU:C:2014:282, p. 74.

¹⁹ Opinion of Advocate General Wahl, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, ECLI:EU:C:2014:85.

²⁰ Cf A. Jabłonowska, G. Tagiuri, ‘Working paper on transparency of standard terms’ [manuscript], with a further reference to Waelkens, n 8 above, 56; a similar point seems to be made also by N. Reich, ‘Vulnerable Consumers in EU Law’, in D. Leczykiewicz and S. Weatherill (eds), n 1 above, 153 *et seq* who links vulnerability with a need to differentiate standards for duties to inform: ‘[i]nformation which is not understandable for the targeted group of intellectually disabled consumers implies absence of information as such ...’.

²¹ CJEU judgment of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, ECLI:EU:C:2014:282, p. 40.

²² Judgment of 21 March 2012, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, C-92/11, ECLI:EU:C:2013:180, p. 55: ‘Articles 3 and 5 of Directive 93/13 in conjunction with Article 3(3) of Directive 2003/55 must be interpreted as meaning that, in order to assess whether a standard

the same thread, the *Van Hove* case²³ ascertains that the benchmark of consumer attention may vary according to the place of the particular contract within a broader framework.²⁴ This approach may be further reinforced by reference to the UCTD itself, which in Recital 20 demands the actual understandability of a contract for the particular consumer ('the consumer should actually be given an opportunity to examine all the terms'). Building on these ideas, it seems fitting to ask for more context-specific benchmarks – related to the particular consumers or at least to more specific pools of them (i.e. defined in a more 'targeted' sense than the generic average consumer concept).²⁵ This line of reasoning is especially remarkable due to a peculiar stance it takes towards the average consumer standard. While development of such a 'specified' approach stems from dissatisfaction with the one-size-fits-all nature of the average consumer, it nonetheless reasons from within this concept, seeking ways to break it down into more specific categories. In other words, it keeps perceiving transparency through the prism of the average consumer standard, without considering a move beyond its boundaries.

The European Commission in its 2019 interpretive guidelines for the UCTD has (timidly) pointed domestic courts in this direction.²⁶ Amongst the criteria for assessing whether the particular term meets the transparency standard, the guidelines mention also that 'the position or perspective of consumers to whom the relevant terms are addressed has to be taken into account; this will also include the question of whether the consumers to whom the relevant terms are addressed are sufficiently familiar with the language in which the terms are drafted.'²⁷ The

contractual term by which a supply undertaking reserves the right to vary the charge for the supply of gas complies with the requirements of good faith, balance and transparency laid down by those directives, it is of fundamental importance: ... It is for the national court to carry out that assessment with regard to all the circumstances of the particular case, including all the general terms and conditions of the consumer contracts of which the term at issue forms part'.

²³ Judgment of 23 April 2015 *Jean-Claude Van Hove v CNP Assurances SA*, C-96/14, ECLI:EU:C:2015:262.

²⁴ *Ibid*, p. 48: 'The fact that the contract at issue in the main proceedings forms part of a broader contractual framework and is related to the loan contracts could be also relevant in this context. The consumer cannot be required, when concluding related contracts, to have the same vigilance regarding the extent of the risks covered by that insurance contract as he would if he had concluded that contract and the loan contracts separately'.

²⁵ So also S. Whittaker, 'Consumer Contracts', in H. Beale (ed). *Chitty on Contracts*, vol. II, *Specific Contracts* (Sweet & Maxwell, London 2018), 38-240, 38-259 who points out that an average consumer is 'in generally an objective standard variable according to its context'.

²⁶ European Commission notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (OJEC C 323, 27 September 2019, pp. 4–92).

²⁷ *Ibid*, 26.

basis of this claim – which the Commission seems to derive mostly from the CJEU case law – is however rather questionable.²⁸

In any event, incentivizing domestic judges to construe the average consumer standard with reference to more particular circumstances of the case does not challenge our claim. Nothing in these cases suggests that the CJEU wanted to make contract terms transparent for the vulnerable consumer. Quite the opposite – the Court vividly sticks to the average consumer model and suggests only that it should be contextualized in deciding particular cases at the national level.

Against this background, one point is particularly important for the present investigation. As seen, there is an attempt by the EU institutions to make the transparency test in the application of the UCTD more flexible. However, the said attempt does not challenge the assumption that the appropriate consumer standard to be used is the average consumer. In this regard, Section 2.2 has exposed the weak doctrinal foundations of the necessary connection between the average consumer standard and transparency in the context of the UCTD. Before moving forward with supporting our claim, it is advisable to review the areas that have attracted most attention in both the caselaw of the CJEU and the literature.

2.3 The Focus on Other Features of Transparency in the UCTD and the Behavioural Critique of the Average Consumer Benchmark

Importantly, the shallow justification for the use of the average consumer standard in the application of the UCTD has attracted no substantive attention in the literature. In this context, understanding transparency through the prism of the average consumer benchmark is nowadays a rarely questioned part of the *communis opinio*.²⁹ The focus has been on other issues, namely the distinction between

²⁸ The Commission seems to ground this view in p. 48 of the CJEU *Van Hove* case (judgment of 23 April 2015 *Jean-Claude Van Hove v CNP Assurances SA*, C-96/14, ECLI:EU:C:2015:262. It is however dubious whether the Court really wanted this passage to express such a far-reaching claim. It seems rather more convincing that it wanted to draw attention to different contexts in which a particular term is read by a consumer – not to say that the specific features of such consumer should matter for the transparency test. In other terms, the *Van Hove* decision is still confined to the classical average consumer paradigm and does not seem to bring any substantial changes in this regard.

²⁹ As has been already said, the principal line of criticism directed against the average consumer idea has been supported by behavioral observation that real-life consumers are substantially uneven in terms of their cognitive capacities; on this see also: European Commission, DG Justice and Consumers, *Consumer vulnerability across key markets in the European Union Final Report*, 2016 and the UK Competition & Markets Authority report: *Consumer vulnerability: challenges and*

core and ancillary terms,³⁰ and whether the average consumer standard – as currently applied in by the Court of Justice – is satisfactory content-wise, especially in the light of behavioural research.³¹

Drawing the line between core and ancillary terms has been one of the principal concerns in CJEU case law on Article 4(2) UCTD (amongst the most recent decisions for instance in: *Van Hove*,³² *Andriuc*,³³ *EOS KSI Slovensko*,³⁴ *GT*³⁵ and *BNP Paribas*³⁶). Each of these judgments was addressing the question on how to categorise certain terms in compound or atypical consumer agreements (mostly in the financial services sector). As a result of these developments in the case law and the scholarship, the focus in interpretation of Article 4(2) has been put almost entirely on the more general and abstract premise of this provision (i.e. which terms fall within the ambit of the exception) and not on the more specific one (i.e. to what extent a term should be plain and clear to justify exclusion of the unfairness check).

The question whether the average consumer is a satisfactory standard content-wise requires a multi-layered analysis. First and foremost, the right mix of empowering and protection is difficult to be identified even assuming that the said

potential solutions, 2019 (both of which elaborate on individual consumers' constraints in accessing and comprehending information).

30 Cf e.g. an elaborated classification of the core and the ancillary terms provided by S. Cámara Lapuente, 'Control of Price Related Terms in Standard Form Contracts in the European Union: The Innovative Role of the CJEU's Case-Law', in Y.M. Atamer and P. Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Cham: Springer, 2019) 81–85. As well as a theoretic framework developed by F. Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15 *European Review of Contract Law* 177.

31 The average consumer concept has been also criticized in the literature as an all-embracing foundation of the EU consumer law. Recently on this issue O. Seizov, A.J. Wulf, J. Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' 42 (2019) *Journal of Consumer Policy* 149, 152, along with further references. Nonetheless, the general applicability of this benchmark on the grounds of UCTD does not seem to be substantially questioned in the scholarship.

32 Judgment of 23 April 2015, *Jean-Claude Van Hove v CNP Assurances SA*, C-96/14, ECLI:EU:C:2015:262.

33 Judgment of 20 September 2017, *Ruxandra Paula Andriuc and Others v Banca Românească SA*, C-186/16 ECLI:EU:C:2017:703.

34 Judgment of 20 September 2018, *EOS KSI Slovensko sro v Ján Danko and Margita Danková*, C-448/17, ECLI:EU:C:2018:745.

35 Judgment of 5 June 2019, *GT v HS*, C-38/17, ECLI:EU:C:2019:461.

36 Judgment of 10 June 2021, *VB and Others v BNP Paribas Personal Finance SA and AV and Others v BNP Paribas Personal Finance SA and Procureur de la République*, C-776/19–C-782/19, ECLI:EU:C:2021:470.

mix is chosen aiming at ensuring a high level of consumer protection. In fact, it is undeniable that relying too much on consumers ‘helping themselves’ may leave them at the mercy of unscrupulous traders.³⁷

For this reason, the average consumer model has been heavily criticized by behaviourally-informed consumer lawyers. Behavioural research has provided ample evidence that one should not put too much trust in consumers’ cognitive abilities and their capacity of being the best judges of their own interests.³⁸ The main implication of this literature is that consumers live in a dismal reality, where traders can exploit and manipulate them rather easily; accordingly, the enthusiastic reliance on the information paradigm will often be ineffective, if not counterproductive.³⁹ Relaxing the rationality assumption enshrined in the average consumer to make this construct more fitting with how real consumers operate on the market is – without a doubt – a commendable endeavour.⁴⁰ In this article we follow a different, but complementary, approach. Even assuming that the average consumer is a plausible construct, we claim that the core terms exception can entail detriment to vulnerable consumers. Accordingly, finding that a core term is transparent for the average consumer shall not lead to an automatic exception of the said terms from the fairness review. To this end, Sections 2.4 and 2.5 reconstruct the concept of vulnerability in the UCPD and the *communis opinio* holding that the transparency of core terms is to be assessed from the perspective of the average consumer. On these grounds, Section 3 shows why vulnerable consumers are left unprotected by the *communis opinio*.

2.4 Vulnerability Against the Backdrop of UCPD

In discussing the average consumer and its pitfalls, one should not ignore the introduction of the vulnerable consumer in the UCPD.⁴¹ In fact, the UCPD has

³⁷ Cf Reich, n 20 above, 139–141.

³⁸ Cf e.g. R. Incardona and C. Poncibò, ‘The average consumer, the unfair commercial practices directive, and the cognitive revolution’ (2007) 30 *Journal of Consumer Policy* 21, 29–31.

³⁹ See, for a clear articulation of this view, F. Esposito, ‘A Dismal Reality: Behavioural Analysis and Consumer Policy’ (2017) 40 *Journal of Consumer Policy* 193.

⁴⁰ An endeavor that, given the porosity of the concept of the average consumer is compatible with the argumentative practices accepted by the CJEU in its case law. See, F. Esposito, ‘Conceptual Foundations of the Behavioural Analysis of Consumer Law in Europe’, in H.-W. Micklitz, A.-L. Sibony and F. Esposito (eds), *Research Methods in Consumer Law* (Cheltenham: Edward Elgar, 2018), 68–70.

⁴¹ On this definition, as well as on the other scattered references to consumer vulnerability in the EU *acquis* see M. Friant-Perrot, ‘The Vulnerable Consumer in the UCPD and Other Provisions of EU Law’, in W. van Boom, A. Garde and O. Akseli (eds), *The European Unfair Commercial Practices*

recognized that some consumers are more vulnerable than others and that they deserve a higher level of protection. Vulnerability may be considered ‘as a concept enabling greater differentiation of consumer protection policy where uniform treatment of consumers as a class would create situations of unfairness. It thus touches upon a feature of the image of the consumer in EU law – its frequent singularity and lack of necessary differentiation’.⁴²

According to Recital 18 UCPD, the vulnerable consumer applies to situations where ‘a commercial practice is specifically aimed at a particular group of consumers, such as children’. As the Directive explains in the subsequent Recital 19, vulnerability understood in this way refers in particular to instances where ‘certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product’. In such situations, enhanced protection for these persons is necessary, while the intensity of the protection should be tailored for the ‘perspective of the average member of that group’.

The definition of vulnerability adopted in the UCPD is also largely inadequate to the ways in which consumers participate in the online market and the risks they are exposed to within that context.⁴³ In particular, the context in which the contract is entered into – and, above, all because of the way the parties communicate with each other – may expose the consumer to particular risks of manipulation or exploitation.⁴⁴

Having these general features in mind, it is possible to elucidate more precisely to what extent the concepts of ‘average consumer’ and ‘vulnerable consumer’ overlap with the concept of transparency in the EU acquis. As noted above,⁴⁵ a look at the jurisprudence of the Court of Justice leaves no doubt in this regard: the standard of transparency is set by reference to the average consumer

Directive. Impact, Enforcement Strategies and National Legal Systems (Abingdon–New York: Routledge, 2016) 94 *et seq*; I. Domurath, ‘The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law’ (2013) 3 *Journal of European Consumer and Market Law* 124, 128 *et seq*; H.-W. Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018) 293–295, 318–320.

⁴² D. Leczykiewicz and S. Weatherill, ‘The Images of the Consumer in EU Law’, in Leczykiewicz and Weatherill (eds), n 1 above, 8.

⁴³ M. Grochowski, ‘Does European contract law need a new concept of vulnerability?’ (2021) 10 *Journal of European Consumer and Market Law* 133–135.

⁴⁴ Cf especially Helberger, Lynskey, Micklitz, Rott, Sax, Strycharz, n 3 above, as well as N. Helberger, A. Reyna, F. Zuiderveen Borgesius, ‘The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law’ (2017) 54 *Common Market Law Review* 1427, especially 1457–1459.

⁴⁵ See cases discussed in Section 2.2 of this article.

and with only little consideration that consumers are not a fully homogenous group. In practice, this means that the concept is determined by reference to the general level of knowledge and cognitive ability of a consumer belonging to a broad (usually national or EU-wide) community. The transparency of contract terms is not understood through the lens of consumer vulnerability in the UCTD. In other words, from the point of view of particular forms of weakness or particular cognitive needs that a particular consumer may have.

2.5 Transparency and ‘Core Terms’ Under the UCTD: Exploring the Rationale

The transparency requirement is introduced in the EU *acquis* primarily for the information disclosed to consumers. In the most general way, this attitude is expressed in Article 5 UCTD, discussed in the preceding section. Article 4(2) UCTD plays a more specific role, since it excludes the unfairness check for the terms that relate ‘to the definition of the main subject matter of the contract [o]r to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other’. Crucially, this exclusion applies only as long as the provisions meet the standard of transparency (they are expressed in ‘plain intelligible language’).

Shielding transparent core terms from the unfairness test is generally viewed as an attempt to reconcile the control of a consumer contract’s content with the parties’ autonomy.⁴⁶ Read in this way, the provision opens the door to unrestricted price-setting on the consumer market, thus being a clear tenet of the liberal version of the market-law link. However, a lack of clarity about the content of a clause precludes determining whether the parties have reached an agreement in this respect.⁴⁷ In other words, if a core term is transparent, it may be assumed that a consumer took it into account before entering into the agreement. The consumer is then put into the situation of having to shop around for better offers. However, if

⁴⁶ T. Wilhelmsson, ‘Varieties of Welfarism in European Contract Law’ (2004) 10 *European Law Journal* 728 *et seq*; Y.M. Atamer, ‘Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics’ (2017) 80 *Modern Law Review* 627–629; partly critically in this regard O. Lando, ‘Liberal, Social and “Ethical” Justice in European Contract Law’ (2006) 43 *Common Market Law Review* 817.

⁴⁷ See also W.H. van Boom, ‘Price Intransparency, Consumer Decision Making and European Consumer Law’ (2011) 34 *Journal of Consumer Policy* 359, 364 *et seq*; M. Schillig, ‘Directive 93/13 and the Price Term Exemption: A Comparative Analysis in the Light of the Market for Lemons Rationale’ (2011) 60 *International and Comparative Law Quarterly* 933, 940–945.

the core term is not transparent, the consumer can rely on the protection granted by substantive judicial control.⁴⁸

Such a view is not necessarily dismissive of the economic interests of consumers. With respect to provisions that determine the relationship of price to the value of a good or service, the exclusion of fairness control also has an additional rationale, making the need for judicial restraint even more apparent. As the CJEU noted in *Kásler*, an assessment of the adequacy of price is inherently without a clear benchmark: ‘no legal scale or criterion exists that can provide a framework for, and guide, such a review.’⁴⁹ This passage makes explicit an important element of Article 4(2) UCTD’s rationale: the conviction that the market will be able to effectively set the price levels in consumer transactions; or, at least, it will typically do a better job in comparison to courts.⁵⁰ To put it differently, Article 4(2) UCTD rests on the assumption that core terms are the only part of the contract where the consumer’s possibility of shopping around will exercise a disciplining effect on traders. While the said assumption is implicit in the case law of the Court of Justice, it has been emphasized in the literature.⁵¹

Notably, this assumption fits with traditional contract law views. In particular, it connects well with the idea that provisions relating to the main benefits of a contract are by their very nature always (or almost always) subject to the parties’ consent. Since core terms determine the existence of the contract itself, they do not

48 As Atamer and Pichonnaz put it, ‘[t]he so-called “transparency” condition is reflecting the trust in market mechanisms: if the price term is comprehensible to an average consumer it is part of the price competition and no need for judicial control arises’, Y.M. Atamer, P. Pichonnaz, ‘Control of Price Related Terms in Standard Form Contracts: General Report Judicial Control and Other Means of Price Control’, in Y.M. Atamer and P. Pichonnaz (eds), *Control of Price Related Terms in Standard Form Contracts* (Cham: Springer, 2019) 4 *et seq.*

49 Judgment of 30 April 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C–26/13, ECLI:EU:C:2014:282, p 55; this rationale was followed in the judgment of 26 February 2015, *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA*, C–143/13, ECLI:EU:C:2015:127, p. 55.

50 The institutional choice under comment is, after all, a choice between imperfect alternatives. Seminal in this regard, N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: The University of Chicago Press, 1997).

51 This insight is clearly at the centre of the US approach to consumer contract terms. See, for example, O. Bar-Gill and O. Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law’ (2013) 50 *Common Market Law Review* 109 (discussing EU consumer law generally from a US and law and economics perspective); D. Caruso, ‘Qu’ils Mangent des Contrats: Rethinking Justice in EU Contract Law’, in D. Kochenov, G. de Burca and A. Williams (eds), *Europe’s Justice Deficit?* (Oxford: Hart, 2013); and A.-L. Sibony, ‘European Unfairness and American Unconscionability: A Letter From a European Lawyer to American Friends’ (2019) 15 *European Review of Contract Law* 195 (both reflecting on the differences in mindset behind consumer law and scholarship in the US and EU).

pose a significant risk of surprising the consumer with their content. The situation is different for ancillary terms, especially in the realities of standardized consumer agreements. From this perspective, it is crucial to remember that terms that were individually negotiated are not subject to the fairness test. Accordingly, the exception introduced in Article 4(2) of the UCTD protects first and foremost the autonomy in deciding whether to be bound by a contract with certain core terms, letting the consumer trust that the legal system will deter the trader from inserting unfair terms into the standard terms.

To sum up, Article 4(2) UCTD protects ‘core terms’ from judicial substantive scrutiny as long as the term in question has been put in plain intelligible language. This requirement can be justified by the consideration that consumers can shop around for the best core terms and this will ensure their quality (better than courts). Since Article 4(2) is interpreted as adopting necessarily the average consumer standard to assess the transparency of core terms, the *communis opinio* can be understood as meaning that average consumers shopping around for the best core terms will ensure their quality (better than courts).

2.6 Interim Conclusion

In the existing EU *acquis*, the average consumer standard is presented as necessarily connected to transparency. This approach is conventionally shared by the entire CJEU case law, and legal scholarship is not focusing on this issue. On a closer look, however, this attitude is adopted without any theoretical or empirical justification. The existing scholarly and judicial accounts refer to the average consumer concept without giving any reasons, as a self-evident property of the transparency requirement. The concept of transparency has been challenged so far from the behavioural law and economics standpoint. This critique has not, however, tackled directly the conviction that transparency should be assessed through the average consumer prism. Section 3 offers a doctrinal critique of this *communis opinio*. Section 4 reinforces it with the aid of the theory of consumer harm approach.

3 First Step: The Doctrinal Critique of the *Communis Opinio*

In the previous section, we have shown that the academic debate and discussion on the UCTD has not fully elucidated the use of the average consumer standard in the interpretation of Articles 4(2) and 5 of the directive.

In the remainder of this article, we problematize this view. Our claim is that under certain conditions, the current interpretation of Articles 4(2) and 5 is inadequate to offer protection to vulnerable consumers. We articulate this idea in detail in the next section by relying on the theory of harm approach to consumer law. In this section, we lay the ground for that analysis: first, we summarize the argumentative scheme applied by the Court of Justice in interpretation of EU law; second, we attempt to show that the sole use of the average consumer standard for Articles 4(2) and 5 has no doctrinal grounds beside the formal support of the Court of Justice's authority.

One of the key interpretive guidelines in reading a provision of EU law is the 'settled case law of the Court'. As was established by the CJEU, 'it is necessary to interpret [a] provision not only by reference to its wording but also by reference to the context in which it occurs and the objectives pursued by the rules of which it is part'.⁵² There is hence no clear interpretive hierarchy, so that no argument is considered capable of justifying an interpretation on its own. The interpretation of EU law is ultimately a holistic exercise.⁵³

The wording of Articles 4(2) and 5 is the starting point of the analysis. It is notable and consequential that these provisions refer to a consumer *simpliciter* and not to an average consumer only. In other words, there is nothing in the wording of these provisions that requires evaluating the transparency of a (core) contract term from the average consumer's perspective only. Accordingly, by excluding vulnerable consumers from the meaning of 'consumer' in Articles 4(2) and 5, the CJEU case law reduces the scope of application of these provisions when it requires that terms have to be transparent for the average consumer only. The Court could have ruled that terms have to be transparent also for vulnerable consumers, or at least make it a matter of case-by-case analysis. Moreover, as shown in Section 2.2, the Court of Justice has failed to offer a doctrinal justification to this restrictive interpretation of the term 'consumer'. The doctrinal implication is clear: the argumentative burden to meet in order to claim that also the vulnerable consumer standard shall be used to interpret these provisions is easy to meet. But let us proceed in an orderly fashion.

If one takes into account a broader array of other provisions and, ultimately, the entire text of UCTD, this initial finding becomes even more conspicuous. Nowhere does the directive mention the average consumer (or the vulnerable one). In this regard, it is noteworthy that the case law of the Court of Justice had relied on

⁵² Judgment of 11 September 2019, *Lexitor*, Case C-383/18, ECLI:EU:C:2019:702, p. 26.

⁵³ See, generally, J. Bengoetxea, *The Legal Reasoning of the European Court of Justice?: Towards a European Jurisprudence* (Oxford: OUP, 1993) and G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2012).

the average consumer long before the proposal of the directive was drafted.⁵⁴ For this reason, the choice of referring to the consumer and not to the average consumer may be considered as a meaningful indication of legislative intent. Yet, this is not how the Court has understood it so far.

Once we look at the matter from a systematic point of view, the obvious candidate for comparison is the UCPD. This directive gives legislative specification and expands on the case law of the Court of Justice in matters of free circulation of goods and services. As explicitly stated in its Recital 18, ‘It is appropriate to protect all consumers from unfair commercial practices; however, the Court of Justice has found it necessary ... to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer’. Importantly, Recital 19 adds that ‘Where ... consumers [are] particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of [vulnerable] consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group’.

The EU legislator seems to take credit for the introduction of the vulnerable consumer benchmark. But its statement is (ironically) misleading. The Court of Justice itself already allowed for consumer vulnerability to play a role in justifying restrictions to traders’ freedom of economic activity. Indeed, the CJEU recognized that sometimes consumers are not as capable of minding their own business as the average consumer. A telling example in this regard is the *Buet* decision. On that occasion, the CJEU held that when ‘potential purchaser often belongs to a category of people who, for one reason or another, are ... particularly vulnerable’ going beyond empowerment techniques – in that case, a right to withdraw was discussed – is compatible with EU law.⁵⁵

Importantly, the view that sometimes not all consumers are able to take care of their own business and are therefore practically vulnerable is central to the

⁵⁴ Indeed, the CJEU makes explicit reference to the ‘average consumer’ for the first time in the judgment of 16 July 1998, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, C-210/96, ECLI:EU:C:1998:369. However, the normative content of the standard can be traced back to *Cassis de Dijon* – judgment of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, Case C-120/78, ECLI:EU:C:1979:42; see N. Reich and H.-W. Micklitz, *Europäisches Verbraucherrecht* (Baden-Baden: Nomos, 2003) 298; B.B. Dundevooort, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Amsterdam: Ipskamp Drukkers, 2014) 31.

⁵⁵ Judgment of 16 May 1989, *Buet and Others v Ministère public*, Case C-382/87, ECLI:EU:C:1989:198, p. 12 *et seq.*

structure of UCTD.⁵⁶ In fact, the idea that ancillary terms are always reviewable for their unfairness – that is, independently of whether they are transparent or not – can be rationally justified only by taking the view that consumers are not able to protect themselves against unfair ancillary terms and therefore courts and consumer associations have to step in.⁵⁷ To put it differently, Articles 4(2) and 5 aim at consumer empowerment, whereas Article 4(1) is a measure of consumer protection.⁵⁸

In sum, restricting the transparency test to the average consumer's perspective is supported by neither the UCTD's wording nor its structure. Moreover, additional considerations support the opposite view – the view that, sometimes, the transparency of a (core) contract term shall be reviewed from the vulnerable consumer's perspective and not from the average consumer's one. Systematic and evolutionary considerations about the relationship between the average and the vulnerable consumers show that EU law reviews the legality of business practices from the perspective of the vulnerable consumer when there is reason to do so.

This finding is hardly surprising. The European Union has long recognized the importance of ensuring a high level of consumer protection. It is therefore possible to formulate the teleological consideration that when consumers are likely not to be adequately protected by the use of the average consumer standard in the context of the UCTD, the proper standard is the vulnerable consumer. This argument, combined with the principle of effectiveness,⁵⁹ gives firm doctrinal foundations to the claim we defend in this article: sometimes core terms should be reviewed from the vulnerable consumer's perspective to ensure that EU law effectively ensures a high level of consumer protection. In the following section this argument will be further elaborated with use of the theory of harm approach to consumer law. In this way it will be evidenced that the current understanding of the meaning of Articles 4(2) and 5 fails to adequately protect vulnerable consumers.

⁵⁶ F. Esposito, 'Towards a General Theory of Harm for Consumer Law' (2021) *Journal of Consumer Policy* 44, 329.

⁵⁷ See below, Section 2.4.

⁵⁸ On this distinction, see F. Esposito and A.-L. Sibony, 'In Search of the Theory of Harm in EU Consumer Law: Lessons from the Consumer Fitness Check', in K. Mathis and A. Tor (eds), *Consumer Law and Economics in Europe* (Dordrecht: Springer, 2021) 251, 265–267.

⁵⁹ See, N. Gavrilovic, 'The Unfair Contract Terms Directive Through the Practice of the Court of Justice of the European Union: Interpretation or Something More?' (2013) 9 *European Review of Contract Law* 163.

4 Theory of Harm Approach to Consumer Law and Effectiveness

4.1 Introduction

The theory of harm approach offers blueprints for the systematic analysis of the strategic interactions between traders and consumers. It allows one to identify situations where the market mechanism is unlikely to offer a high level of consumer protection to everyone.⁶⁰ This approach bridges the gap between legal and economic analyses of consumer law and policy.

At the normative level, the approach rejects the view that the economic analysis of consumer transactions should focus on the maximization of total or of the social welfare, without paying attention to distributive issues between consumers and traders. Instead, the theory of harm⁶¹ opts for a consumer welfare standard as a point of reference. There are strong economic and legal theoretical reasons supporting the view that (rejecting a total welfare standard in favour of) a consumer welfare standard is not only acceptable for the economic analysis of market law, but even desirable.⁶² The theory of harm approach should not be looked at with suspicion by consumer lawyers, but welcomed as the opportunity for better interdisciplinary collaboration.

At the analytical level, the theory of harm approach of consumer law recommends analysis of a certain market interaction through the lenses of a set of analytical constructs ('scenarios of harm'). A scenario of harm is a set of premises

60 The theory of harm is a recent proposal formulated in the scholarship through an interdisciplinary project that merged legal and economic perspectives on consumer law – see P. Siciliani, C. Riefa and H. Gamper, *Consumer Theories of Harm* (Oxford: Hart Publishing, 2019); on the other applications of this theory see also Esposito and Sibony, n 58 above; F. Esposito, 'Making Personalised Prices Pro-Competitive and Pro-Consumers' (2020) *CeDIE Working Paper*, 2/2020.

61 Siciliani *et al*, n 60 above, 9.

62 F. Esposito, *The Consumer Welfare Hypothesis in Law and Economics* (Cheltenham: Edward Elgar, forthcoming). See also: F. Esposito and S. Grundmann, 'Investor-Consumer or Overall Welfare: Searching for the Paradigm of Recent Reforms in Financial Services Contracts' (2017) *EUI Law Department Research Paper Series*, 2017/5; F. Esposito and L. de Almeida, 'A Shocking Truth for Law and Economics: The Internal Market For Electricity Explained With Consumer Welfare', in K. Mathis and B. Huber (eds), *Energy Law and Economics in Europe* (Dordrecht: Springer, 2018) 101; F. Esposito and L. de Almeida, 'In Search of a Grand Theory of European Private Law: Social Justice, Access Justice, Societal Justice and Energy Markets', in K. Purnhagen, L. de Almeida, M. Gamito and M. Durovic (eds), *Transformation of Economic Law: In Honour of Hans-W Micklitz* (Oxford: Hart Publishing, 2019) 153; F. Esposito and G. Tuzet, 'Economic Consequence for Lawyers: Beyond the Jurisprudential Preface' (2020) 9 *Journal of Argumentation in Context* 368.

about the strategic interaction of traders and consumers and consumers in relation to attributes of different degree of transparency.⁶³

With the aid of this analytical framework it is possible to show that, under plausible assumptions, the average consumer does not protect the vulnerable one from unfair core terms.

4.2 The General Theory: A Sketch

According to the theory of harm approach, it is necessary to distinguish between two main types of traders and two main types of consumers. Traders can choose between two business strategies: competing on the merits by offering the best possible deals to consumers, and trying to make a profit by exploiting the well-known structural asymmetries existing between consumers and traders. Notably, the choice to compete on the merits is not (primarily) altruistic, but is based on a profit-maximizing calculation.⁶⁴ At the same time, consumers can be divided into two groups that, for present purposes, can be equated to the average and vulnerable consumer standards.⁶⁵

The next step is reflecting on how these four types of agents will behave in different situations. By investigating this question, it is possible to identify at least four archetypical scenarios of harm: the bottom, the lemon, the subsidy, and the benchmark. The bottom is the scenario where there are not enough average consumers to police the quality of traders' offers. Accordingly, traders do not compete on the merits and focus on exploiting consumers. The lemon is the scenario where traders struggle to compete on the merits because they face significant challenges in signaling the quality of their offers and thereby distinguishing themselves from profiteers. The subsidy is the scenario where the interests of the average and vulnerable consumers are not aligned. This is worrisome to the extent that the average consumer benefits from a consumer right or power, but that very same right or power is useless for the vulnerable consumer – typically because it is too complex to exercise. This scenario is called subsidy because average consumers predominantly benefit from this consumer right or power, while also the vulnerable consumers end up paying for it; therefore, there is a regressive cross-subsidization between the latter and the former groups.

Finally, in the benchmark scenario, the interests of the average and vulnerable consumers are aligned. The average consumers are up offering a form of herd

⁶³ See, for a more detailed analysis, Esposito and Sibony, n 58 above, 255–259.

⁶⁴ Siciliani *et al*, n 60 above, 110 *et seq*.

⁶⁵ Siciliani *et al*, n 60 above, 109 *et seq*. On this point, see, however, Esposito n 56 above.

protection to the vulnerable consumers. In other words, the average consumers operate on the market by choosing traders competing on the merits. By doing so, they help these traders to succeed on the market by sidelining the profiteers. In this context, the vulnerable consumers benefit from the exercise of their power of choice by the average consumers.

Let us elaborate on the relationship between these scenarios. The benchmark scenario is the best of the possible worlds for consumers, while the bottom is the worst one. The lemon is an unstable scenario: if traders (and or the legal system) succeed in solving the signaling problem, then the situation of consumers improves to the benchmark scenario; if they fail, the situation degenerates into the bottom scenario. The subsidy scenario is a bit peculiar because it is arguably better understood as a possible complement to other scenarios. In other words, average consumers may grant some protection to the vulnerable ones (benchmark), but at the same time may benefit disproportionately from consumer rights.

For current purposes, it is important to discuss how the rationale animating the *communis opinio* can be expressed within the framework of the theory of consumer harm approach.⁶⁶ The assumption that average consumers will offer adequate protection also to the vulnerable one is at the core of the rationale behind the *communis opinio*. The same idea is also at the core of the benchmark scenario. Accordingly, the benchmark scenario can be used to describe in more detail the rationale behind the *communis opinio*.

Using the conceptual apparatus developed by the theory of harm approach, our claims can be reformulated as follows. The *communis opinio* is wrong in considering that average consumers will protect the interests of the vulnerable ones regarding core terms; in other words, the *communis opinio* is wrong in considering core contract terms as an instance of the benchmark scenario. In some situations, at least, traders can use self-selection mechanisms based on opacity to ‘divide and conquer’ consumers. When this happens, vulnerable consumers find themselves in the bottom scenario, not in the benchmark one. Let us see why.

4.3 Harming Vulnerable Consumers with Core Terms

As currently understood, Articles 4(2) and 5 of the Unfair Contract Terms Directive presuppose that core contractual terms fall within the last scenario – the benchmark. In other words, Articles 4(2) and 5 are based on the assumption that the

⁶⁶ Notably, also Siciliani, Riefa and Gamper share this view; Siciliani *et al*, n 60 above, 124 *et seq*. See, however, Esposito n 56 above.

vulnerable consumers are adequately protected by the behavior of the average consumer in relation to core terms.

This conclusion follows directly from the idea that it is sufficient to review the transparency of core terms from the average consumer's perspective. The reasoning is as follows: traders who want to attract average consumers have to offer transparent and attractive terms. Thus, also vulnerable consumers benefit from the traders' fear of losing business opportunities with average consumers. Indeed, the mainstream economic analysis of consumer law supports this view, especially in relation to core terms.⁶⁷ This analytical framework has been used to analyze the distinction between core and ancillary terms in UCTD.⁶⁸ The theory of harm approach helps to understand that this account is not convincing. For starters, it seems entirely plausible that there will be situations where there is a cross-subsidization between average and vulnerable consumers. However, for current purposes, it is advisable to focus on a different problem altogether: it is economically attractive for profiteers to offer core terms that are uninteresting for the average consumer but can be chosen by the vulnerable one. When this happens, it is clear that asking whether the term is transparent for the average consumer is not a good reason to conclude that the market mechanism ensures the fairness of the offer.

This situation is just an application of versioning, the business strategy consisting in offering different versions of the contract and letting the consumer choose the version they prefer. The problem is that, as we will show, the interaction between self-selection and opaque terms leads to the dynamics described by the bottom scenario for vulnerable consumers.

The key element of our analysis is the idea that a trader can formulate multiple offers. Once this happens, there will be unattractive offers for the average consumer that will be chosen by some vulnerable consumers because the latter do not notice the offers' unattractiveness. In terms of the theory of harm approach, the scenario we are considering resembles most closely the bottom. As we shall see, when traders formulate multiple offers, some of which are transparent for the average consumer only, vulnerable do not enjoy any herd immunity, and therefore, all traders have little economic incentive not to exploit vulnerable consumers.

We can illustrate the harm for vulnerable consumers in general terms as follows. A trader offers at least two versions of the same product, plan, tariff, etc. One

⁶⁷ Broad survey in F. Esposito, n 39 above. Recently, A.-S. Vandenberghe, 'The Law on Unfair Terms in Standard Form Contracts in Europe', in Mathis and Tor (eds), n 58 above, 121, 126–127.

⁶⁸ M. Dellacasa, 'Judicial Review of "Core Terms" in Consumer contracts: Defining the Limits' (2015) 11 *European Review of Contract Law* 152; F. Gómez Pomar, 'Characterizing Economic and Legal Approaches to the Regulation of Market Interactions', in P. Cserne and F. Esposito, *Economics in Legal Reasoning* (Cham: Palgrave, 2020) 63.

version is simpler to understand and therefore transparent for both the average and vulnerable consumer. The other version, however, is more complex and can be adequately understood only by the average consumer. This situation is quite common in practice. Every time a trader offers a basic and premium version of the same contract (internet, transportation, etc.), the vulnerable consumers can be exploited along these lines.

Under the current interpretation of Articles 4(2) and 5 UCTD, the trader is on safe grounds. Both offers are shielded from the fairness review since they are both transparent for the average consumer; at the same time, since the offers are transparent for the average consumer, also Article 5 is complied with. However, the vulnerable consumer is not able to fully understand the more complex offer. For this reason, the vulnerable consumer will not be able to exercise an informed choice between the two versions. Unscrupulous traders are deterred neither by the risk of losing the average consumers (herd immunity) nor by the legal sanction, since the terms they drafted are transparent.

To investigate the matter further, let us distinguish two opposite but symmetrical decisional contexts. To simplify the exposition, let us call ‘simple’ the offer understood by all consumers and ‘complex’ the one understood by the average consumer but not by the vulnerable one. In the first decisional context, the simple offer is more advantageous than the complex one – the complex offer includes a hidden trap. The opposite is true in the second decisional context: the complex offer is more advantageous than the simple one – the complex offer includes a hidden gem.

The first decisional context is the one where the complex offer hides a negative attribute (the hidden trap). For example, the complex offer includes a high cost in an uncertain scenario, such as a deductible in case of an accident, a high fee for overdrafts on the bank account, or a complex indexation of a loan agreement. In recent years, the legal literature – first in the US – has investigated the economic incentives and rationales behind this context.⁶⁹ However, the focus has been on explaining why the market mechanism fuels this behaviour and what cognitive schemes make it likely for some consumers to fall for them. The ability of the average consumer to protect the vulnerable one has not been investigated so far.

The central questions in this decisional context – which will be essentially similar also in the second one – are the following: will the average consumer offer protection to the vulnerable one? If not, what will the vulnerable consumer do?

⁶⁹ Seminal in this regard, R.B. Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203. See also the literature review in Esposito, n 39 above.

The average consumer realizes that the simple offer provides a superior price/quality ratio (to put it in the UCTD's language). It follows that the average consumer will opt for the simple offer. However, and this is the answer to the first question, this behaviour will not give any disincentive to the trader to offer both the simple and complex offers. The trader presents both offers to the average consumer, who invariably chooses the simpler one. What will the vulnerable consumer do then? This is the second question that needs to be answered.

Contrary to the average consumer, the vulnerable consumer does not perceive that in the complex offer there is a hidden trap. For this reason, the complex offer is probably going to be more appealing to her than the simple one. This finding is based on the plausible assumption that the simple offer will have a higher price than the complex one.⁷⁰ Under the current – challenged – interpretation of Articles 4(2) and 5 of the UCTD, such an outcome is lawful. However, vulnerable consumers are systematically exploited. Therefore, the current interpretation of the provision fails to deliver a high level of consumer protection – as it should.

Let us now consider the case of the hidden gem, namely the case where the simple offer is less convenient than the complex one. For example, under the complex offer, the trader bundles the performance of the simple offer together with a complementary good or service for a convenient price. For example, the trader offers insurance together with the rented car, an antivirus together with the internet plan, or extended aftersales assistance.

Is the situation any better in the second subscenario for the vulnerable consumer? In short, it is not. Vulnerable consumers are at the mercy of traders, just like in the previous subscenario. Like before, average consumers pierce the informational barrier and understand that the complex offer is better – they find the hidden gem. Vulnerable consumers, again, consider the simple and less convenient offer to be the better one. They will not discover the hidden gem. It follows that, again, the current interpretation of Articles 4(2) and 5 of the UCTD fails to deliver a high level of consumer protection – as it should.

The above considerations are reinforced by observing that in many decisional contexts, the consumer does not choose in solitude but in dialectical interaction with the seller, who is therefore capable of directing the vulnerable consumer towards the exploitative offer. This interaction gives the trader ample opportunities to direct vulnerable consumers towards the less convenient offers on the menu. Moreover, even when the consumer operates in a digital environment, plenty of 'dark patterns' can be used to achieve the same

70 In the unlikely scenario that the two offers are equal but for the opaque trap, the vulnerable consumer would choose randomly. The exploitative nature of the complex offer is then apparent.

result.⁷¹ Finally, traders do not even need to be able to distinguish the average and the vulnerable consumers. Traders can simply cast a wide net; the agile average consumer will swim through, while the clumsy vulnerable one will get caught.⁷²

4.4 Protecting Vulnerable Consumers with Articles 4(2) and 5

The previous section has shown that the strategic proliferation of contractual offers creates ample opportunities for traders to exploit vulnerable consumers even when terms are transparent for the average consumer. This section investigates how a more demanding understanding of transparency in Article 4(2) and 5 of the UCTD may contribute to the protection of vulnerable consumers.

As anticipated in the Introduction, in this paper we claim that, in situations like the one described in the previous section, a more robust, demanding, intrusive notion of transparency is justifiable because it is instrumental to protect vulnerable consumers against unfair terms. This thicker notion of transparency requires that contract terms are transparent also for the vulnerable consumer. According to this thicker notion of transparency, Article 4(2) shields from the unfairness test only core terms that are transparent also for the vulnerable consumer. Conversely, Article 5 requires terms that are transparent also for the vulnerable consumer.

Let us now explain why the thicker notion of transparency is beneficial to vulnerable consumers. Let us consider first the case where the complex offer is worse than the simple one – the hidden trap. As seen, the vulnerable consumer is likely to choose the complex offer. If this happens, under our proposed interpretation of Article 4(2), the core terms of the complex offer will not satisfy the transparency requirement. Consequently, these terms will have to be reviewed for their substantive fairness. Article 5 contributes to the overall deterrence of the UCTD by exposing the trader to additional legal sanctions.⁷³

⁷¹ Broad survey in J. Luguri and L.J. Strahilevitz, ‘Shining a Light on Dark Patterns’ (2021) 13 *Journal of Legal Analysis* 43. This literature is deeply intertwined with behavioural scholarship, which is highly relevant for consumer law and policy in the EU and beyond; for a discussion this topic focusing on its doctrinal relevance, see F. Esposito, n 40 above.

⁷² Something similar happens with phishing attempts: out of thousands of emails sent, only a small fraction will reach a distracted recipient who will fall for it; but that small fraction is enough to make the practice economically viable.

⁷³ Even after the adoption of the Modernization Directive (Directive (EU) 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJEC L 328/7), Member States have an extensive discretion in determining the legal consequences of violating Article 5. Investigating the matter further falls outside the scope of the present inquiry; on the matter see e.g.

It is in the second case – the hidden gem – that Article 5 plays a pivotal role. In this case, the complex offer is better than the simple one. As seen, the vulnerable consumer is likely to opt for the simple offer, even if less advantageous. Against this background, a thicker notion of transparency in Article 4(2) will not do much to help the vulnerable consumer. In fact, by assumption, the simple offer will be transparent also according to the thicker notion of transparency. Consequently, vulnerable consumers are prone to choose the simpler and less advantageous offer, to their detriment. To benefit the vulnerable consumer, the UCTD should motivate traders to increase the transparency also of the complex offer. When both offers become transparent, the vulnerable consumer should join the average one in preferring the complex offer. However, Article 4(2) cannot be used for this purpose. The reason is simply that the complex offer has not been accepted by the consumer: the consumer has chosen the simple offer. Accordingly, only the terms of the simple offer can be reviewed pursuant to Article 4(2).⁷⁴

It follows that it is necessary to look elsewhere to find a deterrence mechanism against the drafting of complex but advantageous offers marketed in tandem with simpler and less advantageous ones. Article 5 of the UCTD can be used to this end. Since this provision introduces a general obligation to draft transparent terms, it can also be used against the complex but advantageous offers (within the meaning of these terms as used in the previous section). It should be remembered that the CJEU's case law leaves ample room for national legal systems to design sanctions in consumer law.⁷⁵

Only pecuniary sanctions (damages and/or fines) would be easy to apply to the situation under scrutiny. In this situation, the trader is sanctioned for the lack of transparency of the terms of a contract that ultimately the vulnerable consumer has chosen not to enter into. Under the current scheme of the UCTD, it seems hard to apply remedies such as termination, rescission, nullity, or revision. All these remedies presuppose that the opaque term is part of the contract that is binding the consumer. However, in the situation under scrutiny, this is not the case.

V. Mak, *Legal Pluralism in European Contract Law* (Oxford: OUP, 2020) 157–159; P. Nebbia, *Unfair Contract Terms in European Law* (Oxford: Hart, 2007).

⁷⁴ It appears to us that granting to the consumer the power to challenge the transparency of the terms of an offer that the consumer has not accepted falls outside the scheme and structure of the unfair contract terms directive. Indeed, neither of us is aware of a jurisdiction where such a review would be possible. For this reason, it seems appropriate to articulate the present investigation on the premise that Article 4 of the UCTD applies only to the terms of the contract the consumer has actually entered into.

⁷⁵ See, recently, Judgment of 10 June 2021, *Ultimo Portfolio Investment*, C-303/20, ECLI:EU:C:2021:479.

As a final point, let us discuss the burden placed on traders and average consumers. In general terms, compliance with information duties is cheap for traders.⁷⁶ In essence, the current proposal would imply a one-time review of current disclosure practices and then incorporation of the generated expertise in future disclosure decisions. Of course, the cost represented by the reduction of profits coming from exploiting vulnerable consumers should not be taken into consideration. Likewise, the only cost for the average consumer would consist in sharing part of the compliance costs. At the same time, more transparency should also be beneficial to the average consumer because of the increase in competitive pressure it will cause. At the very least, it can be said that there is no obvious case against the present proposal in terms of compliance costs.

To sum up. The thick notion of transparency according to which vulnerable consumers should understand a core term improves the situation of vulnerable consumers by exposing traders to the sanctions associated with the violation of Article 5 of the UCTD. Moreover, our proposal ensures that the core terms of the complex offer will be reviewed for their substantive fairness. However, this opportunity is relevant only when vulnerable consumers choose the more complex offer. When the vulnerable consumer opts for the simple offer, a thicker notion of transparency will not have any practical consequence, as the core terms of the simple offer will remain shielded from the fairness test.

5 Conclusion

In this article, we have challenged the *communis opinio* that the transparency standard in the Unfair Contract Terms Directive is that of the average consumer only. We have shown that traders can operate a business model based on versioning and self-selection, where certain offers will be understood by the average consumer, but not by the vulnerable one.

When this happens, the economic foundation of the *communis opinio* crumbles into pieces: average consumers do not offer any form of herd protection to the vulnerable ones. In this context, Articles 4(2) and 5 should be given a more robust,

⁷⁶ The Consumer Fitness Check analyzed five representative sectors and found that ‘the estimated overall costs of regular compliance checks amount to approximately 0.024% of turnover, of which 0.011% for checking compliance with rules concerning advertising and marketing targeted at consumers, 0.004% for checking compliance with rules concerning advertising and marketing targeted at businesses, and 0.009% for checking compliance with rules concerning standard contract terms’; European Commission, *Report of the Fitness Check*, SWD(207) 219 final, 40–55, citation from 54.

demanding, intrusive interpretation, according to which contract terms must be transparent also for vulnerable consumers.

This conclusion opens additional questions that we cannot fully explore in this article. First and foremost, it is well-known that identifying vulnerable consumers is complex. Accordingly, the obligation we are proposing faces delicate operationalization problems that have been constantly identified by legal scholars in relation to the UCPD.⁷⁷ Additionally, what would be the appropriate fairness test when a core term is not transparent in the circumstances considered in this article? And what would be the proper suppletive term in case the *Kásler* doctrine⁷⁸ applies? In our view, it seems that the simple offer that is alternative to the complex one shall play a pivotal role in answering these questions. However, we have some concerns about whether the Court would find such an approach compatible with the *Dziubak* guillotine.⁷⁹ Additionally, it is unclear to what extent an injunction *ex* Article 7 could be used to have a term declared opaque;⁸⁰ however, these injunctions might be quite useful in protecting vulnerable consumers against the exploitative practices described in this article.

Most fundamentally, the previous analysis has led to an apparent asymmetry in the UCTD's effectiveness to protect vulnerable consumer against exploitation. On the one hand, in terms of consumer harm, depending on whether we are dealing with a hidden gem or hidden trap, implies that sometimes the vulnerable consumer will be harmed by having chosen the simple offer (hidden gem) or by having chosen the complex one (hidden trap). However, we have also shown that the UCTD's bite is clearly stronger when the vulnerable consumer chooses the

⁷⁷ See, for example, G. Howells, T. Wilhelmsson, C. Twigg-Flesner, *Rethinking EU Consumer Law* (London: Routledge, 2018) 58–73.

⁷⁸ Judgment of 6 June 2014, *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, C-26/13, ECLI:EU:C:2014:282. Under this decision it is possible for the domestic courts to fill-in gaps in consumer agreements – which result from removing an unfair term – using non-mandatory rules of domestic law.

⁷⁹ Judgment of 3 October 2019, *Kamil Dziubak, Justyna Dziubak v Raiffeisen Bank International AG*, C-260/18, ECLI:EU:C:2019:819. Building on the earlier *Kásler* decision, the Court excluded in this judgment the possibility for domestic courts to supplement lacunae in consumer agreements by creating *ad hoc* terms, based on general standards of private law, such as fairness. On this case, and its constraining effects for national courts, see F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection' (2020) 16(4) *European Review of Contract Law* 538; A. Wiewórowska-Domagalska, 'Unfair Contract Terms in CHF Mortgage Loans' (2020) 9 *Journal of European Consumer and Market Law* 206.

⁸⁰ Indeed, the provision refers to unfair terms only. And the matter has not attracted much academic or policy attention. See, for example, Howells *et al*, n 77 above, 155–157; European Commission n 26 above, 63–64.

complex offer (hidden trap). At this point, one shall not forget that the UCTD is a minimum harmonization directive.⁸¹ Accordingly, it is critical to look at how member states have implemented it. Such a comparison could also lead to empirical confirmation of our analysis: in countries offering a stronger protection to vulnerable consumers, using complex offers is less advantageous. Accordingly, one should observe that traders opt for less and simpler offers.

Before concluding, let us point out some significant advantages of our proposal in comparison to relying on the UCPD. Addressing the business strategy discussed in this article with this directive is fraught with obstacles. No blacklist item applies to the practice. Moreover, under the current understanding of Articles 6 to 9 of the UCPD, only the average consumer standard can be used to challenge a practice as misleading or aggressive.⁸² For our purposes, this interpretation would need to be challenged. Relying on the general test *ex* Articles 5 UCPD requires that consumers prove that the practice is contrary to professional diligence, and it is likely to distort the behaviour of the targeted vulnerable consumer. Relying on the UCTD under our proposed interpretation in comparison to the UCPD is advantageous for two reasons. First, courts – starting with the CJEU – have more experience in dealing with the assessment of the fairness of contract terms under the dedicated fairness test rather than under the UCPD's professional diligence test. Second, once it is accepted that core terms have to be transparent for the vulnerable consumer, the consumer does not have to argue that the practice is likely to distort the behaviour of vulnerable consumers. The latter is a complex argumentative step, where consumers are at a systematic disadvantage in comparison to traders; therefore, avoiding this step is a clear advantage of our proposal over reliance in the UCPD.⁸³

As noted in the Introduction, consumer law scholars wish for the renovation of the field, somehow. The present investigation shows that the theory of harm approach to consumer law should play a role in this renovation process.

⁸¹ Article 8 of the UCTD.

⁸² Cf Howells *et al*, n 77 above 48.

⁸³ Notably, Riefa *et al*, n 3 above, relies primarily on the UCPD in their seminal work or propose a more intrusive positive duty to propose the most convenient offer.