2.2 Trade Practices and Consumer Disinformation

Abstract: The last decade the European consumer information model has been the subject of increasing criticism, not in the least from scholars of non-legal disciplines. The information paradigm whereupon this model is based takes as a starting point that consumers are benefit-maximising creatures who, when given full information, will consistently make decisions that maximise their welfare. Precisely the assumption that informed consumer decisions are efficient decisions is increasingly challenged nowadays. Especially the fact that the release of information in the market is not non-committal in cases where that information empowers him to correct his misleading impressions based on particulars of the product or in advertising, is subject of criticism. To date, these critiques are of no specific concern to the European legislator. Recent harmonisation measures continue to be heavily rooted in the European information model. Also the Unfair Commercial Practices Directive is not well equipped to combat, for example, disinformation as a result of an overload of information. However, recent developments in case law demonstrate the ECJ’s willingness to mitigate the consumer’s duty to internalise information for his own good. Yet, the European legislator seems far better placed to deal with the drawbacks of the information model and should, in that respect, approach valuable insights from other disciplines with an open mind.

1 Introduction

In view of the establishment of the internal market the European legislator developed a European consumer information model. Although consumers automatically benefit from more competitive market structures they also must be secured a legal environment wherein they are capable of searching out bargains between goods and services offered and sold across borders. Thus a consumer must be made capable of reaping full benefit from the internal market by making purchase decisions in full knowledge of the fact. This requires the release of information in the absence of which consumers would fail to fulfil their function in the internal market. The European preference for information disclosure measures comes as no surprise. The economic theories underlying the internal market
policy presuppose that the release of information can hardly have a negative impact on the market. Quite the opposite, these theories approach the consumer as a benefit-maximising creature who will consistently make decisions that maximise his welfare if he is given full information. It follows that informed consumer decisions are efficient decisions. This so-called information paradigm lies at the core of the European consumer information model. Factor in that information requirements are much more in line with the internal market objectives than straightforward prohibitions, as they are much less inhibitive to trade, and the finding that European harmonisation measures are heavily focused on disclosure mandates was only to be expected.

The European consumer information model will be briefly highlighted in section 2, with special attention to relevant European legislation (subsection A) and case law of the European Court of Justice (subsection B). In the last decade the European consumer information model has been the subject of increasing criticism not least from behavioural economics scholars. Section 3 of this contribution highlights the critiques. In a subsequent section it will be examined whether Directive 2005/29/EC on unfair commercial practices (hereafter: UCPD) is capable of responding to those critiques. The protection of consumers against misleading practices forms an important, if not the most important, part of the aforementioned directive. This directive is of general application and therefore deserves separate attention. Finally, a concluding section completes the analysis.

2 The Internal Market and the European Consumer Information Model

To provide for the appropriate measures in view of the establishment and correct functioning of the (internal) market lies at the core of the European Union. Companies and consumers would both benefit from more efficient market structures. However, for the internal market to yield its benefits to consumers they must be able to have easy access to goods and services promoted, offered and sold across the borders, since it is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and ensures that they optimise their consumption decisions. For this system to work the release of private consumer autonomy within the market

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1 See Article 3(3) TEU.
3 See also e.g. Green Paper on European consumer protection, Brussels, COM(2001)531final.
is presupposed. This implies a consumer who is looked at as a benefit-maximising creature capable of reaping full benefit from the internal market by making purchase decisions in full knowledge of the facts. The consumer’s right to choose the goods and services closest to his preferences also requires a certain empowerment of consumers. Hence, information must be disclosed to consumers.

By impairing the consumer’s ability to make choices which are informed and therefore efficient, unfair commercial practices generate a market failure. Consequently misleading practices were prohibited and mandated disclosures were imposed on businesses to combat the market inefficiencies resulting from the information asymmetry that exists between companies and consumers. This explains why the earliest consumer measures were mainly concerned with misleading information in two central domains, namely advertising rules and labelling requirements.

As a result of the informational empowerment of consumers the idea that consumers were genuine promoters of integration instead of passive beneficiaries gained ground fairly rapidly. Hence the focus of European legislation shifted to

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7 Economic theory presupposes that information can never have a negative impact. If the information is ineffective or irrelevant, it will simply be ignored by consumers and businesses. If consumers are given full information, they will consistently make decisions that maximise their welfare. Hence informed consumer decisions are efficient.

8 Consumers have less information than businesses and so have difficulty in making decisions that reflect their true preferences. Businesses themselves have no sufficient incentives to provide consumers with the information they need. Therefore the law comes to the aid of consumers and requires the information be provided. See also G. Howells, “The Potential and Limits of Consumer Empowerment by Information”, *Journal of Law and Society* 2005, Vol.32, (349) 355, who points out that “harm will be reduced by ensuring goods and services are more likely to be in line with realistic consumer expectations based on reliable information. Avoiding problems through the consumer taking responsibility for his or her own purchasing choices must be a desirable objective. Moreover, this accords with popular support for the notion of consumer autonomy and avoids criticisms of paternalism from the nanny-state”. That way “information rules empower consumers to protect themselves and have the advantage that they are not prescriptive and so do not prevent traders innovating”, a.c., 356.

9 In the Third Action plan on consumer policy, Brussels, COM(95)0519, the consumer is already referred to as a full-blown participant, a key player in the internal market, and also as a person who is able to make well-informed choices and who is sufficiently alert to defend his own rights.
the establishment of a legislative environment in which consumer’s confidence may grow, enabling the confident consumer to become the new benchmark of the internal market.

A Consumer Information Model – Legislative Developments

Two ground breaking harmonisation measures secured consumers the information they need to participate in the internal market, the foodstuffs labelling directive and the directive on misleading advertising. The aim of both directives was to prevent any deception of consumers. Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer prohibits the misleading of purchasers as to the characteristics of foodstuffs and also contains compulsory rules to indicate a number of foodstuff particulars, for instance a list of ingredients on labelling. Directive 79/112/EEC is of general application and has been replaced by Directive 2000/13/EC which in its turn has been repealed as from 13 December 2014 by Regulation 1169/2011/EU on the provision of food information to consumers. Article 13 (1) of the Regulation requires mandatory food information to be “marked in a conspicuous place in such a way as to be easily visible, clearly legible, and where appropriate indelible. It shall not in any way be hidden, obscured, detracted from or interrupted by any other written or pictorial matter or any other intervening material”. It further contains rules as regards the font size and characters of mandatory particulars and rules concerning distance selling and the omission of certain mandatory particulars.

Directive 84/450/EEC concerning misleading advertising harmonised the definition of ‘misleading advertising’. In contrast to the labelling directive this directive did not stop Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers.

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10 O.J., 1979, L 33/1.
11 In particular the nature, identity, properties, composition, quantity, durability, origin of provenance, method of manufacture or production.
13 See in particular Regulation 1169/2011/EU on the provision of food information to consumers, OJ 2011, L 304/18.
15 Article 2.2 of the Directive.
Although it was initially believed that both instruments conveyed sufficient information to consumers to make them beneficiaries from increased competition in the market, the shift towards the establishment of a legislative environment in which consumers’ confidence may grow required the release of more information. As a result, all harmonisation measures targeted at protecting consumers included from that date an impressive number of pre-contractual information obligations imposed on traders.

For instance according to Article 5(1) of the recent Consumer Rights Directive\(^\text{16}\) (hereafter: CRD) the trader shall provide the consumer with no less than 20 information particulars before the consumer is bound by the contract. This information must be provided *in a clear and comprehensible manner* if that information is not already apparent from the context. In providing that information, “the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity, in a way which the trader could reasonably be expected to foresee” (own emphasis)\(^\text{17}\). However, the directive peculiarly adds on this point that “taking into account such specific needs should not lead to different levels of consumer protection”\(^\text{18}\).

The directive also contains rules that are more targeted to the media user. The trader must provide the user of any new media which concludes a distance contract the more detailed information provided for in Article 6(1) or make that information available to the consumer *in a way appropriate to the means of distance communication used in plain and intelligible language* (own emphasis). Additional information requirements apply to distance contracts concluded by electronic means that place consumers under an obligation to pay\(^\text{19}\). Unlike the general pre-contractual information obligations, these obligations concerning distance contracts set forth in the CRD are completely harmonised so that no interference from Member States is allowed.

Users of media are further protected by the Electronic Commerce Directive\(^\text{20}\), the Services Directive\(^\text{21}\) and the Unfair Commercial Practices Directive\(^\text{22}\). The Services Directive and the E-commerce Directive also contain pre-contractual information requirements additional to those laid down in the CRD.\(^\text{23}\) However, if a

\(\text{16}\) Directive 2011/83/EU, O.J. 22 November 2011, L 304/64.
\(\text{17}\) Article 5(3) from the UCPD holds a similar provision. See also on this point, albeit from a different angle, the contribution of Förster/Weish to this book.
\(\text{18}\) In the absence of this rule, the requirement in the UCPD seems to be stricter.
\(\text{19}\) Article 8(2) CRD.
\(\text{23}\) Article 6 (8) CRD.
provision of Directive 2006/123/EC (services) or Directive 2000/31/EC (e-commerce) on the content and the manner in which the information is to be provided conflicts with a provision of the CRD, the provision of the latter will prevail. This means that only in cases of conflicting requirements is the complementary nature of the directives estopped in favour of the CRD.

Although the UCPD merely prohibits misleading and aggressive commercial practices and does not impose information requirements as such, it nevertheless contains indirect information duties with respect to invitations to purchase. In the case of invitations to purchase a trader has according to Article 7(4) of the UCPD a stricter obligation to provide information, failure of which may constitute a misleading omission. This material information partly overlaps with the information requirements imposed by the CRD. Both lists of information duties must be complied with when the advertising is categorized as an invitation to purchase. Yet again, in the case of conflict the CRD prevails.

It follows from the foregoing that directives on consumer protection, and more in particular on the protection of media users, continue to pile on information requirements. Some of the requirements referred to above are open to interpretation and leave broad discretion to the judges. Also the obligation to take into account the special needs of particularly vulnerable consumers is rather unclear, especially in the CRD where this tailoring of information may not lead to different levels of consumer protection.

B Consumer Information Model – Case Law of the European Court of Justice (ECJ)

The ECJ highly contributed to the development of the information model. On many occasions, it has been asked to clarify the information model and the information duties laid down in the aforementioned directives. It thereby comes as no surprise that the ECJ’s approach towards the two central pillars of the European information model, advertising and labelling, has been basically

24 It repeals and incorporates the misleading advertising directive referred to above.
25 The ECJ interpreted an invitation to purchase broadly: “an invitation to purchase exists as soon as the information on the product advertised and its price is sufficient for the consumer to be able to make a transactional decision, without it being necessary for the commercial communication also to offer an actual opportunity to purchase the product or for it to appear in connection with such an opportunity” (para. 33, ECJ 12 May 2011, case C-122/10, Ving Sverige, ECLI:EU:C:2011:299).
26 For instance requirements such as ‘easy to understand’, ‘in plain language’ etc.
the same.\textsuperscript{27} In the case that the consumer was able to make informed choices, market deregulation prevailed over national regulatory protection.

It is precisely in that regard that the Court consistently held that the assessment whether an appellation, brand name or advertising statement may be misleading must take into account the presumed expectations of an \textit{average consumer who is reasonably well informed and reasonably observant and circumspect}.\textsuperscript{28} This benchmark of the European average consumer has its origin in the prime consideration taken from the non-binding preliminary programmes for a consumer protection and information policy that consumers should be enabled to make a choice in the market in full knowledge of the facts.\textsuperscript{29} The emergence of this European consumer image was implicitly present in misleading practices cases like \textit{GB-Inno-BM}, \textit{Yves Rocher} and \textit{Mars}, and was subsequently consolidated in the \textit{Gut Springenheide} and \textit{Tusky} case.\textsuperscript{33} It has been confirmed since in case law, and also more recently in legislation.\textsuperscript{34}

With regard to labelling requirements, the ECJ emphasized that the rational consumer whose purchasing decisions depend also on the composition of the products will first read the list of ingredients. As a result the average consumer

\begin{itemize}
\item \textsuperscript{27} For an extensive analysis, see G. Straetmans, \textit{Consument en markt}, Kluwer Rechtsweten-schappen, 1998, 197–466.
\item \textsuperscript{28} See in particular, ECJ 1999, \textit{Sektkellerei Kessler}, Case C-303/97, EU:C:1999: 35, para. 36. Thereby, the ECJ was not particularly inspired by human information processing models taken from other disciplines. See for example the Limited Capacity Model of Mediated Message Processing and the LC\textsubscript{4}MP developed by Lang and find more about this model in the contribution of Mangold to this book (chapter on human processing of commercial information).
\item \textsuperscript{29} ECJ 1990, C-362/88, GB-Inno-BM, EU:C:1990, para. 17: “a prohibition against importing certain products into a Member State is contrary to (the provisions relating to free movement of goods) where the aim of such a prohibition may be attained by appropriate labelling of the products concerned which would provide the consumer with the information he needs and enable him to make his choice in full knowledge of the facts” (own emphasis).
\item \textsuperscript{30} See ECJ 1990, C-362/88, GB-Inno-BM, EU:C:1990. The ECJ agreed with the European Commission that any normally aware consumer knows that annual sales take place only twice a year so that the ‘European’ consumers would not be misled by information on temporary price reductions.
\item \textsuperscript{31} ECJ 18 May 1993, Yves Rocher, C-126/91, EU:C:1993. The Court held that the prohibition on ‘eye-catching’ advertising was disproportionate: it also prohibits correct advertising that is eye catching.
\item \textsuperscript{32} ECJ 1995, Mars, C-470/93, EU:C:1995, paragraph 24: The ECJ held that “reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase”.
\item \textsuperscript{33} ECJ 1998, Tusky, C-210/96, EU:C:1998, para. 31.
\item \textsuperscript{34} See Directive 2005/29/EC on unfair commercial practices (UCPD) and Directive 2011/83/EU on consumer rights (CRD).
\end{itemize}
who is “reasonably well informed and reasonably observant and circumspect” is not misled by the use of a term on the label if the seemingly misleading impression the term entails is contradicted by the list of ingredients that duly indicates the presence of all the ingredients in the product.\(^{35}\) Hence, a comprehensive and correct list of ingredients on the packaging of a product may prevent a consumer’s misleading impression derived from a term or depiction used on the packaging of the product.\(^{36}\)

Although the ECJ recognises that cases may exist where the requirement of an additional statement to the trade description is necessary in order to avoid any confusion on the part of consumers, it consistently struck down additional national labelling requirements to that end. In *Commission vs. Italy*\(^ {37}\), for instance, the ECJ was opposed to the German prohibition to market hollandaise sauce or béarnaise sauce prepared from vegetable fats instead of butter and eggs in accordance with the recipe traditionally followed in Germany. The ECJ stated that “for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which (...) must appear on the labelling”\(^ {38}\). In the same vein, the ECJ held in *Darbo*\(^ {39}\) that mentioning ‘naturrein’ on the packaging of strawberry jam gave consumers no misleading impressions.\(^ {40}\) It pointed out that “an average consumer who is reasonably

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35 See to that effect, e.g. ECJ 1999, *Van der Laan*, Case C-383/97, EU:C:1999:, para. 37.
36 See e.g. Severi, C-446/07, EU:C:2009:530, paragraph 61, on the question whether the designation of a foodstuff, ‘Salame tipo Felino’, which is evocative of a place and which is not registered as a PDO or PGI may be legitimately used by producers who use it uninterruptedly for a considerable period and in good faith, is misleading. “It is clear from the Court’s case law that, in order to assess the capacity to mislead of a description to be found on a label, the national court must in essence take account of the presumed expectations, in light of that description, of an average consumer who is reasonably well informed, and reasonably observant and circumspect, as to the origin, provenance, and quality associated with the foodstuff, the critical point being that the consumer must not be misled and must not be induced to believe, incorrectly, that the product has an origin, provenance or quality which are other than genuine”.
38 Paragraph 36, *Commission vs. Italy* case.
40 See also:
well informed and reasonably observant and circumspect could not be misled by the term ‘naturally pure’ used on the label simply because the jam contains pectin gelling agent whose presence is duly indicated on the list of its ingredients”⁴¹.

Also, in the misleading advertising cases, the ECJ emphasized that the European average consumer has the duty to internalize the information which is disclosed to him in the market.⁴² The Clinique⁴³ case is illustrative of that point. In that case the German Government sought to stop the use of the name “Clinique” for cosmetic products on the ground that that name could mislead consumers into believing that the products in question had medicinal properties. The ECJ adequately countered the German objections. It stated “that the range of cosmetic products manufactured by the Estée Lauder Company is sold in the Federal Republic of Germany exclusively in perfumeries and cosmetic departments of large stores, and therefore none of those products is available in pharmacies. It is not disputed that those products are presented as cosmetic products and not as medicinal products. It is not suggested that, apart from the name of the products, this presentation does not comply with the rules applicable to cosmetic products. Finally, according to the very wording of the question referred, those products are ordinarily marketed in other countries under the name “Clinique” and the use of that name apparently does not mislead consumers”⁴⁴. Hence the German prohibition did not appear to be necessary to satisfy the requirement of consumer protection and human health. The Court therefore added: “The clinical or medical connotations of the word “Clinique” are not sufficient to make that word so misleading as to justify the prohibition of its use on products marketed in the aforesaid circumstances” (own emphasis)⁴⁵.

The importance of this last sentence cannot be overlooked. Even though the ECJ recognises that it is not excluded that German consumers may wrongfully infer from the product name that it has medicinal qualities, this is not sufficient to prohibit the use of that name as deceptive. The product is presented as a

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⁴³ ECJ 1994, Clinique, C-315/92, EU:C:1994:.
cosmetic product, its presentation complies with the specific labelling requirements laid down in European directives, and the product can only be bought outside pharmacies. This information should suffice to alert the European consumer and allows him to correct his initial wrongful inferences from the product name.

The bluntness of the ECJ in *Clinique* has been severely instead of severally; criticised more than once. The ECJ therefore mitigated somewhat the effect of its ruling in subsequent judgments. Thus, in *Estée Lauder*\(^{46}\) whilst confirming the standard of the average consumer, the ECJ also held that “in particular, it must be determined whether *social, cultural or linguistic factors* may justify the term ‘lifting’, used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word ‘lifting’”\(^{47}\). However, the mitigating effect of the reference to particular social, cultural or linguistic factors was put immediately into perspective by the Court’s consideration that “at first sight, the average consumer – reasonably well informed and reasonably observant and circumspect – ought not to expect a cream whose name incorporates the term ‘lifting’ to produce enduring effects”\(^{48}\). The ECJ acted similarly in the *Linhart and Biffi*\(^{49}\) case where it held that the mere statement ‘dermatologically tested’ or ‘clinically tested’ appearing on the packaging of soaps and hair products meant that the product was “well tolerated or at least harmless when applied to the skin”\(^{50}\).

It follows from the foregoing that the European average consumer is depicted as someone who is well capable of processing information which is disclosed in the market. Moreover, the European average consumer has the duty to take advantage of this information, the release of which is not non-committal, especially when that information empowers him to correct his misleading impressions based on the product name or other particulars on the packaging of the product or in advertising.

\(^{47}\) ECJ 2000, Estée Lauder Cosmetics vs. Lancaster Group, C-220/98, EU:C:2000:8, para. 29. According to the German Government the use of the term ‘lifting’ for a firming cream may mislead consumers as to the duration of the product’s effects, because it gives purchasers the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting.
\(^{49}\) ECJ 2002, Linhart and Biffi, C-99/01, EU:C:2002:618.
\(^{50}\) ECJ 2002, Linhart and Biffi, C-99/01, EU:C:2002:618, para. 32.
3 Information Model – Criticism

The ECJ’s preference for the European average consumer as a standard for the assessment of misleading practices has been criticised in consumer literature as majoritarianism. Some authors advanced that the concept of the confident consumer has a very weak and unreliable basis in Community law. In the same vein, it is often objected that although information disclosure can contribute to the empowerment of consumers, they are often of very little help to vulnerable consumers when it comes to leading a self-determined life. This even prompted some scholars to conclude that the European consumer information policy leaves out the protection of the really weak, illiterate or poor consumer.

Another critique advanced by legal scholars is the lack of a real benchmark of reasonable consumer expectations. Especially with regard to digital content the absence of such a benchmark may have adverse effects on the level of protection of media users. According to those scholars “consumer information can shape the reasonable expectations of consumers, and thereby also the level of protection consumers can reasonably expect. In this respect, the level of protection consumers can expect (e.g. according to the rules of fairness of commercial practices or contract terms), depends to a considerable extent on the extent to which consumers have been informed. Hence, consumer information may indirectly also serve as an unfair exclusion clause”.

Also on a more general level, information requirements have been the subject of substantial criticism, not the least from behavioural economists. Without going into too much detail behavioural economists mark as major

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54 N. Helberger, L. Guibault, M. Loos, Ch. Mak, L. Pessers, “Digital Content Contracts for Consumers”, J. Consum. Policy 2013, 36:50–51. These scholars argue that instead of leaving the matter entirely at the discretion of suppliers and relying on consumer information, a certain minimum standard of usability, safety and consumer friendliness of digital content must be imposed (p.50).
critiques of consumer information policies based on mandated disclosures, the bounded rationality of consumers, the fact that consumers often lack the time to read information, the absence of rules on the presentation of the information, the length of the information and the comprehensibility of information for consumers in general and for vulnerable consumers in particular.

The ease with which the European legislator faithful to the European consumer information model continues to adopt mandatory information requirements in recent harmonisation measures may be questioned in the light of aforementioned critiques. In a legislative context that is piling on information requirements the question arises whether this overload of information does not bear in itself the risk of misinforming consumers? An interesting question in that respect is whether the UCPD, which completely harmonises the domain of unfair (including misleading) commercial practices, can be of help to combat (potential) disinformation resulting from an overload of information as a misleading commercial practice. This will be examined in the following section.

4 Is the UCPD of Help?

It must be submitted first that the scope of the UCPD is broad. It encompasses market practices that ‘materially distort the economic behaviour of consumers’.


60 In this respect, it is sometimes submitted that there exist a risk that traders cover their backs by oversupplying consumers with information; see G. Howells, “The potential and limits of consumer empowerment by information”, Journal of Law and Society, Vol. 32, 2005, 363.

This means: “using a commercial practice to appreciably impair the consumer’s ability to make an informed decision”. It follows that information is misleading when it has an adverse effect on the purchase decision of the consumer. As a consequence, badly drafted information can be misleading, for instance if the reason for doing so is to hide certain facts or conditions from consumers. If a commercial practice omits material information that the average consumer needs, according to the context, to take an informed transactional decision, it constitutes a misleading omission prohibited under the UCPD.

The broad scope of the UCPD does not at first glance exclude the categorization of an overload of information as a misleading practice or omission. However, one should not overlook that the UCPD is designed within the context of the European information model and finally interpreted by the ECJ in accordance with the standards set out above. It follows from the information model that irrelevant information is not as such misleading. Only relevant information has the potential to negatively impact the purchase decision of the consumer.62 The assumption therefore remains that a sufficiently informed consumer cannot be distorted by an overload of information in taking his purchase decision, provided that the relevant information to his purchase decision is correct. As a result, the success rate for combatting overloads of information on the basis of the UCPD will be in the current state of European law fairly limited. And yet, recent developments in the ECJ’s case law may reveal a changing approach towards the overload of information and the consumer’s duty to internalize disclosed information.

In the recent Teekanne case63 the Court had to interpret the alleged misleading character of the statements on the packaging of a fruit tea.64 That packaging comprised a number of elements of various sizes, colour and font, in particular (i) depictions of raspberries and vanilla flowers, (ii) the indications ‘fruit tea with natural flavourings’ and ‘fruit tea with natural flavourings – raspberry-vanilla taste’ and (iii) a seal with the indication ‘only natural ingredients’ inside

62 An interesting parallel may be drawn here with different outcomes in information psychology studies. See for example the handling of environmental claims in greenwashing advertising and the contribution of Naderer, Schmuck and Matthes to this book.


64 See also:
a golden circle. The question brought before the Court was whether the de- pictions on the packaging of the fruit tea were of such a nature that they could mislead consumers with regard to the tea’s content inasmuch as it gives the impression that it contains raspberry and vanilla-flower or flavourings obtained from those ingredients, even though such constituents or flavourings are not present in that tea.

Having regard to the settled case law set out above, one would have expected the ECJ to rule that the list of ingredients expresses, in a manner free from doubt, the fact that the flavourings used are not obtained from vanilla and raspberries but only taste like them, and that correct and complete information provided by the list of ingredients on packaging constitutes sufficient grounds on which to rule out the existence of any misleading of consumers. As was indicated above, consumers have the duty to internalize information which is disclosed to them in the market and on the products. Despite all this the ECJ however stated: “the list of ingredients, even though correct and comprehensive, may in some situations not be capable of correcting sufficiently the (average reasonably well informed, and reasonably observant and circumspect) consumer’s erroneous or misleading impression concerning the characteristics of a foodstuff that stems from the other items comprising its labelling” (own emphasis)\(^\text{65}\). In doing so, the ECJ for the first time recognised in the Teekanne case that correct and complete information provided by the list of ingredients on packaging in accordance with the labelling of foodstuffs directive may constitute misleading advertising. It follows that the display of the correct and comprehensive list of ingredients no longer rules out the possibility that the labelling has the capacity to mislead consumers. That will be the case if some of the items of which the labelling is composed of are in practice misleading, erroneous, ambiguous, contradictory or incomprehensible.\(^\text{66}\). This assessment must particularly take into account “the words and depictions used as well as the location, size, colour, font, language, syntax and punctuation of the various elements on the fruit tea’s packaging”\(^\text{67}\).

A striking parallel may be drawn with recent developments in case law relating to unfair contract terms. In the Katalin Sebestyén\(^\text{68}\) case the ECJ was asked whether an arbitral clause could be regarded as unfair despite the fact that the consumer received, before the conclusion of the contract, general information on the differences between the arbitration procedure and ordinary

\(^{65}\) Para. 40, Teekanne case.

\(^{66}\) Para. 41, Teekanne case.

\(^{67}\) Para. 43, Teekanne case.

\(^{68}\) ECJ 3 April 2014, C-342/13, Katalin Sebestyén vs. Raiffeisen Bank e.a., EU:C:2014:1857.
legal proceedings. The ECJ first confirmed the fundamental importance of pre-contractual information for the consumer’s decision to be bound by the conditions drafted in advance by the seller or supplier.\textsuperscript{69} But instead of connecting immediate consequences for consumers to this voluntary disclosure by the trader, the ECJ mitigated its impact on consumers, pointing out that “even assuming that the general information the consumer receives before concluding a contract satisfies the requirement under Article 5 that it be \textit{plain and intelligible}, that fact alone cannot rule out the unfairness of a clause such as that at issue in the main proceedings” (own emphasis)\textsuperscript{70}.

These developments with respect to labelling requirements and unfair contract terms demonstrate that the ECJ, unlike the European legislature, is increasingly aware of the flaws of the European information model. In both domains the ECJ seems to be prepared to mitigate the harsh consequences of the information model. It thereto reduces the consumer’s responsibility to process information and his duty to internalize mandated or voluntary disclosures when taking purchase decisions.

\section*{5 Conclusion}

The legislation and jurisprudence relating to misleading practices is still heavily rooted in the European information model. The average rational consumer has a duty to internalize mandated or voluntary disclosures. Recent developments in case law demonstrate that the ECJ is prepared to mitigate this duty in respect of contract terms and foodstuff labelling. It remains to be seen whether this development will have a spill-over effect in the context of misleading commercial practices. If so, it would certainly offer judges additional tools to combat existing overloads of information in e-commerce or beyond. Yet, the European legislator seems far better placed to deal with the drawbacks of the information model and should approach valuable insights from other disciplines, e.g. behavioural economics, communication studies, information psychology, with an open mind. It will require a substantial mindshift in current legal thinking, away from the beaten path of the existing legal assumptions. Such a shift will obviously take time, but the recent case law may well usher in a new era.

\textsuperscript{69} Para. 33, Sebestyén case.
\textsuperscript{70} Para. 34, Sebestyén case.