THEME X. MISLEADING OMISSIONS/INVITATION TO PURCHASE

I. CASE C-122/10, *KONSUMENTOMBUDSMANNEN (KO) V VING SVERIGE,* [2011] ECR I-3903

§1. Facts

On 13 August 2008, the *Svenska Dagbladet* ran a not particularly conspicuous advertisement (on less than a quarter of a page).[1] It showed a picture of the Statue of Liberty and read "New York from 7 820 crowns". In smaller characters, the ad mentioned the following additional information:

> "flights from Arlanda airport with British Airways and two nights at the Bedford hotel – Price per person staying in a double room, airport tax included. Additional night from 1 320 crowns.[2] For selected journeys from September to December. Limited number of places".

The website and telephone number of Ving, the tour operator advertising the offer, featured at the foot of the advertisement.

The Swedish Consumer Ombudsman found that this advertisement violated a provision of the Swedish law on marketing practices,[3] which transposed directive 2005/29/EC (hereafter "UCPD").[4] More precisely, the Ombudsman took issue with two aspects of this advertisement: the fact that only an entry price was mentioned and the fact that the main characteristics of the product were not adequately described. According to him, the advertisement constituted an "invitation to purchase" and the seller was therefore under a specific obligation to provide information about "the main characteristics of the product to an extent appropriate to the medium and the product" and "the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated".[5]

The Ombudsman issued proceedings against Ving. He sought orders prohibiting Ving from continuing to state only an entry-level price and requiring

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1 Case C-122/10, *Konsumentombudsmannen (KO) v Ving Sverige*, [2011] ECR I-3903, para 16 and Opinion of Advocate General Mengozzi, para 30.

2 At the time of writing, the advertised entry-price of 7 820 SEK converts as € 889,91 and the price for an additional night (1320 SEK) represents € 151, 68.

3 Law 2008:486 on marketing practices.

4 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, OJ 2005 L 149/22.

5 Art. 7(4) a) and c) of UCPD and Art. 12 (1) and (2) of the Swedish law on marketing practices.

it to state a fixed priced and to give further particulars about travel arrangements and dates.[6]

The Swedish court seized of the matter referred several questions to the Court of Justice of the European Union (CJEU) regarding the interpretation of the UCPD. The questions concerned, first of all, the notion of "invitation to purchase". This notion was key to the case, as the information obligation, which the Ombudsman held to be violated, does not apply to all advertisements but only to invitations to purchase. According to Article 2 (i) of the UCPD, "'invitation to purchase' means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase". The referring court asked whether, in this definition, the clause "and thereby enables the consumer to make a purchase" is to be understood as adding an autonomous qualitative requirement regarding the information on product characteristics and prices, or if any commercial communication which indicates the characteristics of the product and the price ought to be considered as constituting an invitation to purchase provided that this information is given "in a way appropriate to the means of the commercial communication". The Court was, in particular, invited to clarify whether the material element is that the commercial communication gives enough information for the consumer to take a *decision* to purchase or if it was required in addition that the consumer be given an actual *opportunity* to purchase (for example by means of an order form). The Court was also asked a number of questions about the nature of the information requirement in the definition of an invitation to purchase: did an entry-price qualify as "price"? Was a verbal or visual reference to the product enough to consider that the commercial communication "indicates the characteristics of the product"? How should these requirements be interpreted when the advertised product is offered in many versions?

In addition to these questions aiming at guiding the referring court on the threshold issue of whether the advertisement was to be considered as an invitation to purchase, the Court was asked other substantive questions, regarding the interpretation of the information requirements applicable to such invitations under Article 7(4) UCPD. Here again, the focus was on product characteristics and price, but this time the notion of misleading practice was at stake. Regarding product characteristics, the Court was asked to clarify whether it was enough for the trader to mention only to certain characteristics in the invitation to purchase and to refer the consumer to its website for additional information. Regarding price, the question was whether and under what circumstances an entry price could be considered as misleading.

6 Opinion of Advocate General Mengozzi, para 13.

§2. *Judgment*

"29. A non-restrictive interpretation of the concept of invitation to purchase is the only one which is consistent with one of the objectives of that directive which, according to Article 1 thereof, is that of achieving a high level of consumer protection.
30. In the light of that information, the words 'thereby enables the consumer to make a purchase' must be analysed not as adding a further requisite condition to categorisation as an invitation to purchase, but as stating the purpose of the requirements set out with regard to the characteristics and the price of the product so that the consumer has sufficient information to enable him to make a purchase.
31. Such a finding is borne out by a literal interpretation based on the use of the adverb 'thereby' and is closely linked to the teleological interpretation of Article 2(i) of Directive 2005/29.
32. It follows that, for a commercial communication to be capable of being categorised as an invitation to purchase, it is not necessary for it to include an actual opportunity to purchase or for it to appear in proximity to and at the same time as such an opportunity.
33. In those circumstances, the answer to the first question is that the words 'thereby enables the consumer to make a purchase' in Article 2(i) of Directive 2005/29 must be interpreted as meaning that 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."

"36. As Article 2(i) of Directive 2005/29 does not require the indication of a final price, it cannot automatically be ruled out that the requirement relating to the indication of the price of the product is met by a reference to an entry-level price.
37. That provision provides that an invitation to purchase must indicate the price of the product in a way appropriate to the means of the commercial communication used. That being the case, it is conceivable that, by virtue of the medium used, it might to difficult to state the price of the product corresponding to each of its versions.
38. Furthermore, Article 7(4)(c) of Directive 2005/29 itself concedes, as far as concerns misleading omissions, that, having regard to the nature of the product, a trader may not reasonably be able to communicate, in advance, the final price.
39. Furthermore, if a reference to an entry-level price had to be regarded as not meeting the requirement relating to the indication of the price referred to in Article 2(i) of Directive 2005/29, it would be easy for traders to indicate only an entry-level price in order to prevent the commercial communication in question from being categorised as an invitation to purchase and, therefore, from having to comply with the requirements of Article 7(4) of that directive. Such an interpretation would erode the practical effect of that directive, as pointed out in paragraphs 28 and 29 of this judgment.
40. It follows from the foregoing that an entry-level price may meet the requirement relating to the reference to the price of the product within the meaning of Article 2(i)

of Directive 2005/29 if, on the basis of the nature and characteristics of the product and the commercial medium of communication used, that reference enables the consumer to take a transactional decision.
41. Consequently, the answer to the third question is that Article 2(i) of Directive 2005/29 must be interpreted as meaning that the requirement relating to the indication of the price of the product may be met if the commercial communication contains an entry-level price, that is to say the lowest price for which the advertised product or category of products can be bought, while the advertised product or category of products are available in other versions or with other content at prices which are not indicated. It is for the national court to ascertain, on the basis of the nature and characteristics of the product and the commercial medium of communication used, whether the reference to an entry-level price enables the consumer to take a transactional decision."

"45. In so far as Article 2(i) of Directive 2005/29 requires that the characteristics of the product must be indicated in a way appropriate to the means used, the commercial medium of communication used must be taken into consideration for that purpose. The same degree of detail cannot be required in the description of a product irrespective of the form – radio, television, electronic or paper – which the commercial communication takes.
46. A verbal or visual reference may enable the consumer to form an opinion on the nature and characteristics of the product for the purpose of taking a transactional decision, and that includes a situation where such a reference designates a product which is offered in many versions.
47. Furthermore, as the Advocate General stated at point 29 of his Opinion, an entry-level price may enable the consumer to understand that the product which he has been able to customise exists in other versions.
48. It is for the national court to ascertain, on a case-by-case basis, taking into account the nature and characteristics of the product and the medium of communication used, whether the consumer has sufficient information to identify and distinguish the product for the purpose of taking a transactional decision.
49. The answer to the fourth and fifth questions is therefore that Article 2(i) of Directive 2005/29 must be interpreted as meaning that a verbal or visual reference to the product makes it possible to meet the requirement relating to the indication of the product's characteristics, and that includes a situation where such a verbal or visual reference is used to designate a product which is offered in a variety of forms. It is for the national court to ascertain, on a case-by-case basis, taking into account the nature and characteristics of the product and the medium of communication used, whether the consumer has sufficient information to identify and distinguish the product for the purpose of taking a transactional decision."

"51. It should be recalled that the commercial practices covered by Article 74. of Directive 2005/29 require a case-by-case assessment, whereas the commercial practices referred to in Annex I to that directive are regarded as unfair in all circumstances (see, to that effect, Joined Cases C-261/07 and C-299/07 *VTB-VAB*

[2009] ECR I-2949, paragraph 56, and Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-0000, paragraph 45).
52. Article 7(4)(a) of Directive 2005/29 refers to the main characteristics of the product without however defining that notion or providing an exhaustive list. It is however stated that account must be taken, first, of the medium of communication used and, secondly, of the product.
53. That provision must be read in conjunction with Article 7(1) of that directive, according to which the commercial practice must be assessed having regard to its factual context and the limitations of the medium of communication used.
54. It must also be pointed out that Article 7(3) of that directive provides expressly that account is to be taken, in deciding whether information has been omitted, of the limitations of space and time of the medium of communication used and of the measures taken by the trader to make that information available to consumers by other means.
55. It follows that the extent of the information relating to the main characteristics of a product which has to be communicated, by a trader, in an invitation to purchase, must be assessed on the basis of the context of that invitation, the nature and characteristics of the product and the medium of communication used."

"58. It is for the national court to assess, on a case-by-case basis, taking into consideration the context of the invitation to purchase, the medium used to communicate and the nature and characteristics of the product, whether a reference only to certain main characteristics of the product enables the consumer to take an informed transactional decision.
59. In the light of the foregoing, the answer to the sixth question is that Article 7(4)(a) of Directive 2005/29 must be interpreted as meaning that it may be sufficient for only certain of a product's main characteristics to be given and for the trader to refer in addition to its website, on condition that on that site there is essential information on the product's main characteristics, price and other terms in accordance with the requirements in Article 7 of that directive. It is for the national court to assess, on a case-by-case basis, taking into consideration the context of the invitation to purchase, the medium of communication used and the nature and characteristics of the product, whether a reference only to certain main characteristics of the product enables the consumer to take an informed transactional decision."

"62. Whereas Article 2(i) of Directive 2005/29 seeks to set out the definition of an invitation to purchase, Article 7(4)(c) of that directive defines the information which, in the case of an invitation to purchase, must be regarded as material.
63. Although it is true that information regarding the price is regarded, in Article 7(4) of that directive, as being, as a rule, material, the fact remains that Article 7(4)(c) provides that, where the nature of the product means that the price cannot reasonably be calculated in advance, the information must include the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.

64. A reference only to an entry-level price may, therefore, be justified in situations where the price cannot reasonably be calculated in advance, having regard, *inter alia*, to the nature and characteristics of the product. It is apparent from the information in the documents before the court that, in order to establish the final price of a trip, a certain number of variable factors may be taken into consideration, *inter alia* the point at which a booking is made; the interest in the destination on account of the existence of religious, artistic or sports events; the particular characteristics of seasonal conditions; and the dates and times of travel.
65. Nevertheless, where there is only an entry-level price in an invitation to purchase, and the detailed rules for calculating the final price as well as, where appropriate, the additional charges or the fact that those charges are payable are not indicated, it is necessary to ask the question whether that information is sufficient for the purpose of enabling the consumer to take an informed transactional decision or whether it must be concluded that there are misleading omissions in the light of Article 7 of Directive 2005/29.
66. It is important to consider that Article 7(3) of Directive 2005/29 states that, where the medium used to communicate the commercial practice imposes limitations of space or time, those limitations and any measures taken by the trader to make the information available to consumers by other means are to be taken into account in deciding whether information has been omitted.
67. The guidance provided by that provision relating to the factors to be taken into account in order to ascertain whether the commercial practice must be categorised as a misleading omission apply to the invitations to purchase referred to in Article 7(4) of that directive.
68. The extent of the information relating to the price will be established on the basis of the nature and characteristics of the product, but also on the basis of the medium of communication used for the invitation to purchase and having regard to additional information possibly provided by the trader.
69. A reference only to an entry-level price in an invitation to purchase cannot therefore be regarded, in itself, as constituting a misleading omission.
70. It is for the national court to ascertain whether a reference to an entry-level price is sufficient for the requirements concerning the reference to a price, such as those set out in Article 7(4)(c) of Directive 2005/29, to be considered to be met.
71. The national court will have, *inter alia*, to ascertain whether the omission of the detailed rules for calculating the final price prevents the consumer from taking an informed transactional decision and, consequently, leads him to take a transactional decision which he would not otherwise have taken. It is also for the national court to take into consideration the limitations forming an integral part of the medium of communication used; the nature and the characteristics of the product and the other measures that the trader has actually taken to make the information available to consumers.
72. Consequently, the answer to the seventh question is that Article 7(4)(c) of Directive 2005/29 must be interpreted as meaning that a reference only to an entry-level price in an invitation to purchase cannot be regarded, in itself, as constituting a misleading omission. It is for the national court to ascertain whether a reference to an entry-level price is sufficient for the requirements concerning the reference to a

price, such as those set out in that provision, to be considered to be met. That court will have to ascertain, *inter alia*, whether the omission of the detailed rules for calculating the final price prevents the consumer from taking an informed transactional decision and, consequently, leads him to take a transactional decision which he would not otherwise have taken. It is also for the national court to take into consideration the limitations forming an integral part of the medium of communication used; the nature and the characteristics of the product and the other measures that the trader has actually taken to make the information available to consumers."

II. COMMENTS

Anne-Lise Sibony[7]

§1. Introduction

1. The *Ving* case invites reflection on several questions examined in the scholarship of Jules Stuyck. As with many others, this judgment illustrates an attempt to strike a balance between the rights of traders – whose freedom of commercial expression is largely preserved by the judgment –, the rights of consumers not to be misled by the omission of some material information and the goal of fair competition in the market.[8] This judgment also offers food for thought as to whether the interpretation of EU consumer law could benefit from the insights of behavioural sciences, and, if so, how; huge questions which Jules Stuyck and his co-authors have raised,[9] but which are still largely unexplored and unresolved. I will now focus on this aspect of the judgment, likely asking more questions than I can answer, but in the hope that Jules Stuyck and other readers of this volume will continue to develop the discussion.[10]

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8 J. Stuyck, "Consumer Protection and Fair Competition – One Fight?" in L. Thévenoz and N. Reich (eds), *Droit de la consommation – Konsumentenrecht – Consumer Law. Liber Amicorum Bernd Stauder* (Baden-Baden/Geneva: Nomos/Schultess, 2006), pp. 497–509; J. Stuyck, "The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotions and the Law of Unfair Competition" in S. Weatherill and U. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Oxford: Hart Publishing, 2007) pp. 159–174.

9 J. Stuyck, E. Terryn, and T. Van Dyck, "Confidence through fairness? The new directive on unfair business-to-consumer practices in the internal market", 43 *Common Market Law Review* (2006), pp. 107–152 at pp. 125–126 (pointing out that the interest of psychologists for consumer decisions goes back to the 1930s).

10 On the need to go beyond the *homo economicus* paradigm in consumer law, see J. Stuyck, "The Unfair Commercial Practices Directive and its Consequences" above footnote 8, at p. 172.

§2. *How do consumers make a decision to purchase and should the Court care?*

A. The information paradigm and its limits

2. EU consumer law rests on an information paradigm.[11] It assumes that information matters and, what is more, that information is all that matters. This information-*über alles*-orientation is apparent from the numerous information requirements contained in existing legislation[12] as well as in instruments currently being discussed, such as the regulation on common European sales law (CESL).[13] In the *Ving* case, this trait is illustrated explicitly in the Opinion of Advocate General Megozzi and by omission in the judgment. The Advocate General writes that the trader should be allowed to offset the limitation of the medium used for commercial communication by referring consumers to its website provided all required information is to be found on the website.[14] "In the midst of all these fluctuating criteria", writes the Advocate General (referring to context, nature of the product, means of communication used), "there is one constant: in all cases, the consumer must remain in a position to take a decision in full *knowledge* of the facts".[15] Going beyond the *Ving* case, in which this was not material, this language suggests that no attention will be paid to how difficult it is to find the relevant information on the trader's website. The same impression is conveyed in another passage of the Opinion, regarding the obligation to state the price under Article 7(4). In this context, the Advocate General reasons that mentioning only an entry-level price satisfies the requirement of Article 7(4)c "provided that the site actually allows the consumer to access the reference [*i.e.* the extra information necessary to calculate the price]".[16] Anyone who has struggled to discover how to get rid of unwanted travel insurance services on the website of certain airline operators will appreciate that it is not only that the information *can* be found *somewhere* on the trader's website that matters.[17] Salience matters.

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11 J. Stuyck, E. Terryn, and T. Van Dyck, above footnote 9, at p. 108 and references cited.

12 To cite only Directive 2011/83/EU on consumer rights, OJ 2011 L 304, 64–88, see Art. 5 and 6 and comments, notably: J. Stuyck, "La nouvelle directive relative aux droits des consommateurs", *JDE* 2012, no 187, pp. 69–75; S. Weatherill, "The Consumer Rights Directive: How and Why a Quest For "Coherence" Has (Largely) Failed", 49 *CMLRev* (2012), pp. 1279–1318.

13 Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, see in the main text Articles 9 and 12 (referring to the services directive) and, in the annex, Article 13 to 20.

14 Opinion, para 52.

15 Opinion, para 52 (my emphasis).

16 See also para 63 of the Opinion 'provided that the site actually allows the consumer to access the reference'.

17 Creative compliance with the prohibition of pre-ticked boxes for insurances services includes hiding the 'no insurance' option in a menu containing numerous options and which is not

3. It is hard to infer from the *Ving* judgment where the Court might stand on this issue of ease of access to information. The issue is simply not considered and would be left to national courts. One may, however, observe that the wording chosen by the Court, which is less precise than that of the Opinion, leaves more room for the national judge to consider not only *if* but also *how* the trader makes available on his website the information which is not presented on the invitation to purchase. The relevant paragraph of the judgment reads as follows:

> "The national court will have, *inter alia*, to ascertain whether the omission of the detailed rules for calculating the final price prevents the consumer from taking an informed transactional decision and, consequently, leads him to take a transactional decision which he would not otherwise have taken. It is also for the national court to *take into consideration* the limitations forming an integral part of the medium of communication used; the nature and the characteristics of the product and *the other measures that the trader has actually taken to make the information available to consumers*."[18]

In my view, this allows the national court to consider the steps that the trader has "actually" taken to make some of the information which is present on its website accessible only with difficulty. Such an interpretation of the ruling is in line with the spirit of the UCPD and the wording of Article 7 (2), which provides that the notion of misleading practice extends to the case where the material information required under paragraph 1 is provided but "in an unclear, unintelligible, ambiguous or untimely manner". In other words, despite the traditional focus of EU consumer law on what information should be given, it is possible for national courts to consider how it is given.[19] This would in principle be commendable: both common sense and behavioural sciences suggest that humans, as opposed to *homo œconomici*, are very sensitive to how information is presented to them.[20]

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presented as a menu of choices on insurance. The strategy consists in bundling the choice of insurance with the choice of other features such as the choice of a particular seat on a plane.

18 Judgment, para 72.

19 A separate point concerns who should be giving the information. In this regard, the Advocate General stresses that it is not enough that the relevant information is made available by a consumer association; it is for the trader himself to give all the material information (Opinion, para 61).

20 On how humans behave differently from 'econs', see C. Sunstein and R. Thaler, *Nudge: Improving decisions about health, wealth and happiness* (New York: Penguin, 2009), part I. See also D. Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: Harper Collins, 2008) and, for a marketing perspective, R.B. Cialdini, *Influence: The Psychology of Persuasion* (New York: HarperCollins, 2007, 3rd ed). One well-studied example of how people decide differently according to how information is presented to them is called the framing effect. It refers to the fact that people react differently to a particular choice depending on whether it is presented as a loss or as a gain. In the classic example, used by Kahneman and Tsversty in their seminal article, participants were asked to choose between two treatments for 600 people affected by a deadly disease. Treatment A was predicted to

B. The relevance of behavioural arguments in consumer law

4. Behavioural arguments have a place in consumer law. The *Ving* case illustrates it in relation to unfair commercial practices. The issue of how the law should apprehend the relationship between information and decision surfaces in the discussion of the proper construction of the notion of "invitation to purchase". The definition contained in the directive links the presence of information on price and product characteristics to the fact that the consumer is "enabled to make a purchase". As seen above, the precise question before the Court was whether "enabled" in this context meant that the consumer must be given a practical means to effect the purchase and the Court answered it in the negative. It follows from this interpretation that what matters for the purposes of assessing whether a commercial communication is an invitation to purchase is not that the consumer can *buy* a product directly, but that he can *decide to buy*. When applying this definition, national courts will therefore be confronted with nothing less than the issue of how we decide.[21] This is of course an extremely vast – and growing – area of scientific research and it cannot reasonably be expected of courts that they possess state-of-the Art knowledge on how the human brain reacts to all sort of cognitive, sensory and emotional stimuli that affect decision-making. Yet, basic tenets of behavioural science can be explained to the layman and therefore to judges and this may be enough to inform legal interpretation.

5. If the use of psychology in consumer law is in any way similar to the use of economics in competition law, then courts will not need to be experts in behavioural studies or neuroscience. They will be able to rely on categories, distinctions and typical reasoning patterns to shape their interpretation of the law.[22] In my view, there are good reasons to believe that the ways in which

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result in 400 deaths, whereas treatment B had a 33% chance that no one would die but a 66% chance that everyone would die. This choice was then presented to participants either with positive framing, i.e. how many people would live, or with negative framing, i.e. how many people would die. Treatment A was chosen by 72% of participants when it was presented with positive framing ("saves 200 lives") dropping to only 22% when the same choice was presented with negative framing ("400 people will die"). A. Tversky and D. Kahneman, "The framing of decisions and the psychology of choice", 211 *Science* 4481 (1981), pp. 453–458, doi:10.1126/science.7455683. This effect was also shown in other contexts. Marketers rely on many variations of framing effects to induce purchasing decisions by presenting options in a way that will induce more frequent choice of certain options (e.g. on a restaurant menu, choice of the dishes that are neither the cheapest nor the most expensive). See R. Dooley, *Brainfluence: 100 Ways to Persuade and Convince Consumers with Neuromarketing* (Hoboken, NY: John Wiley & sons, 2012) at 22 "Decoy Products and Pricing".

21 J. Lehrer, *How We Decide* (Boston: Houghton Mifflin Hartcourt, 2010). In this book, the science journalist, J. Lehrer, gives a very accessible account of the main teachings of neuroscience on decision-making.

22 On the basic legal techniques used to incorporate basic economic insights into the interpretation of competition law, A.-L. Sibony, "Limits of Imports from Economics into

scientific insights are integrated into law are analogous across fields of law and across sciences. This is because law is low tech: there is only a limited number of legal techniques available to incorporate any argument or idea, whatever its origin (scientific or not), into judge-made law. Therefore only those types of insights that can be given a legal translation through existing judicial techniques – such as, assigning the relevance of a fact, designing a legal test or creating a presumption – will be processed by courts.[23] Processing basic teachings of behavioural sciences in the case law on unfair commercial practices will certainly take time, but it is an endeavour worth pursuing. The law of unfair practices seeks to protect consumer decision-making against certain kinds of influence. Marketers are the engineers of influence and they rely on what is known about influencing mechanisms. It simply seems unreasonable for the law to lag behind and continue to ignore relevant scientific knowledge about the phenomena it seeks to regulate.

6. In order to first illustrate the sort of issues at the crossroads of consumer law and behavioural sciences, let us take an example from the *Ving* case. When considering the definition of an initiation to purchase, the Court encounters a very fundamental point of common interest to lawyers, behavioural scholars and marketers. It concerns the impact of information regarding price and product characteristics on the decision to purchase. In its observations, the UK Government noted that this impact can be variable and submitted that "the impact of the commercial communication on the decision to purchase […] has to be evaluated".[24] As it is presented in the Opinion, the argument seems to have been motivated by the desire to allow traders to plead that their commercial communication only had an insignificant impact on the decision of the average consumer to purchase a good or an impact which is too remote or uncertain to be material.[25] The underlying preoccupation of the UK Government was to strike a balance between traders' prerogative and consumers rights that would not disadvantage business. The Court did not go into the remoteness argument or, for that matter, into any analysis of causal links between information received – or perceived – by the consumer and his decision. However, nothing in the Court's findings rules out the possibility that similar arguments could be raised before national courts. When deciding whether the information contained in a commercial communication is capable of causing the average consumer to take a decision to purchase, national courts may therefore have to face arguments on

Competition Law" in I. Lianos and D. Sokol (eds), *The Global Limits of Competition Law* (Stanford: Stanford University Press, 2012), pp. 39–53.

23 For an elaboration, see A.-L. Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (Paris: LGDJ, 2008). More generally on how law can make sensible use of science, see R. Feldman, *The Role of Science in Law* (New York: Oxford University Press, 2009).

24 Opinion, para 40.

25 Ibid.

the actual effect of particular items of information contained in (or omitted from) a commercial communication. It is to be expected that courts will try to avoid gauging the actual impact of commercial information on consumer decisions. Both the standard of the average consumer in consumer law[26] and the more general tradition of abstract assessment of effects in EU law – whether in the field of internal market or competition law – would seem to point in this direction.[27] Even if courts refrain from conducting an exceedingly difficult case-by-case factual assessment, they will still need a model to think, in general terms, about how consumers process information.

C. Behavioural insights and their legal implications: an example

7. One insight which deserves consideration when elaborating such a model is the decision to purchase as the result of two countervailing forces: on the one hand, the desire for an object and, on the other, the little reasonable voice in the back of the consumer mind which, when not silenced, asks such questions as "is this not too expensive for what it is?", "can I afford it?", "do I really need/want this?".[28] In *How We Decide*, Jonah Lehrer gives the following account of how neuroscientists view consumer decisions:

> "Seeing a desirable object triggers activation of the nucleus accumbens.[29] Looking at the price tag on the other hand activates the insula[30] (always unpleasant) and the prefrontal cortex.[31] By looking at relative activity in each brain region, scientists

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26 Recalled in the *Ving* judgment at paras 22–23. On the average consumer standard, see in particular S. Weatherill, "Who is the average consumer" in S. Weatherill and U. Bernitz, *The Regulation of Unfair commercial practices under EC Directive 2005/29: New Rules and New Techniques* (Oxford: Hart Publishing, 2007), pp. 115–138; V. Mak, "Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights Directive", *ERPL* (2011), pp. 25–42.

27 In the field of internal market, the *Dassonville* formula encapsulates this abstract approach: the test for a measure having equivalent effect is whether it is "capable of hindering, directly or indirectly, actually or potentially, intra-community trade" (Case 8/74, *Dassonville*, [1974] ECR 837; in competition law see, e.g., Case T-25/05, *KME*, [2010] ERC II-91*, para 68 and case law cited (abstract approach of the effects of a cartel); Case T-219/99, *British Airways v Commission,* [2003] ECR II-5917, paras 293–294 and 297 (abstract approach of the effect of an abuse of a dominant position).

28 See J. Lehrer, above footnote 21, esp. Chapter 7 "The Brain Is an Argument". "Argument is a defining feature of our decision making process" writes Lehrer. "It works like an internal neural competition in which stronger emotions and more compelling thoughts win over weaker ones" (199).

29 The nucleus accumbens is an area of the brain (or rather two areas, as there is one in each hemisphere) involved inter alia in reward and pleasure [footnote added].

30 Insula is involved among others in self-awareness and cognitive functions [footnote added].

31 The prefrontal cortex is a brain region implicated in planning complex cognitive behaviour, decision-making and moderating social behaviour. The basic activity of this brain region is considered to be orchestration of thoughts and actions in accordance with internal goals [footnote added].

> could accurately predict the purchase decision the subject was about to take. Prefrontal cortex seems to be a spectator watching the tug of war between insula and nuccleus accumbens."

Such an account is disturbing for the rationalist model implicitly incorporated in the UCPD and consumer law more generally. It does not account for rational calculation but for a very different mechanism, namely a pleasure/pain trade off, which is "outsourced to our emotional brain".[32] "This is why", Lehrer concludes, "attempts at rationalising consumer choices are misleading: we don't make shopping decision by rationally looking at a series of properties of the various goods".[33] These insights from neuroscience are used in marketing,[34] so that it is worth considering whether the law of unfair trade practices, which regulates marketing practices, should also draw on behavioural knowledge.

8. For example, would information requirements about product characteristics and price need to be reconsidered in light of the above characterisation of the decision-making process? If it is envisaged that information is not processed rationally but, in whole or in part, emotionally, then what matters is not the informational content as such, but the impact of information on both the desire for an object and the countervailing forces within the consumer's brain. From this perspective, the aim of disclosure requirements could be thought of as ensuring a form of equality of arms between the lawyer for the purchase and the lawyer for budget balance within the consumer's brain. If, for the sake of discussion, one pushes this trial analogy one step further, it would be possible to envisage fairness in the context of UCPD as procedural fairness within the brain. The implications of such a neuro-procedural notion of fairness would need to be worked out. Questions to explore include whether it would be desirable and possible to design a legal test for misleading practices that would balance the pro-buying effect of information on product characteristics and the pro-frugality effect of information on price. Providing only partial information could still be legal, as the Court held in *Ving*, but the question asked would be informed by the notion that price information and product information are used in a balancing exercise. As such, this is common sense as much as neuroscience: scientists may tell us about the brain circuits processing each type of stimuli and emotion, but the man in the street knows that what matters is value for money. Where the science might be able to help refine the legal test is in providing factual knowledge, about the types of stimuli that are harder to resist, because they rely

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32 J. Lehrer, above footnote 21, at p. 200.

33 J. Lehrer, above footnote 21, at p. 201.

34 See R. Dooley, above footnote 20; M. Lindstrom, *Buy.ology: Truth and Lies about Why We Buy* (New York: Broadway books, 2008); P. Renvoisé and C. Morin, *Neuromarketing: Understanding the Buy Buttons in Your Customer's Brain* (Nashville: Thomas Nelson, 2007); P. Georges and M. Badoc, *Le Neuromarketing en Action* (Paris: Eyrolles, 2010).

on automatic processes rather than cognition.[35] If existing behavioural knowledge bears out such generalisations, it is conceivable that information about product characteristics delivered in a particularly powerful form, such as a smell of hot croissants, could trigger a more demanding assessment regarding price information.[36]

9. Opening the legal discussion to scientific insight could, in this vein, help move beyond the information paradigm, shifting the focus from informational content to the probable effect of information given how it is likely to be processed. More generally, if behavioural science enters the legal debate on unfair commercial practices, it could serve to broaden the focus beyond information altogether. Indeed, many marketing practices do not consist in framing information in a particular way but, more directly, seek to create emotions by relying on visceral reactions to sensory stimuli – smell, touch or sounds – that do not describe the product or say anything about its price and yet influence buying behaviour.[37]

D. Behavioural sciences and fairness

10. Arguably, adding a behavioural dimension to the protection of consumers against unfair practices would not, in and of itself, solve the normative issues involved in determining what influence is unfair. As Jules Stuyck and his co-authors have remarked, these are difficult issues: the line between permissible and unfair influence is a hard one to draw.[38] Science can tell us what causes influence, what are the influencing mechanisms marketing techniques rely on, it can perhaps shed light on the magnitude of influencing effects, but it cannot tell us what the law should deem unfair. This, however, is no reason to ignore the science that informs marketing practices. A better understanding of the phenomena that the UCPD seeks to regulate may not simplify the discussion on fairness, but can help bring to the fore normative issues that will need to be considered if and when

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35 This applies to words, such as "free" or "new" (Dooley, above footnote 20, at p. 64; more generally, word use see Renvoisé and Morin, above footnote 47, at p. 65 et seq.), but also sensory stimuli, such as smells or colours.

36 On the power of scents, see "Scents and sensitivity: Subliminal smells can have powerful effects", *The Economist*, 6 December 2007, www.economist.com/node/10250329 [last accessed 1 July 2013]. On the inexact science of scent marketing, S. Dowdey, "Does what you smell determine what you buy?", http://money.howstuffworks.com/scent-marketing.htm [last accessed 1 July 2013].

37 On the effect of touch, see D.E. Smith, J. Gier, and F.N. Willis, "Interpersonal touch and compliance with a marketing request", 3 *Basic and Applied Social Psychology* (1982), pp. 35–38; J. Hornik, "Tactile stimulation and consumer response", 19 *Journal of Consumer Research* (1992), pp. 449–458.

38 J. Stuyck et al., above footnote 9, at p. 127: "In many cases, the line between 'persuasion' and 'appreciable impairment' will be very thin".

the question of the unfair character of neuro-marketing practices will be raised.[39] Exploring the potential of a neuro-procedural view of fairness would add a new dimension to the existing debate, as it cuts across the opposition between a (European) economic view of fairness as an adjuvant of competition and (national) views of fairness as a moral and cultural standard.[40] At present, the idea that an unfair commercial practice could perhaps be defined as a practice that tampers with consumers' emotions in a way that the cognitive system cannot override is equally foreign to all legal systems. It does not mean that it is a good idea, only that it is not loaded with implicit normative content specific to a national legal tradition. In other words, the debate on whether the interpretation of the autonomous notion of fairness under EU law could engage with science can be clearly distinguished from the debate on the type and intensity of harmonisation in consumer law.

E. Are behavioural sciences dangerous?

11. At this point, the reader may think that I am presenting Jules Stuyck with Pandora's box wrapped in a case note. I confess to not having checked every corner of this box of behavioural insights. And yet I am prepared to say that it should not be equated too lightly with all the evils of the world.[41] In particular, the evil of subjectivity, evoked by Advocate General Mengozzi in his Opinion in the *Ving* case, need not be part of the behavioural package lawyers could draw on when interpreting and applying the UCPD. "It is difficult, in my opinion", writes the Advocate General, "to make the definition of an autonomous concept of European Union law dependent on *subjective* elements, such as the psychological parameters peculiar to each individual which will prompt that person to decide, at a given time, to buy, or not to buy, such or such product".[42] I agree. The misleading character of a practice needs to be ascertainable without expert reports on the psychology of the aggrieved consumer. This does not imply, however, that psychology cannot contribute to the interpretation of the UCPD.[43] The way in which psychology can be brought to bear on consumer law is not by

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39 N. Lee, A. Broderick, and L. Chamberlain, "What is 'neuromarketing'? A discussion and agenda for future research", 63 *International Journal of Psychophysiology* (2007), pp. 199–204; R. Wilson, J. Gaines, and R. Hill, "Neuromarketing and Consumer Free Will", 42 *The Journal Of Consumer Affairs* (2008), pp. 389–410; C. Morin, "Neuromarketing: The New Science of Consumer Behavior", (2011), DOI 10.1007/s12115–010–9408.

40 On which, see H.-W. Micklitz, "Unfair Commercial Practices and Misleading Advertising" in H.-W. Micklitz, N. Reich, and P. Rott, (eds), *Understanding Consumer Law* (Antwerp: Intersentia, 2009), pp. 62–117, at pp. 82–84.

41 In the Greek myth, Pandora, who was the first woman on earth, receives a jar which she is not to open. This is the vengeance of Zeus after Prometheus stole the fire from heaven. Pandora, nagged by her curiosity (instilled in her by the gods), opened it, and all evil contained therein escaped and spread over the earth.

42 Opinion, para 44.

43 A.-L. Sibony, "Making Sense of Directive 2005/29/EC on Unfair Practices: Can Psychology Help?", IEJE Working paper, 2011, http://orbi.ulg.ac.be/handle/2268/101437.

appraising individual character, it is by providing insights into universal mechanisms that link stimuli (that can be manipulated by traders) and consumer behaviour. If such insights can be translated as rules of thumb – such as, for example "oxytocin generally causes people to be more trusting than they otherwise would"[44] – those rules will be usable by courts in the form of presumptions. The presumption in this example, if acceptable to scientists,[45] would be useful as the practice of spraying oxytocin, for example in casinos, is not caught by any of the 31 black-listed practices in annex I of UCPD.[46] Its operation would not require any investigation of individual gambler's psychology.

F. What can lawyers reasonably expect from behavioural sciences?

12. A reasonable hope for the dialogue between the law of unfair practices and behavioural sciences is that it can, in time, help to produce acceptable generalisations that will allow courts to take better account of the context in which consumer decisions occur. The law as it stands does require that context be taken into account. Article 7 (1) UCPD defines the misleading character of a commercial practice as a matter of context. It provides that "a commercial practice shall be regarded as misleading if, *in the factual context*, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the consumer needs, *according to the context*, to take an informed transactional decision". Similarly, Article 7(4) lists as material information – which must therefore be disclosed in an invitation to purchase – the main characteristics of the product *to an extent appropriate to the medium and to the product concerned*, *when not already apparent from the context*. Context is therefore not absent from the law, but is considered within the information paradigm: what seems to be assumed by the EU legislature is that the nature of the product governs how much information the consumer needs and that the medium chosen governs how much information can be given. This is in accordance with

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44 Oxytocin has been colloquially described as the "love hormone". It is naturally released by mothers during lactation and by both men and women during sexual intercourse. It is thought to play a role in the bonding between mother and child and in connecting more generally. For a short and accessible account, see, e.g., M. Delgado, "To Trust or Not to Trust: Ask Oxytocin", *Scientific American*, July 15 2008, www.scientificamerican.com/article.cfm?id=to-trust-or-not-to-trust [last accessed 1 July 2013]. Neuro-economic experiments have shown that variation in oxytocin levels correlate well with level of trust. P. Zak, *The Moral Molecule: the New Science of What Makes us Good or Evil* (London: Transworld publishers, 2012). For a mini conference on the topic, P. Zak, "Trust, morality – and oxytocin?", *Ted talk* (November 2011) www.ted.com/talks/paul_zak_trust_morality_and_oxytocin.html [last accessed 1 July 2013].

45 This links up with the debate about how courts assess scientific robustness of a proposal. In most EU jurisdictions, there are no explicit admissibility standards comparable to the Daubert rules. On how this issue is dealt with under French law, see O. Leclerc, *Le juge et l'expert* (Paris: LGDJ, 2005).

46 P.-Y. Lin et al. (2013), "Oxytocin Increases the Influence of Public Service Advertisements", PLoS ONE 8(2): e56934.doi:10.1371/journal.pone.0056934.

common sense. Complex products such as computers or package holidays are multidimensional. There is simply more information to give about these products than about simple products. While there is not so much to say about a shovel (the consumer will of course want to know whether it is a toy or a gardening tool, but this will generally be apparent from context), it is to be expected that a consumer will have more questions about a computer or a package holiday. He will want to know how much data can be stored in the computer and what software can run on it, or whether the hotel room has a sea view, and much more. Equally, it is obvious that the quantity of information that can be communicated depends on material constraints. Evidently, a tweet can contain less information than a video; an advertisement occupying less than a quarter of a page of a daily newspaper cannot possibly be as details as a promotional brochure. The way in which context is taken into account in the UCPD therefore makes sense. This is also true of other consumer law instruments, such as the directive on consumer rights, which contain requirements that mandatory information is disclosed in a "clear and legible"[47], "clear and comprehensible"[48] or in in a "clear and prominent"[49] manner.

13. However, the way in which context is taken into account is at the same time very partial. For example, the fact that choice can be overwhelming and that marketing practices can engineer choice fatigue[50] does not seem to be adequately addressed by the law as it stands. As Stephen Weatherill has remarked, "it is well understood that consumers readily and rationally choose not to absorb all information on offer",[51] yet EU law tends to be "fetishistic"[52] with information requirements that ignore context. More generally, the assessment of misleading practices would gain from the recognition that information is processed selectively and context influences the selection. Elaborations on this simple principle constitute the basis of marketing. They should form part of the analytical grid for the assessment of marketing practices. This would lead to enlarge the current focus on content. When it comes to consumer choice, context matters not only to determine what information is needed and what quantity of information can be provided. Context matters to understand how information shapes decision. This is of importance to lawyers as the link between information and decision is precisely at the core of the notion of misleading practice and, to a large extent, unfair practice more generally. While it is beyond the scope of this

47 Recital 38 of Directive 2011/83/EU on consumer rights, OJ 2011 L 304, 64–88.

48 Recital 34, Articles 5 and 6 of Directive 2011/83/EU on consumer rights. A similar requirement for information being provided in a 'clear and intelligible' manner in Articles 11, 20, 25 (3) of the proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

49 Art. 8 (2) of Directive 2011/83/EU on consumer rights. See also Art. 25 (1) of the proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

50 R. Dooley, above footnote 20, at p. 29.

51 S. Weatherill, above footnote 12, at p. 1294.

52 Ibid.

contribution to identify all behavioural insights that may have legal relevance for the appraisal of context of consumer decisions, it is possible to identify on the basis of *Ving* case some avenues for further analysis.

14. When one reads this judgment, it is striking that two factors that affect behaviour are left outside the scope of the analysis.[53] One has already been mentioned above: it concerns micro-obstacles or costs that stand in the way of access to information not given in the advertisement, such as unclear websites.[54] Should consumer protection take into account such practicalities as the need to use a specific device – different from the device on which the advertisement can be seen, heard or watched – in order to access the information needed to "counterbalance" the effect of the advertisement? Should it go as far as requiring that consumers be nudged into being diligent and attentive? Another element that does not command much attention in the *Ving* case but that could be more important in other cases is timing.[55] The UCPD itself contains refers to the effect of timing in the definition of misleading practices: Article 7(2) makes clear that when a trader provides all the required information but does so in an "unclear, unintelligible, ambiguous or *untimely* manner"[56], this constitutes a misleading practice.

15. Psychology can help shed light on the effect of timing on consumer decisions. Many influencing technique studied in experimental social psychology rely on a sequence. This is the case of bait & switch, which is *per se* prohibited,[57] but also "foot-in-the-mouth", "door-in-the-face" or "low ball". All of these techniques rely on the succession of two phases and their efficacy rests on the emotion or disposition triggered in the first phase and leveraged in the second. Foot-in-the mouth consists, in the first stage (priming), in presenting a small request. Only after the request has been accepted and completed a second – larger request is made.[58] "Door-in-the-face" is the opposite: it consists in first presenting a large request followed by a small one. When the first request is so

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53 This is not a criticism of the judgment as these factors were not necessarily relevant to the referred questions. For present purposes, reference to the *Ving* judgment, now familiar to the reader, is a matter of convenience.

54 What I call micro obstacles (and associated coginitive or emotional costs) are what nudges help overcome. See C. Sunstein and R. Thaler, above footnote 20.

55 In fairness, the time element is not completely ignored: Advocate General does note that a decision to purchase does not necessarily happen in a moment. Opinion, para 43.

56 My emphasis.

57 Annex I, pt 5, "Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered".

58 J.L. Freedman and S.C. Fraser, "Compliance without pressure: the foot-in-the-door technique", 4 *Journal of Personality and Social Psychology* (1966), pp. 195–202.

costly that subjects are very likely to refuse, and do refuse before being presented with a smaller request.[59] In low-ball, a requester induces a subject to accept a request and only then reveals hidden costs of performing this behaviour.[60] All of these two-phase influencing techniques have been shown to be effective.[61] While these results have been obtained in non-commercial contexts (the typical psychology experiment is staged in a campus setting and the target behaviour is volunteering for a task rather than marking a transactional decision), there may be a general lesson to learn for the appraisal of commercial practices, namely the relevance of the time architecture of a practice for its effectiveness. Subject to more studies to confirm this insight in commercial context, this and other insights on how time or succession of stimuli affects choice could help refine the legal test for misleading practices under the UCPD.

The silences in the *Ving* judgment inspire one last remark. In his Opinion, the Advocate General invites the referring courts to duly consider the argument of the defendant, according to whom price of a package holiday depends on factors that are familiar to the average consumer. One assumes that this relates for example to the duration of the stay. It is indeed reasonable to consider that the average consumer will *know* that the price of a package holiday depends on

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59 R.B. Cialdini et al., "Reciprocal concessions procedure for inducing compliance: The door-in-the-face technique", 31 *Journal of Personality and Social Psychology* (1975/2), pp. 206–215. In this study, the large request consisted asking the subject to volunteer to help delinquent juveniles for two years, the small request was to chaperon a group of under-privileged children for one visit to a zoo. A. Pascual and N. Guéguen, "Door-in-the-face technique and monetary solicitation: an evaluation in a field setting", 103 *Perceptual and Motor Skills* (2006), pp. 974–978. This study was staged in bars. A girl asked other consumers if they could pay for the drink her boyfriend had not paid before leaving the bar (explaining she didn't have enough money to pay his drink). After the subject refused, the girl asked for some change to contribute to the unpaid bill. The study showed that this works better than directly asking for change.

60 The seminal article on low ball is R.B. Cialdini et al., "Low-Ball Procedure for Producing Compliance: Commitment then Cost", 36 *Journal of Personality and Social Psychology* (1978/5), pp. 463–476. The experimental design was the following: students were asked to participate in an experiment. Some (control group) were told initially that this experiment would require their presence at the lab at 7 am. Others were told about this inconvenient time only after they had accepted to take part (low-ball condition). The result was that members of the second group generally did not take their word back, even though they might not have accepted if they had known from the start that they would have to get up so early. In a more recent study on the same technique, authors have carried out a field experiment (i.e. they did not stage the experiment in a campus setting, which is practical for academics running the experiments but where there may be biases due to the fact that subjects are all students). People at the entrance of a hospital building were asked if they could mind a dog while the dog owner visited a patient. Only after they had accepted were they told that the visit would take about half-an-hour. Again, it was shown that using the low ball technique was much more effective than asking people directly if they would mind a dog for half- an hour. N. Guéguen, A. Pascual, and L. Dagot, "Low-ball and compliance to a request: an application in a field setting", 91 *Psychological Reports* (2002), pp. 81–84.

61 For non technical accounts of research in this field see R.V. Joule and J.-L. Beauvois, *Petit traité de manipulation à l'usage des honnêtes gens* (Grenoble: Presses universitaires de Grenoble, 2002); O. Corneille, *Nos préférences sous influence* (Wavre: Mardaga, 2010).

the number of hotel nights. Yet, this *knowledge* does not necessarily preclude that the advertisement has an *emotional* impact on the intention to buy (this is precisely what the seller relies on). If, as suggested in the first part of the judgment, the law of unfair practices takes an interest in how a commercial practice impacts the internal decision procedure of consumers, it might take inspiration from a line of reasoning that has been suggested in the context of consumer contracts by Oren Bar-Gill: practices that organise a misperception of true costs through framing or sequencing of price information exploit universal biases in consumer perception.[62] They induce over-consumption and impact both consumer welfare and competition. The normative implication for disclosure requirement is that traders should be mandated to disclose statistically important information and, when possible, personalised information about consumption (such as consumption of mobile communications for example).[63]

Transposed to the facts of the *Ving* case, this line of thought could have led to recommend that Ving discloses the price of a stay of the average length rather than a 2-night-stay – which is probably well below average for a transatlantic city trip. The judgment leaves room for the national court to apply such a rule. Of course various objections could be raised against this rule. On a practical level, it could be argued that the proposed rule would be difficult to monitor. Where would the figures for average duration of the stay come from? Would the travel agency be able to rely on its own data? Would it need to use industry wide data if available (on certain markets, this could raise competition issues)?[64] Would a Swedish travel agency have to base its advertisement on the average duration of the stay of tourists travelling from Sweden to New York? Or on the average duration of stays of European tourists in New York? Such complexities may seem daunting at first glance. On the other hand, it might be argued that national courts deal with similarly complex issues of appraisal on a daily basis. A different objection could be that the rule would upset the balance between the rights of traders to influence consumers (which is probably a key element for growth in already sluggish economy), consumer protection and fair competition among traders. This debate is inherent to the law of unfair practices and will be re-enacted in nearly every case. My point is only that, in this debate, consumer protection should not be envisaged exclusively from cognitive point of view (what consumers *know*), but open up to how consumers are known to *behave*.

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62 O. Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* (Oxford: Oxford University Press, 2012).

63 O. Bar-Gill, above footnote 62, at 37.

64 On the link between competition law, law of unfair competition and consumer law of unfair commercial practices, see J. Stuyck, above footnote 8.

§3. *Conclusion*

The *Ving* judgment is unremarkable. It features typical elements of the current state of EU consumer law on unfair commercial practices. In the judgment, the Court gives a broad interpretation of the notion of "invitation to purchase" and thus wide scope to the information requirement imposed on traders by Article 7(4) UCPD. It leaves it to the national court to decide whether the practice at stake is misleading or not and its guidance is inspired by the information paradigm. In this comment, I have tried to outline both the appeal and the challenges of a change of approach. In the law as it stands, there are openings to a more behaviourally-informed approach to consumer protection: UCPD does not ignore the importance of clarity, timeliness or salience of information. This potential can be developed if parties and their lawyers bring before national courts arguments about how commercial practices impact decisions. This does not require major scientific education on the part of lawyers or courts. Law can only incorporate general insights and these are made available to anyone who cares to read books popularising the main schools of thought on behavioural sciences.

What is ultimately at stake in such a development is not more consumer protection but more effective consumer protection. Marketing relies on the teachings of psychology and other behavioural sciences to influence consumer choice. It seems unreasonable for the law of unfair commercial practices, which seeks to regulate marketing practices, not to draw more on scientific insights that shed light on why, how and how well influencing practices work. The information paradigm limits the scope of enquiry to cognition (and treats it like a black box) when we know that decisions owe a lot to emotions. The average consumer ought to be seen not only in the light of what the average person knows or should know. Rather, if "the average consumer" is to become a more meaningful and apt standard, it should incorporate the knowledge that experimental psychology and other behavioural sciences (behavioural economics, neuro-economics) have accumulated about how decisions are formed. While science does not have a ready-made portrait of the average consumer or a new and better legal test for misleading or for unfair practices, science has something to say to lawyers who research these questions.[65] More work is needed to transform existing knowledge into legal arguments. As Jules Stuyck knows, this is a good place for legal scholarship and litigation to meet.

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[65] For converging points of view, see: R. Incardona and C. Poncibó, "The average consumer, the unfair commercial practices directive, and the cognitive revolution", 30 *J Consum Policy* (2007), pp. 21–38; J. Trzaskowski, "Behavioural Economics, Neuroscience, and the Unfair Commercial Practises (sic.) Directive", 34 *J Consum Policy* (2011), pp. 377–392; A. Nordhausen Scholes, "Behavioural Economics and the Autonomous Consumer", *Cambridge yearbook of European legal studies*, Vol. 14 (Oxford: Hart Publishing, 2012), pp. 297–324.