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Law and Philosophy Library 86

Reasonableness and Law

Springer

materially distort the economic behaviour" of the consumer (Article 5 of Directive 2005/29/CE).

Therefore, a consumer can seek an injunction against a trader even if there is only a risk that an unfair commercial practice could appreciably curtail the consumer's freedom of choice, "thereby causing the consumer to take a transactional decision that he would not have taken otherwise" (Article 2(e) of the Directive 2005/29/CE). This option is extremely relevant to consumer protection. Indeed, Article 11 (2) of the directive allows member states to prohibit unfair practices "even without proof of actual loss or damage or of intention or negligence on the part of the trader."

To seek an injunction it is not necessary for a consumer to have actually entered into a contract. In the event that a misled consumer has entered into a contract, it may not even be valid. In addition, the consumer may be able to successfully sue the trader for damages under applicable national law on the invalidity of contracts and on pre-contractual liability. (As is stated in Article 3(2), the "Directive is without prejudice to contract law and, in particular, to the rules on the invalidity, formation or effect of a contract").

Consumers can also seek an injunction even if they have not been harmed and have not suffered any loss through their use of an advertised product, and even if they have not purchased the product. In addition consumers who do get harmed or do suffer a loss are further entitled to sue the product's manufacturer or the trader, or both, on the grounds of product liability for defective products (as is stated in Article 3(3), "the Directive is without prejudice to Community or national rules relating to the health and safety aspects of products").

In conclusion, commercial practices are deemed unfair and are accordingly prohibited if they threaten the consumer's freedom of choice. This freedom is protected by the directive on the theory that an informed choice is an efficient one (see the directive's 14th whereas).

It seems to me consistent with the directive's purpose, and with the interests protected, that the trader's professional diligence toward consumers should be measured by reference not just to market standards but also to the consumer's reasonable expectation.

3 To Understand What a *Consumer's Reasonable Expectation* Means, We Need Also Clarify the Meaning of *Reasonable Man,* or, More to *the* Point, of *Reasonable Consumer*

There are a few questions that need to be asked in working toward an adequate definition of a consumer's reasonable expectation: How do consumers see the world? What do they think? What do they want? How do they feel? What is their understanding? What do they know? What is their experience? What is their history?

To answer these questions, we need to decide whether the consumer's reasonable expectation corresponds to the average man's normal—and perhaps optimistic—expectation, or to the many individual cases where consumers are anything but average and have to deal with possibly dubious business practice.

It is also important to point out that a reasonable expectation of professional fairness may in fact not be the average person's expectation, which is understood as "what most people expect". The *average person* is a notional concept, and this "he" or "she" in fact represents a myriad of very different people. So we can begin to see here that the term *reasonable expectation* needs to be carefully defined, which is precisely what will be attempted in this short article. I submit that we should not box it into a fixed, rigid, or statistical formula. *Reasonable expectation* should not just mean "*suitable* for *market practice*", consistent with trade usage, or in keeping with the *id quod plerumque accidit* rule. If we are not clear about what *reasonable* is and what *average* is, we may end up with too lax a standard; that is, we may end up requiring the trader to exercise toward the consumer a lower standard of diligence than European advertising regulations previously required.

In real life, consumers are that flesh and blood people whose expectations can deemed reasonable if appropriate to their circumstances and to their ability to understand those circumstances. An unusual expectation is in this respect reasonable only if it can "reasonably" be predicted by the trader concerned. Traders and judges alike need to take into account such factors as age, physical or mental infirmity and naivety in thinking about the concept of reasonable expectation. Reasonableness is a term that by definition entails an understanding of the realities of life: that is, an adequate awareness formed by day-to-day contact with the real world, taking into account the individual circumstances of the person concerned, their problems, vulnerabilities, and so on. This means that professional diligence may have to be held to a higher standard if it is to respond to the individual nature of reasonable expectation. Therefore, traders should take into account not only market practice but also their customers' ability to understand what a trader says to them—whether they are young or old, healthy or ill, experienced or inexperienced.

The directive seems to suggest a notion that is in some respects realistic about the average consumer. As its 18th whereas states:

- "It is appropriate to protect *all* consumers from unfair commercial practices";
- in enforcing the national regulations implementing the directive, "national Courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case";
- in order "to permit the effective application of the protections contained in it," the "directive takes as a benchmark the average consumer," but it "also contains provisions aimed at preventing the exploitation of consumers whose characteristics [young age, physical or mental infirmity, or naivety] make them particularly vulnerable to unfair commercial practices";
- the average consumer is "reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors";
- "the average consumer test is not a statistical test."

The phrase "reasonably well-informed" has been translated in the Italian version of the directive as "normalmente informato", which means "normally informed".

So, according to this version of the directive, the average consumer's only standard characteristic consists in having the usual amount of information about a product, that is, he or she is a "normally informed" person.

However, the consumer is not expected to have a normal ability to understand but need only be "reasonably observant and circumspect, taking into account social, cultural and linguistic factors".

If you look at the Italian translation of the directive, you could come to the conclusion that EU legislators have adopted a mixed solution, a solution based in part on the facts specific to the case in question, and in part on statistical evidence.

If we take into account the proportionality required for the provisions' enforcement (a requirement set forth in the 18th whereas), we might conclude that the trader is entitled to assume the consumer would have a normal amount of information (a consumer unfamiliar with the normal run of things will not be protected if a normally-informed consumer would not be deceived in the same circumstances). But since your being informed does not mean you understand, the directive states (under Articles 6(2) and (7)(1)) that the judge or the competent authority, in assessing the fairness of a commercial practice, must base this assessment on the consumer's "reasonable attention and shrewdness" in "taking account of all [. . .] features and circumstances" of the practice in question.

Among the things that need to be taken into account in properly *considering the circumstances* are the following two points:

- the limitations of the communication medium (Article 7(1) of the directive), considering that more information can be provided in print and on the Web than on TV or on the radio;
- the type of product advertised, meaning that traders are required to exercise more diligence with complex products (such as financial instruments, telephone plans, and insurance policies); but traders must also consider that the average consumer tends not to pay as much attention when considering everyday goods.[1]

Another factor that must be taken into account in *considering the circumstances* is the consumer's cultural background, social context, and language skills as elements affecting his or her ability to have a proper appreciation and understanding of the product advertised. Advertising must accordingly be suitable in the sense of its protecting the freedom of choice of particularly vulnerable people, having a lower-than-normal capacity to understand owing to judgement that may be compromised by emotional factors related to age, illness, weight, appearance and the like. However, if a consumer's understanding is normal for the group the consumer belongs to (for example, children) but is still inadequate for a grasp of the trade situation at hand, then a practice that relies on (or at least ignores) such an incapacity is deemed unfair because the incapacity is one that a reasonable trader is expected to recognize and take into account.

[1] See C.G.C.E., April 29, 2004: Procter & Gamble v. UAMI.

4 The Average Consumer and the Vulnerable Consumer

The Italian law implementing Directive 84/540/EEC has always been enforced by the country's antitrust commission (*Autorità Garante per la Concorrenza e il Mercato*, or AGCM) in line with the notion of the average consumer as interpreted by the European Court of Justice and as recently defined in the directive on unfair commercial practices. A survey of the cases the AGCM commission has ruled on evinces a clear idea the commission itself has when it comes to the characteristics of the average consumer.

We thus come to discover an average consumer—*a reasonable man* by definition,—who, for the AGCM, is really a hurried and inattentive reader and viewer. For this reason the test the commission uses in assessing whether an advertisement is misleading looks at the advertisement's initial impact on the consumer. The commission assesses the ad's fairness (or lack thereof) against what can be assumed to be the initial thoughts of a hurried and inattentive reader or viewer, and not against the conclusions this person would come to on reflection, having thought the matter through. Consequently, a conspicuous warning on a package will not suffice if the ad for this product does not also include the same warning. If the ad does include the warning, but does so in fine print by way of a footnote or a super-fast banner running across a television or cinema screen, this too will not suffice to prevent the ad from being deemed misleading. Nor will it suffice to rectify deceitfully ambiguous or incomplete information at a later stage, by way of additions, corrections, or explanations the consumer can only become aware of afterward, as in the course of later negotiations or inspections, or in an instruction handbook, or in a contract clause revealed once a purchase is made, and so on.[2]

The principle that an advertisement must be complete and contain all important information relative to the product has been held up especially for complex products, ones that a reasonable consumer cannot be expected to understand. These products include financial instruments, telephone plans, and insurance policies. In these cases, advertisements are often held to be unfair because the prices and other advertised economic conditions will not suffice except in combination with footnoted information on further charges, taxes, and the offer's period of validity.[3]

The reasonable consumer believes in miracles when it comes to their health, beauty, and physical and sexual performance.[4] Thus, ads for body treatments and cosmetics can neither use emphatic language nor promise amazing results or

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[2] It is in the following rulings that the Italian Antitrust Commission (AGCM) has established this standard interpretation of the concept of an average consumer: AGCM 8 August 2006, n. 15823; AGCM 29 March 2006, n. 15330; AGCM 12 December 2002, n. 11517; AGCM 1 August 2001, n. 9848; AGCM 22 December 1999, n. 7888; AGCM 15 April 1998.

[3] Two AGCM ruling in which this principle has been applied are AGCM 1 August 2002, n. 11068; and AGCM 5 July 2001, n. 9747. On the issue of ads for mineral water, see AGCM 13 December 2001, n. 10237.

[4] Hence the provisions in Articles 21(a), 22(2), and 23(n) of the Italian Consumer Protection Code.

immediate and definitive ones. Claims such as *Thicker hair*, *Prevents cellulite*, and *You'll lose seven kilos in seven days* are always deemed misleading because there is no way that anyone can get these results using cosmetic products or physical and beauty treatments alone. Indeed, the simple fact that the problem of cellulite, baldness or obesity cannot be remedied with cosmetic treatments should be something that people understand immediately. However, finding a solution to problems relating to self esteem is very important for many people and they are often unable to apply normal standards of judgement for psychological reasons. As a result the trader's standards must be higher to compensate for this factor.[5]

Reasonable consumers are influenced by expert advice and by the endorsements of respected TV presenters who work on health-related TV programmes or write articles on this topic. Thus, a toothpaste or a brand of mineral water cannot be advertised by a doctor or an expert, because this leads the consumer to conclude that the product provides medical benefits that it does not in fact have.[6]

The reasonable consumer in Italy is familiar with only a handful of basic words and forms in English.[7] Thus, an advertisement ascribing a "lifting effect" to a cosmetic lotion could be deemed misleading for the Italian consumer, the word "lifting" being a false friend in Italian, since it is typically used as a noun meaning a "facelift," and so any advertising that uses the word can be taken to suggest, to many Italian consumers, that the product achieves a permanent result.[8] The same is not true of consumers from the countries of northern Europe, such as Holland, where English is widely spoken.

The reasonable consumer is superstitious. The AGCM commission has taken the view that the advertising of products and services relating to the paranormal obviously targets people who purchase these kinds of products on the basis of irrational beliefs born of superstition and credulity and not ascribable to the misleading nature of the message per se. This does not make it permissible, however, to advertise talismans or other objects to which magical powers are attributed, claiming they have the power to solve an array of problems involving health, work, or life at large: this is considered misleading because it exploits the consumer's superstitious insecurities, anxieties, and fears.[9]

The reasonable consumer is normally an apprehensive, even fearful person. Thus, it is misleading to advertise jackets affording protection against electromagnetic radiation, because to do so is to play on fears about the danger of exposure to electromagnetic fields. On top of that, such advertising is dangerous and reckless,

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[5] The following AGCM rulings, among others, are relevant in this regard: AGCM 13 December 2001, n. 10232; AGCM 13 December 2001, n. 10230; AGCM 11 October 2001, n. 10026; AGCM 6 September 2001, n. 9924; AGCM 8 August 2001, n. 9867; and AGCM 29 March 2001, n. 9367.

[6] Two relevant rulings are AGCM 25 February 1999, n. 6937; and AGCM 1 August 2001, n. 9848.

[7] Such a limited acquaintance is exemplified in a case heard by the European Tribunal of First Instance (http://curia.europa.eu, dated 23 February 2006, T-194/03), regarding the risk that trade names might be confused, both of them using the word "bridge".

[8] It just so happens that this case (CGCE 13 January 2000, C-220/98) involved a *German* consumer, not an Italian one, but this is just to show that such confusions do become an issue.

[9] On which see AGCM 21 February 2002, n. 3640; and AGCM 23 November 1995, n. 3412.

because in promoting an ineffective product it induces the consumer to ignore the standard cautions for exposure to electromagnetic waves.[10]

I should say at this point that if some of these examples seem a little far-fetched, they are in fact real cases.

The reasonable consumer is an anxious parent. Thus, it is misleading to advertise a food supplement claiming, under the slogan "More Milk," that mothers will thereby have more and better-quality breast milk, since it has been indisputably proven that, while such a product may improve the mother's overall health, it cannot do anything for her milk, whose quantity and quality depend instead on other aspects of the mother's diet. Moreover, the advertisement can be exploitative—depending on the way the product is advertised, e.g. a mailing–list message sent to breastfeeding mothers; it is also manipulative, since its aim is to exploit a mother's anxieties about her baby's health.[11]

The reasonable consumer is concerned about the environment. Thus, what makes the difference for a consumer deciding where to shop for food may well be a supermarket chain advertising its grocery bags as being "100% biodegradable" and hence "not harmful to the environment." However, biodegradability is a standard defined by law, and so if the bag in question fails in any respect to meet this standard, the slogan will be considered misleading. Thus, the Italian antitrust commission has ruled that "biodegradability requires a complex assessment [. . .] that the average consumer cannot be expected to make. The slogan '100% biodegradable' is accordingly misleading for any consumer who lacks specific knowledge of these complex environmental regulations."[12]

The reasonable consumer is compassionate and moved by tragic events and adversities involving others. The European directive classifies as an aggressive commercial practice "the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement" (Article (9)(c) of Directive 2005/29/EC). A rule along these lines had previously been established by the Italian antitrust commission, when it banned the Benetton group advertisement featuring an image of the activist and AIDS sufferer David Kirby on his deathbed. It was the commission's finding that "the cruelty of commercially exploiting an image that depicts a dramatic family tragedy violates all sense of respect for a gravely ill human being and threatens the psychological wellbeing of the more vulnerable members of society, such as children and adolescents."[13]

The reasonable consumer trusts the press. Article 22 (2) of the Italian Consumer Protection Code makes it illegal in Italy to publish news stories in which a commercial advertisement is concealed: "It is considered a misleading omission in a commercial practice when a trader [. . .] fails to point out a commercial intent not apparent from context". This applies to newspaper advertisements laid out in

[10] See AGCM 29 October 1998, n. 6515.
[11] See AGCM 3 July 2007, n. 17063; and AGCM 6 April 2005, n. 14215.
[12] AGCM 11 January 2006, n. 15104.
[13] AGCM 27 January 1994, n. o. 1752.

such a way that they cannot readily be distinguished from news stories on the same page. Moreover, under Article 23(m) of the same code, it is always misleading to publish an *advertorial*, whereby "a product is promoted on a publication's editorial pages, with a trader paying for the promotion without clearly pointing that out to the consumer by way of graphics or a voiceover". The rationale behind this prohibition is that the consumer cannot always be expected to be alert and have a critical attitude toward journalists and the press, which are assumed to be independent. Consumers thus give more weight to what a journalist has to say than to what an ad says, precisely on the assumption that a journalist does not operate on the motive of profit in giving an opinion—and the assumption is justified by the basic difference between journalism and commercial advertising, in that content is paid for in the latter case and it is not in the former. This basic difference is such that legal provisions applicable to advertising cannot be extended to the press, so much so that freedom of the press is constitutionally protected (Article 21 of the Italian Constitution protects the press and by extension journalism at large from outside pressures and restrictions, with the single exception of certain specific cases provided for by the law on anonymous press). It follows that the Italian antitrust commission can have jurisdiction over advertorials only insofar as an advertorial conceals paid-for communication.

To assess that, the commission makes use of presumptions. According to the previous decisions of the commission, an advertorial is a paid-for piece of communication if it focuses on just one product and promotes that product so enthusiastically as to be an advertisement. In this case the commission assumes the existence of an agreement between the business and the journalist, and thus the commission is entitled to prevent publication or broadcasting due to the hidden commercial nature of the advertorial.[14]

The reasonable consumer needs to be aware of fair-advertising issues. Thus, the commission can declare an ad misleading even if it is no longer in use and the product is no longer on the market. In this case, even though the message cannot have any current misleading effect on the consumer, there still exists a public interest in proscribing an unfair commercial practice, for in this way the public can see that the law is consistently being applied.[15]

Finally, the reasonable consumer expects traders to comply with self-regulatory codes they have accepted as binding in their trade.[16] Thus, even violating a self-regulatory code may be deemed an unfair commercial practice. This provision is interesting and fairly innovative because it sets forth a legal penalty for violating self-regulatory codes, while previously the commission used to declare the decisions of self-regulatory bodies were outside its area of concern.

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[14] On which see AGCM 18 December 1997, n. 5572; and AGCM 18 December 1997, n. 5570.

[15] AGCM 6 July 2005, n. 14487; AGCM 9 January 2004, n. 12792; AGCM 18 September 2003, n. 12437.

[16] As stated in Articles 21(2)(b), 23 (1)(a), and 27(5) of the Italian Consumer Protection Code.

5 Conclusions

In short, the reasonable expectation of the consumer implies that the diligence traders must exercise in fulfilling their duty of fairness depends on the particular circumstances of the case, which involves the actual consumer's ability to understand the true meaning of the advertisement in question. This normally implies an increase in the level of diligence required by the trader and a reduction of *dolus bonus* cases (that is of the "common and legitimate advertising practice of making exaggerated claims or claims that are not meant to be taken literally").[17]

The trader's liability under the provisions of the unfair business-to-consumer commercial practices within the scope of the Italian Consumer Protection Code is a form of strict liability: unfair traders will accordingly be sanctioned even if they are not at fault. Thus, for example, even if the misleading advertising is due to a typographical error, it can still affect the consumer's freedom of choice, and so it is still the antitrust commission's duty to restore the market to conditions of fair competition.[18]

There are three main points I should like to make by way of a summary:

- The EU directive and resulting Italian regulation on unfair commercial practices make it clear that an assessment as to whether a trader has fulfilled the duty of fairness and good faith fundamentally depends on what can be taken to be the consumer's reasonable expectations with respect to the matter at hand: it is against the benchmark of these reasonable expectations that a degree of diligence must be determined for the trader to observe. This makes reasonableness in commercial practices clearly complementary to good faith and diligence: but in doing so, it also makes reasonableness distinct and separate from good faith and diligence.
- Reasonableness requires by definition an understanding of the realities of life, that is an adequate awareness of the real world arrived at by daily contact with real-life situations, and by also taking into account the individual circumstances (problems, vulnerabilities, and so on) of the person concerned. Reasonableness accordingly specifies a higher standard than that of what the market practice or trade usage is, for it must also take into account new, unusual, and marginal situations.
- The average consumer is deemed a *reasonable* man as he makes conscious choices. However, although reasonable, he may not be rational.

Reference

Walker, D.M. 1980. *The Oxford Companion to Law*. Oxford: Oxford University Press.

[17] As stated in Article 20(3) of the Italian Consumer Protection Code.
[18] AGCM 29 March 2006, n. 15330.

Part IIb
Reasonableness in Administrative and Public Law

Reasonableness in Administrative Law

Giacinto della Cananea

Arbitrariness is incompatible with the existence of any government considered as a set of institutions.
Constant (1988, 291)

1 Preventing Arbitrariness: Procedural and Substantive Standards

It has traditionally been a concern of Western legal orders to keep arbitrariness at bay.[1] Benjamin Constant only emphasized this. The idea that administrative discretion must be limited, so as to prevent arbitrariness, was shared as well by the most prominent 19th-century Victorian constitutional lawyer, Albert Venn Dicey. Dicey held the view that administrative discretion can easily give rise to arbitrary decisions—unlessit was kept in control by law, which he identified with the ordinary law of the land. This led him to reject the French paradigm of a separate legal regime for the administration, that is to say *droit administratif*, which, in sympathy with Alexis de Tocqueville, he saw as the realm of unbridled discretionary powers.[2] This was largely a myth, however, since Victorian England witnessed increasing intervention on the part of public authorities in the social and economic sphere. That said, it was a *useful* myth. Other lawyers, on the other side of the Channel, believed in the idea that discretionary powers could, and had to,

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I'm indebted to the participants at the EUI conference on "Law and Reasonableness" (November 2007), and in particular to Michael Bobek, Alessandro Lolli, Gian Luigi Palombella and Alec Stone Sweet, for their helpful comments on a first draft. The usual disclaimer, however, applies.

[1] The existence of several, sometimes radical differences between Western legal orders cannot be denied. However, such differences are generally stronger when other legal cultures of the world are considered, which suggests a unitary perspective, as indicated in Kelly (1992).

[2] See Dicey (1956, esp. Chapter XII: "Rule of law compared with *Droit administratif*"). This edition, however, is supplemented with a short article that Dicey wrote in 1915, where he recognizes that in England there was "a considerable step towards the introduction among us of something like *droit administratif* of France" (Dicey 1956, 499). On Dicey's legacy, see Loughlin (1992). See also Cassese (2003, 40), holding that in 1885 Dicey overemphasized the illiberal features of French administrative law.

G. Bongiovanni et al. (eds.), *Reasonableness and Law*, Law and Philosophy Library 86,
DOI 10.1007/978-1-4020-8500-0_14,

be limited, on the model of the English example. One such person was Guido Zanobini, an influential Italian administrative lawyer. In the 1920s he worked out a sort of standard positivist view of the principle of legality, arguing that an administration can do only what is explicitly provided for by specific laws (see Zanobini 1956, 25).

However, such a narrow conception did not reflect reality—and still doesn't. Since the beginning of the 20th century, general and abstract legislative rules have been replaced by legislative programs administered by governmental agencies. Because these forms of governmental action were not suitable for the 19th century, they were viewed with suspicion and were often neglected. Over the years, however, there has been a growing recognition that a basic transformation has taken place. Statutes are often designed to achieve a plurality of interests, without setting out any precise or rigid ranking among such interests. As a result, an administration must not only identify the optimal measure by which to maximize a given public interest:[3] it must also decide which interests are to be maximized. Discretionary powers, in sum, are inevitable and wide. The fundamental question, then, is not *whether* discretion ought be altogether eliminated but rather *how* discretion may be properly limited (to borrow a fortunate formulation), and how it may be structured and checked (see Davis 1969).

Procedural and substantive standards alike have been devised for this purpose. The growing demand for procedural standards is a consequence of governmental activism: the more public rules and decisions affect different and even contrasting interests, the greater will be the demand to include all such interests in the decision-making process. And so it is that procedural due process requirements have been developed by national and international bodies. These requirements include the right to have a hearing and to access relevant papers and documents, the giving-reasons requirement, and the right to effective judicial protection. However, these requirements do not ensure the fairness of rules and decisions. This has been pointed out in an oft-quoted remark by Lord Denning, M.R., who said: "I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable."[4] This position reflects a tendency of courts in several jurisdictions to check for the reasonableness of administrative rules and decisions. Judicial decisions and EU directives also require that administrative and legislative measures be proportionate.

Methodologically, therefore, it seems useful to begin with an analysis of the different meanings that courts (mainly in the United Kingdom and Italy) ascribe to the concept of reasonableness. Next, I will compare such concept with that of proportionality, bringing out similarities and differences. And, third, I will consider the standing that reasonableness enjoys as a general principle of law.

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[3] For this model, see Mashaw (1985).

[4] *Chief Constable of North Wales Police v. Evans*, (1982) 1 WLR 1155 at 1160 and 1174.