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The Average Consumer in EU VAT Law – A Study of Conceptual Consistency in the Caselaw of the CJEU

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Contents

Summary.....	4
Preface.....	4
Abbreviation list.....	6
1. Introduction.....	7
1.1 Background	7
1.2 Aim.....	8
1.3 Method and material.....	8
1.3.1 Overview of Methodology	8
1.3.2 The terminology relating to the Average Consumer Concept in Caselaw.....	9
1.3.3 Legal Certainty approach	10
1.4 Delimitation.....	11
1.4.1 Consideration of relevant Caselaw.....	11
1.4.2 A note on linguistics	12
1.5 Outline	12
2. The Average Consumer Concept in VAT Law.....	14
2.1 Section Outline	14
2.2. Approaches and usages of the Average Consumer Concept.....	14
2.3. Analysis of VAT Caselaw	24
2.4. Conclusion.....	26
3. The Average Consumer Concept in Excise Duty Law.....	27
3.1 Section Outline	27
3.2 Excise Duty Caselaw	27
3.3 Analysis of Excise Duty Caselaw	31
3.4 Conclusion.....	32
4. The Average Consumer Concept in Trademark.....	34

4.1	Section Outline	34
4.2	Central aspects of the Average Consumer Concept in Trademark Law	34
4.3	Relevant Caselaw	35
4.4	Analysis of Caselaw and Concept in Trademark Law	38
4.5	Conclusion.....	40
5.	Comparison of Concepts.....	41
5.1	Section Outline	41
5.2	Comparison between the areas of law	41
5.2.1	Who is the average consumer?.....	41
5.2.2	The use of the Average Consumer Concept.....	42
5.2.3	The geographical frame of reference	43
5.3	Conclusion.....	45
6.	Conclusion.....	46
	Bibliography.....	48
	Table of Cases.....	51

Summary

The average consumer concept in EU VAT law used by the CJEU to determine whether supplies are similar enough to be subject to the same VAT treatment. It is also used to determine whether a transaction should be seen as a single composite transaction or as consisting of multiple supplies. Due to the heterogeneous nature of the transactions taking place within the realm of EU VAT, the concept is hard to exhaustively define. Through a comparison with the average consumer in EU excise duty law and EU trademark law, it can be determined that there is no common average consumer in these areas of EU. While some common attributes of the average consumer can be found in VAT caselaw, the concept is more well-defined in both excise duty caselaw and in trademark law. The use of the concept is, while differing the application by the CJEU, is similarity consistent in each area of law. The average consumer concept in VAT law is subject to circumstances present on the relevant markets in members, meaning that the average consumer is not necessarily the same across the union. This is a key difference to the concept in excise duty law, which is explicitly envisioned by the CJEU as a EU-wide consistent concept. While the concept in trademark law is more variable due to circumstances in the relevant member state/s, it is still more consistently defined than the concept in VAT law. In order to avoid excessive legal certainty, the CJEU should, when applicable continue to define and develop the average consumer concept in VAT law towards a concept which is less dependent on the characteristics of markets in specific member states. Additional legal certainty in the approach of the CJEU to the concept is in line with the key feature of neutrality in the EU VAT system.

Preface

The process of writing this thesis has come to an end. I would like to thank my tutor, Eleonor Kristoffersson, for the feedback and support I have received. I also extend thanks to Cécile Brokelind, Marta Papis-Almansa and the rest of the staff at MEIT for a fantastic master's programme.

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Abbreviation list

AG	Advocate General
CJEU	Court of Justice of the European Union
E.g.	For example
EC	European Communities
EU	European Union
I.e.	In other words
P.	Page
Para	Paragraph
Paras	Paragraphs
PP.	Pages
TFEU	The Treaty of the Functioning of the European Union
VAT	Value Added Tax

1. Introduction

1.1 Background

The European system of VAT (Value Added Tax) is a field of taxation driven by a legislative intent to maintain a system characterized by simplicity, neutrality and generality.¹ While the system does allow for exemptions and exclusions from its scope, due to geographical² and transactional³ reasons, the central aspect of the European Union (EU) VAT system is to include as many transactions as possible – as this is stated to be most in line with underlying principles of the VAT system.⁴ The realization of the internal market presupposes a harmonized VAT system, striving to avoid distortion of competition on both member state and EU levels.⁵ Consequently, the VAT system is a harmonization project aimed at having a as large as possible reach.

The average consumer concept is used by the Court of Justice of the European Union (CJEU) as a tool in two different scenarios. The first type of usage is in cases where the Court needs to decide if a transaction should be split into multiple supplies or be regarded as a single composite transaction for tax purposes.⁶ The second type of usage is in cases where the CJEU is comparing two different products to rule on whether these are similar enough to be treated the same for tax purposes.⁷ Notions of the average consumer also play a central role as a part of the similarity assessment of products in excise duty law.⁸ In EU trademark law, the average consumer concept is used as a benchmark to determine how the average consumer perceives products and trademarks.⁹ It should also be noted that use of the average consumer concept (or its variations) is not limited to these areas of law. The notion of the consumer has been used in many areas of EU law where the consumer plays an important part, both as

¹ Preamble 5 of the Council Directive 2006/112/EC of 29 November 2006 on the common system of value added tax (hereafter the VAT Directive).

² Preamble 12 of the VAT Directive.

³ Title IX of the VAT Directive.

⁴ Preamble 5 of the VAT Directive.

⁵ Preamble 4 of the VAT Directive.

⁶ See for example Case C-349/96 *CPP* EU:C:1999:93 [1999]; Case C-41/04 *Levob* EU:C:2005:649 [2005] and Case C-44/11 *Deutsche Bank* EU:C:2012:484 [2012].

⁷ See for example Case C-499/16 *AZ* EU:C:2017:846 [2017]; Case C-219/13 *K* EU:C:2014:2207 [2014] and Joined Cases C-454/12 and C-455/12 *Pro Med* EU:C:2014:111 [2014].

⁸ See for example Case 45/75 *REWE* EU:C:1976:22 [1976]; Case 243/84 *Walker* EU:C:1986:100 [1986] and C-302/00 *Commission v France* EU:C:2002:123 [2002].

⁹ See for example Case C-251/95 *Sabel* EU:C:1997:528 [1997]; Case C-342/97 *Lloyd* EU:C:1999:323 [1999] and C-102/07 *Adidas Marca* EU:C:2008:217 [2008].

a comparability criterion¹⁰ and as a recurring fixture which must be considered.¹¹

1.2 Aim

The aim of this paper is to define and analyse the average consumer concept in EU VAT caselaw. Through this process, the concept can be problematised and use of it in the caselaw of the CJEU can be thoroughly analysed and criticized as need be. In order to thoroughly elucidate the average consumer concept, an investigation into caselaw relating to EU VAT law, EU excise duty law and EU trademark law will be conducted. By comparing how the CJEU uses and defines the concept across these areas of law, the aim is to ascertain whether the average consumer is the same across all of these areas of law or if it varies depending on the area. Furthermore, the consistency of the average consumer concept across the EU will be explored, i.e. whether the CJEU considers the average consumer to be the same in all member states. This aim is concentrated in the following research questions:

Who is the average consumer in EU VAT law – is the CJEU consistent in its definition of and approach to the average consumer concept?

1.3 Method and material

1.3.1 Overview of Methodology

In order to effectively realize the aim of research, a consistent methodological approach is vital. As the foundation of this paper is the analysis of a concept originating in the caselaw of the CJEU, the legal dogmatic theory will be used to approach the concept. This approach is defined by an internal perspective on law, using concepts and materials in a systematic fashion – essentially a positivist approach.¹² Part of this approach is the systemisation of disorganised legal material into approachable pieces, which increases legal certainty.¹³ Building on this approach, the ambition expressed in this work is the thorough exploration and analysis of the average consumer concept in the hopes of adding lucidity to the meaning of the concept. The framework is relevant caselaw and legal provisions within EU law, narrowed down to three legal areas – VAT law, excise duty law and trademark law. To compare concepts in order to achieve a deeper

¹⁰ See for instance Case C-216/84 *Commission v France* EU:C:1988:81 [1988].

¹¹ See Dorota Leczykiewicz and Stephen Weatherill, ‘The Images of the Consumer in EU Law’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law – Legislation, Free Movement and Competition Law* (Hart Publishing, 2016).

¹² Sjoerd Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014) pp. 17–19.

¹³ *Ibid* pp. 19–20.

understanding of a phenomenon is a quite a common approach within the social sciences, especially as part of textual analysis.¹⁴ While this thesis is exclusively based on legal methodology, inspiration has been drawn from this approach.

1.3.2 The terminology relating to the Average Consumer Concept in Caselaw

In EU VAT law, the wording “Typical Consumer”¹⁵ and the “The Point of View of the Consumer”¹⁶ are sometimes used by the CJEU. There has been doctrinal discussion on exactly who the average consumer is and whether they are the same as the typical consumer.¹⁷ However, there has been no conclusive consensus on this topic. A key hypothesis in this thesis is that these concepts are used in parallel by the Court, albeit for different purposes and sometimes under different sets of circumstances, with the same meaning of the word consumer. According to the Merriam-Webster Online Thesaurus the word “typical” is synonymous to the word “average”.¹⁸ Likewise, “the point of view of the consumer” must by definition mean a type of general or average consumer – otherwise the conclusions in caselaw would be of very limited value, especially since the CJEU has mixed the different wordings when answering questions in preliminary rulings.¹⁹ The CJEU, due to its exceptional position in the EU legal order, has had decisive influence on the EU VAT system, especially through the system of preliminary rulings.²⁰ Still, the nature of judicial decisions is that they are confined to the facts of their respective cases and inherently specific in nature.²¹ Thusly, the aim of this thesis is to assess the average consumer concept within the context provided by caselaw and not extrapolate unfounded generalities beyond the scope of relevant contexts.

Excise duty law is an area of law which encompasses a large number of consumer goods, such as alcohol and tobacco products. Similarly to the situation in VAT caselaw, the CJEU uses different words to refer to the average consumer – such as the “typical consumer”²², “in the eyes of the

¹⁴ Göran Bergström and Kristina Boréus, ‘Samhällsvetenskaplig text- och diskursanalys’ in Göran Bergström and Kristina Boréus (eds.), *Textens Mening och Makt* (Metodbok i Samhällsvetenskaplig Text- Och Diskursanalys (Studentlitteratur 2015) pp. 13–48.

¹⁵ Case C-349/96 *CPP* para 29.

¹⁶ Joined Cases C-259/10 and C-260/10 *The Rank Group* EU:C:2011:719 [2011] para 34.

¹⁷ Paul Stacey and William Brown, ‘A Unifying Composite Supply Doctrine? An Australian View’ (2003) 14 *International VAT Monitor* 178, pp. 183–184.

¹⁸ Merriam-Webster, ‘Typical’ (Merriam-Webster Online Thesaurus)

<<https://www.merriam-webster.com/thesaurus/typical>> accessed 10 April 2020.

¹⁹ See for example the conclusions drawn by the CJEU in Joined Cases C-259/10 and C-260/10 *The Rank Group*.

²⁰ Rita de la Feria, *The EU VAT system and the internal market* (IBFD 2009) pp. 177–179.

²¹ *Ibid* pp. 279–280.

²² Case C-276/09 *Everything Everywhere* EU:C:2010:730 [2010] para 26.

consumer”²³ and “the point of view of the typical consumer”²⁴. In order to maintain a consistent methodology and relying on the same reasoning presented in the previous paragraph, the consumer concept in excise duty law will also fall under the term average consumer concept in this thesis.

In EU trademark law, as well as in the trademark law of the Member States, the concept of the average consumer is widely used.²⁵ Thusly, it is quite an appropriate legal area to use for a comparison of concepts and the usage of these in caselaw. In trademark law, the average consumer concept is consistently referred by the wording “average consumer”.²⁶

1.3.3 Legal Certainty approach

Legal certainty is a cornerstone of the rule of law. It is the aspect of a legitimate legal system which allow the subjects of the system to adhere to the rules.²⁷ In essence, legal certainty derives from the fundamental principle of the rule of law and any exception from this main rule need to be motivated by quite significant reasons in the general interest of society.²⁸ According to Schroeder, legal certainty consists of an subjective element and an objective element – the principle of non-retroactivity and the principle of taxpayer’s legitimate expectations respectively.²⁹ There is a tension between these interests of the taxpayers on the one hand, and the interest of the legislature in drafting of efficient legislation – a tension which is relevant in all areas of tax law.³⁰ Legal certainty is an important aspect of the laws of Member States, as well as of the EU as a whole. While there is no explicit reference to legal certainty in the central legal documents of the EU, the principle still plays a vital part in the functioning of the Union.³¹ Legal certainty in the EU context entails the ban on retroactivity and clarity in EU law so that individuals know their rights and obligations.³² In short, legal certainty is one of the main attributes of EU law.³³ This principle is of high importance in tax law as well and has influenced

²³ C-499/16 AZ para 33.

²⁴ Case C-497/09 *Bog and Others* EU:C:2011:135 [2011] para 43.

²⁵ Rasmus Dalgaard Lautsen, *The Average Consumer in Confusion-based Disputes in European Trademark Law and Similar Fictions* (Springer 2020) pp. 5–8.

²⁶ Case C-251/95 *Sabel* para 23; C-342/97 *Lloyd* para 25 and C-102/07 *Adidas Marca* para 35.

²⁷ Dennis Weber and Thidaporn Sirithaporn, ‘Legal Certainty, Legitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Tax Law’ in Brokelind, C. (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014).

²⁸ Serge Schroeder, ‘The Constitutional Limits of Retroactivity in Tax Law’ in Werner Haslehner, Georg Kofler and Alexander Rust (eds), *Time and Tax – Issues in International, EU, and Constitutional Law* (Wolters Kluwer 2019) p. 269.

²⁹ *Ibid* p. 239.

³⁰ *Ibid* pp. 239–241.

³¹ Weber and Sirithaporn (2014).

³² Damian Chalmers et. al., *European Union law: text and materials* (Cambridge University Press 2019) p. 381

³³ Chalmers et. al (2019) p. 381 and Paul Craig, *EU Administrative Law* (Oxford University Press 2012) pp. 449–550.

caselaw substantially.³⁴ The history of the relationship between tax law and legal certainty is long. Adam Smith, arguably one of the founders of tax law as we know it today, considered legal certainty to be highly important. In *Wealth of Nations*, Adam Smith proposed the Four Canons of Taxation – one of which is legal certainty.³⁵ Therefore, legal certainty will play a role as an underlying consideration throughout this text and the analysis conducted within.

1.4 Delimitation

1.4.1 Consideration of relevant Caselaw

This thesis is mainly focused on the usage of the average consumer concept in EU VAT law. While other areas of EU law are touched upon, these are not the main focus of this thesis. The usage of legal provisions and caselaw relating to EU trademark law, as well as caselaw relating to excise duty law, is part of a comparative effort, with the main focus still on VAT caselaw. Thereby, the excursion into other areas of law will be more limited in scope. Due to constraints in time and scope, national caselaw and legal provisions will not be investigated. Caselaw forms the majority of the material and analysis presented in this thesis. Therefore, the investigation of caselaw is as complete as possible – all relevant VAT caselaw on the topic is included in this work, up until the 30th of April 2020. It should also be noted that there is caselaw from the CJEU which uses argumentation similar to and/or building on cases in which the average consumer concept is used, while not mentioning the average consumer concept in its various forms.³⁶ Additionally, there is caselaw where the wording “consumer” is mentioned very briefly and without clear reference to other relevant caselaw.³⁷ These two types of caselaw will be omitted in order to keep the text focussed.

The significance to the thesis of the wording “ordinary consumer” must be mentioned. In a line of caselaw starting with *De Jong*³⁸, the CJEU used that particular wording in relation to the interpretation of articles 5(6) and 6(2)³⁹ of the Sixth Directive⁴⁰ and the equal tax treatment between taxable persons using goods that are part of his or hers business privately and ordinary

³⁴ Weber and Sirithaporn (2014).

³⁵ Adam Smith, *Wealth of Nations*, (Book V) (Bibliobytes) Available at EBSCOhost, <search.ebscohost.com/login.aspx?direct=true&db=cat02271a&AN=atoz.ebs1261117e&sit e=eds-live&scope=site> Accessed 30 April 2020, pp. 263–264.

³⁶ For example Cases C-425/06 *Part Service* EU:C:2008:108 [2008] and C-572/07 *RLRE Tellmer Property* EU:C:2009:365 [2009].

³⁷ See for instance Case-699/15 *Brockenhurst College* EU:C:2017:344 [2017].

³⁸ Case C-20/91 *De Jong* EU:C:1992:192 [1992].

³⁹ Now article 16 and article 26 of the VAT Directive respectively.

⁴⁰ Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the member states relating to turnover taxes.

consumers who buy the same type of goods.⁴¹ While this is an interesting line of caselaw, it does not represent the usage of a legal concept as a type of benchmark. Instead, the approach taken is different mode of interpretation of legal provisions.⁴² Thusly, that particular line of caselaw will not be further investigated in this thesis.

Lastly, caselaw concerning very specific levies or products will not be considered, such as caselaw regarding special levies on fruit (specifically bananas)⁴³ and on motor vehicles⁴⁴. This is done in order to restrict and focus the scope of the thesis.

1.4.2 A note on linguistics

The topic of linguistics in relation to the CJEU and its caselaw has been extensively discussed in doctrine.⁴⁵ As the EU is and its predecessors have been defined by multilingualism⁴⁶, the importance of language and the law cannot be understated. Some have gone as far as to argue that the French language has had an sizeable impact on the structure and legal deliberation model of the CJEU.⁴⁷ However, all translations of cases into the official languages of the CJEU are held to be equally authentic.⁴⁸ Thusly, the analysis presented rests on the assumption that concepts in the caselaw of the CJEU are applicable in each language version and carry the same meaning. Essentially, the average consumer concept is equally applicable regardless of the official language context wherein it is used. Due to restrictions in the scope of this work, no further investigation into the linguistic factors relating to translation of caselaw will be conducted.

1.5 Outline

Above, the initial considerations of the thesis are presented. The rest of this thesis are organised in the following fashion. In the subsequent section, the average consumer concept in EU VAT law is fully presented in order to provide a stable analytical ground which the rest of the thesis rests on. An

⁴¹ See, amongst others, Case C-230/94 *Enkler* EU:C:1996:352 [1996]; Case C-48/97 *Kuwait Petroleum* EU:C:1999:203 [1999]; Case C-415/98 *Baksci* EU:C:2001:136 [2001] and Case C-322/99 *Fischer* EU:C:2001:280 [2001].

⁴² Compare Case C-415/98 *Baksci* para 42 and Case C-349/96 *CPP* para 29. The approach is quite different.

⁴³ E.g. Case 184/85 *Commission v Italy* EU:C:1987:207 [1987] and Case 193/85 *Co-Frutta v Amministrazione delle finanze dello Stato* EU:C:1987:210 [1987].

⁴⁴ E.g. Case C-265/99 *Commission v France* EU:C:2001:169 [2001] and Case C-101/00 *Tulliasiamies and Siilin* EU:C:2002:505 [2002].

⁴⁵ See for instance Anthony Arnall, 'The Working Language of the CJEU: Time for a Change?' (2018) 43 *European Law Review* 904 and Mattias Derlén, 'Multilingual Interpretation of CJEU Case Law: Rule and Reality' (2014) 39 *European Law Review* 295.

⁴⁶ As laid down in Regulation No 1 determining the languages to be used by the European Economic Community.

⁴⁷ Arnall (2018).

⁴⁸ Article 41 of Rules of Procedure of the Court of Justice.

investigation into caselaw regarding VAT is presented, showcasing how the CJEU has used the concept in different contexts and to different ends. Following that section, the average consumer concept in relation to caselaw about excise duties is presented and analysed. The next section deals with the average consumer concept in EU trademark law, laying the final groundwork for a comparison between the three areas of law. Subsequently, in the following section, a comparison between the three areas is performed and conclusions from this are drawn. Lastly, the overarching conclusion is presented in the final section.

2. The Average Consumer Concept in VAT Law

2.1 Section Outline

The purpose of this section is to present how the average consumer concept has been used in the caselaw of the CJEU relating to VAT. First, a subsection containing an overview of the different approaches and usages of the average consumer concept in caselaw is presented. Secondly, a subsection focusing on specific caselaw in chronological order follows. Thirdly, the analysis of the concept is performed. Fourthly and lastly, a conclusion is presented, summing up the most important aspects presented in the section.

2.2. Approaches and usages of the Average Consumer Concept

In VAT, nature of a transaction is sometimes such that it needs to be determined if the supply made should be seen as a single economic supply which would be artificial to split for tax purposes or as multiple supplies which must be treated differently in regards to VAT.⁴⁹ If the supply is not split, it is considered to be of a composite nature.⁵⁰ In order to make this distinction, the CJEU has referred to the average consumer concept in numerous cases.⁵¹

Adherence to the underlying principle of neutrality of the VAT system means that similar goods and services should be treated equally for VAT purposes.⁵² The CJEU has, on several occasions, decided upon the similarity of supplies through the use of the average consumer concept in the process of determining the applicability of different rates of VAT.⁵³ Essentially, the average consumer concept is a criterion which is part of the similarity assessment conducted by the CJEU.

The CJEU has reasoned on the impact of VAT on consumers, as well as using the consumer as a form of benchmark in its reasoning, for a number of years. In *Commission v Belgium*⁵⁴ the influence of VAT rates on the choice made by consumers (in this case, between beer and wine) was discussed.

⁴⁹ Ad van Doesum et. al., *Fundamentals of EU VAT Law*, (Kluwer Law International 2016) pp. 135–139.

⁵⁰ Ibid.

⁵¹ E.g. Case C-349/96 *CPP*; Case C-111/05 *Aktiebolaget NN* EU:C:2007:195 [2007] and Case C-497/09 *Bog and Others*.

⁵² van Doesum et. al (2016) pp. 37–38.

⁵³ Amongst others, see Joined Cases C-259/10 and C-260/10 *The Rank Group*; Joined Cases C-454/12 and C-455/12 *Pro Med* and Case C-499/16 *AZ*.

⁵⁴ Case 356/85 *Commission v Belgium* EU:C:1987:353 [1987].

The CJEU brought reasoning concerning the effect excise duties has on price into the realm of VAT, which in turn can have protectionist effects (even if none were proven in the case).⁵⁵ While the CJEU did not reason extensively on the average consumer concept in this particular case, the case nonetheless shows how VAT impacts and influences consumers, especially regarding the comparability of products.⁵⁶ Moreover, the relationship between consumer habits and taxation has also been considered by the CJEU.⁵⁷ The average consumer concept was elaborated upon in *CPP*⁵⁸, wherein the benchmarking aspect of the average consumer concept played a central part in the decision of the CJEU and the interpretation of article 2(1) of the Sixth Directive.⁵⁹ From *CPP*, a line of caselaw based on the wording “typical consumer” in relation to composite supplies (with some variations) emanates, dealing with supplies of credit (and negotiation of credit)⁶⁰, payment options⁶¹, software⁶², undersea fibreoptic cables⁶³, reprographic services⁶⁴, undertaker services⁶⁵, supplies of food and beverages from snack bars⁶⁶ and portfolio management services⁶⁷. This line of caselaw has also been used to analyse the exemption for the supply of services closely linked to sport or physical education.⁶⁸

The line of VAT caselaw where the average consumer concept is explicitly used to determine the degree of similarity between supplies started with *The Rank Group*.⁶⁹ Even though that case builds on both *CPP* and caselaw regarding excise duties, it represents a distinct approach to the usage of the average consumer concept in VAT.⁷⁰ Within this line of caselaw, supplies of transport services⁷¹, e-books⁷², baked goods⁷³ and photographic works of

⁵⁵ Ibid paras 12–21.

⁵⁶ Ibid paras 11 and 18–21.

⁵⁷ Case C-230/89 *Commission v Greece* EU:C:1991:156 [1991].

⁵⁸ Case C-349/96 *CPP*.

⁵⁹ Now article 2(1)(a) and (c) of the VAT Directive, Case C-349/96 *CPP* para 29.

⁶⁰ Cases C-34/99 *Primback* EU:C:2001:271 [2001] and C-453/05 *Ludwig* EU:C:2007:369 [2007]. Note that the wording in *Primback* para 43 is “final consumer” rather than “typical consumer” but the meaning is the same in this context.

⁶¹ Case C-276/09 *Everything Everywhere*.

⁶² Case C-41/04 *Levob*.

⁶³ Case C-111/05 *Aktiebolaget NN*.

⁶⁴ Case C-88/09 *Graphic Procédé* EU:C:2010:76 [2010].

⁶⁵ Case C-94/09 *Commission v France* EU:C:2010:253 [2010].

⁶⁶ Case C-497/09 *Bog and Others*.

⁶⁷ Case C-44/11 *Deutsche Bank*.

⁶⁸ Case C-18/12 *Město Žamberk*.

⁶⁹ Joined Cases C-259/10 and C-260/10 *The Rank Group*. Note that the CJEU uses both the terms “average consumer” and “typical consumer”, as well as “in the eyes of the consumer”, see for instance paras 43 and 44

⁷⁰ Joined Cases C-259/10 and C-260/10 *The Rank Group* paras 37–51.

⁷¹ Joined Cases C-454/12 and C-455/12 *Pro Med*.

⁷² Case C-219/13 *K*.

⁷³ Case C-499/16 *AZ*.

art⁷⁴ have been assessed by the CJEU through the average consumer benchmark.

2.2.1. Deciding on single composite supplies or multiple supplies

The line between what is considered a single supply or multiple supplies is sometimes unclear when dealing with VAT matters.⁷⁵ This is further complicated the fact that the VAT Directive is unclear on the topic and lacking in guidance.⁷⁶ Composite supplies are essentially the middle ground, where a single supply contains elements which taken on their own might be considered as individual supplies. A composite supply in VAT caselaw lingo refers to a supply which consists of several different elements (which each might have different VAT liabilities if assessed on their own) but where one element/supply is given priority over the others, thusly defining the entire supply for tax purposes.⁷⁷ Advocate General (AG) Kokott pinpoints the approaches taken by the CJEU in regards to composite in her Opinion in *Levob*. On the one hand, supplies should be assessed separately according to their characteristics – on other hand, excessive splitting of composite transactions would be detrimental to the VAT framework and the application thereof.⁷⁸ The composite supply doctrine points encompassed two different scenarios. The first of these is the one mentioned above, characterized by a principal-ancillary relationship between the different elements in the supply.⁷⁹ The second is more directly linked to the average consumer, illustrated by a supply where the different elements of the supply are so intertwined that they, from an objective economic point of view, would be artificial to split – given that the supply is performed to a typical consumer.⁸⁰ Regardless, all circumstances and all relevant facts should be taken into account by in the assessment of the transaction.⁸¹ Though, it should be remembered that there is no single specific measure through which the issue at hand can be determined.⁸²

In *CPP*, the CJEU used the average consumer concept as a clear indicator of where the splitting of a supply would be artificial and distort the VAT system.⁸³ The case concerned the applicable VAT treatment of the supply of a package of insurance services, mostly centred on the loss of credit cards

⁷⁴ Case C-145/18 *Regards Photographiques* EU:C:2019:668 [2018].

⁷⁵ Ben Terra and Julie Kajus, *A guide to the European VAT Directives Vol 1 – Introduction to European VAT* (IBFD 2019) p. 516.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Opinion of Advocate General Kokott in *Levob* EU:C:2005:292 [2005] para 66.

⁷⁹ *Ibid* para 67 and the caselaw cited therein.

⁸⁰ Case C-41/04 *Levob* paras 21–22.

⁸¹ Opinion of Advocate General Kokott in *Levob* paras 65–70.

⁸² Oskar Henkow, ‘Accessorium Sequitur Principale – The Issue of Defining the Tax Object for VAT Purposes’ in Cecile Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014).

⁸³ Case C-349/96 *CPP* para 29.

by the card holders.⁸⁴ The Court held that a supply consisting of several elements, where some of these elements are ancillary to the main element, could be considered a single supply for tax purposes – the elements, even if they would individually be subject to different rates should, in that case, be taxed in the same manner.⁸⁵ *CPP* is a landmark case, playing a significant role in the definition of principal-ancillary relation in composite transactions.⁸⁶ In the case, the average (or “typical”) consumer is used as a component of a benchmark which, in turn, is could be decisive in the determination of correct tax treatment.⁸⁷

The average consumer concept was part of the CJEU:s reasoning in a duo of cases concerning the granting of credit – *Primback*, and *Ludwig*. In *Primback*, the average consumer concept was used by the CJEU in order to determine whether a furniture retailer which gave consumers the option to purchase furniture on credit through arrangements with finance houses, should be considered as having made supplies of goods (the furniture) as well as supplies of services (the arrangement of credit).⁸⁸ By building on *CPP*, the CJEU arrived at the conclusion that the consumer, from their point of view, did not see the granting of the credit as a separate service supplied to them. As the amount payable for the furniture purchased was the same amount regardless of the method of payment used, the consumer could not reasonably discern the arrangement of the credit as a separate service. Furthermore, even if said consumer would be able to separate the services, the arrangement of the credit would ancillary to the purchase of the furniture – meaning that the same tax treatment should be afforded to both elements of the transaction, following the logic as set forth in *CPP*.⁸⁹ The same logic applied even in situations where the consumer would be allowed a reduction in the price of the furniture under the condition that the payment was made in cash, as these transactions needed to be initiated and negotiated by the customer – a procedure that many customers would not go through with, either due to lack of knowledge or lack of will.⁹⁰ In *Ludwig*, the CJEU was asked by the German courts to interpret whether exemption laid down in article 13B(d)(1) of the Sixth Directive⁹¹ should also encompass financial analyses of the client seeking credit and whether the exemption presupposes a direct contractual relationship between the parties to the negotiation.⁹² The CJEU used the average consumer concept in order to analyse whether the preliminary financial analysis of credit-seeking clients (and the commission

⁸⁴ Ibid paras 7–12.

⁸⁵ Ibid paras 26–32

⁸⁶ Henkow (2014).

⁸⁷ Case C-349/96 *CPP* paras 29–32.

⁸⁸ Case C-34/99 *Primback* paras 41–45.

⁸⁹ Ibid.

⁹⁰ Ibid para 46.

⁹¹ Now article 135(1)(b) of the VAT Directive.

⁹² Case C-453/05 *Ludwig* paras 6–14.

payable for the carrying out of such analysis) should fall under the above mentioned exemption.⁹³ The clients (the borrowers) and the lenders were predominantly interested in the negotiation of credit as such, making the supply of financial analysis and advice ancillary to this principal service.⁹⁴ Thusly, the CJEU held that the financial analyses of clients conducted by a taxable person did not preclude the supply as being defined as a negotiation of credit under the VAT directive – given that the service of providing the financial advice was ancillary to the negotiation of credit in the domestic case.⁹⁵

The average consumer concept played a central role in *Everything Everywhere*. In this case, the CJEU was asked a series of questions for preliminary ruling by the High Court of Justice of England and Wales in on the topic of the VAT treatment of a “separate payment handling charge” (a “SPHC”) levied by a provider of mobile telephone services.⁹⁶ The CJEU focused on whether the payment services which the SPHC related to could be seen as supplies of payment services separate from the supply of telecommunication services, for which the SPHC was consideration, and the VAT treatment thereof.⁹⁷ Using the familiar line of reasoning regarding avoiding artificial splits of transactions which from an economic point of view are to be seen as singular transactions, the CJEU applied the average consumer concept to analyse the characteristics of the transactions between *Everything Everywhere* and the consumers.⁹⁸ The CJEU held that the aim for the average consumer when purchasing services from *Everything Everywhere* was to obtain mobile telephone services. The option to use various other payment services, even if these differed in price, did not constitute a separate and independent supply of payment services.⁹⁹

In *Levob*, the average consumer concept was used to answer questions for preliminary ruling posed by the Supreme Court of the Netherlands to the CJEU regarding the VAT treatment of sale and installation of software, as well as supply of training of staff to use said software.¹⁰⁰ The average concept was deployed in the course of answering of the question whether the supply of the software and the subsequent customisation should be considered separate supplies or one singular supply (and whether that supply should be considered a supply of services). As part of a fairly extensive investigation into this question, the CJEU held that the fact that since the software was of no use to *Levob* without the customisation, it

⁹³ Ibid paras 15–20.

⁹⁴ Ibid para 18–19.

⁹⁵ Ibid para 20.

⁹⁶ Case C-276/09 *Everything Everywhere* paras 7–17.

⁹⁷ Ibid para 20.

⁹⁸ Ibid paras 21–26.

⁹⁹ Ibid paras 27–32.

¹⁰⁰ Case C-41/04 *Levob* paras 7–16.

would be artificial to split the transaction.¹⁰¹ Thusly, from the point of view of the average consumer, the transaction was to be seen as singular composite transaction for VAT purposes.¹⁰²

Aktiebolaget NN showcases how the average consumer concept is not strictly tied to the everyday meaning of a consumer as a private person or individual. The case, which came to the attention of the CJEU as questions for preliminary ruling asked by the Supreme Administrative Court of Sweden, dealt with the VAT ramifications of the supply and installation of an undersea fibreoptic cable.¹⁰³ The average consumer concept was used briefly to establish that the supply and subsequent installation of the cable should be considered as a singular transaction for VAT purposes, using the same reasoning as in *Levob*.¹⁰⁴ A key aspect of the case is, however, the fact that the CJEU seemingly ascertains that there are average consumers even in such esoteric markets as the one for undersea fibreoptic cables.

The average consumer concept also played a minor role in *Graphic Procédé*, a French request for a preliminary ruling on whether reprographics should be considered supplies of goods or of services.¹⁰⁵ Through references to both *Levob* and *Aktiebolaget NN*, the CJEU underlined that the analysis of a transaction which is based on the essential features of said transaction, being made to a typical consumer, is determinative in showcasing whether there is a single supply or several distinct supplies in a transaction.¹⁰⁶

The average consumer concept has also been used by the Commission as basis for bringing an infringement procedure against a Member State, as seen in *Commission v France*. Relying on caselaw regarding the average consumer concept as a safeguard against the artificial splitting of transactions, the Commission took the view that all services performed by undertaker for a client, including the transportation of the body of the deceased, should be considered a single complex transaction and thusly be subject to the same rate of VAT – otherwise the consumer might be confused and competition would be distorted.¹⁰⁷ France defended the VAT regime in place, arguing that the caselaw referred by the Commission in its arguments was not relevant to the case at hand, while also maintaining that it is the prerogative of Member States to apply reduced rates selectively.¹⁰⁸ While the CJEU did mention the average consumer concept as part of its assessment of the arguments put forwards by the Commission, the CJEU

¹⁰¹ Ibid para 24.

¹⁰² Ibid paras 17–26.

¹⁰³ Case C-111/05 *Aktiebolaget NN* paras 12–18.

¹⁰⁴ Ibid paras 23–25.

¹⁰⁵ Case C-88/09 *Graphic Procédé* paras 14–20.

¹⁰⁶ Ibid para 20.

¹⁰⁷ Case C-94/09 *Commission v France* paras 15–17.

¹⁰⁸ Ibid 18–20.

ultimately did not rely on the concept when rendering its judgement.¹⁰⁹ Instead, the CJEU held that the transportation of a body by vehicle was a concrete and specific element in the supply of services by undertakers, meaning that it could be assessed separately under criteria relating to the observance of the principle of fiscal neutrality.¹¹⁰ This principle was not violated by the French system according to the CJEU and the transport of a body by vehicle could continue to be subject to a reduced rate of VAT, meaning that the action of the Commission was dismissed.¹¹¹

In *Bog and Others*, the CJEU assessed the German VAT treatment of food and drinks from snack bars based on a number of questions referred for preliminary ruling from German courts. The average consumer concept was used as part of the answer to questions posed by the German courts regarding whether supplies of food or meals for immediate consumption constitute supplies of goods or supplies of services within the meaning of the Sixth Directive.¹¹² As part of this assessment, the point of view of the average consumer was invoked as a decisive criterion for ascertaining the determinative element of a supply, accompanied by all factual circumstances relating to the supply.¹¹³ In addition, the CJEU made a detailed assessment of how different elements of the relevant supplies and the circumstances around said supplies influences the classificatory outcome.¹¹⁴ An important aspect from the point of view of the analysis carried out in this thesis is however the fact that the average consumer concept is given explicit weight as the decisive criteria in determining the definition of a supply of such character as the supplies relevant to the case as supplies of goods or services.

In *Deutsche Bank*, the CJEU was asked a number of questions regarding the VAT treatment of portfolio management services by the German Finance Court.¹¹⁵ While the CJEU did not add anything new to the average consumer concept in this case, it used a quite a few older cases which dealt with the concept in process of determining the relationship between the principal and the ancillary service in portfolio management service.¹¹⁶ Through this confirmation of the validity of the earlier cases, the CJEU underlined that the perspective of the typical consumer is decisive in determining whether a multi-elemental transaction should be defined as a single indivisible economic supply.¹¹⁷ The Opinion of AG Sharpston

¹⁰⁹ Ibid paras 32–34.

¹¹⁰ Ibid paras 35–40.

¹¹¹ Ibid paras 44–47.

¹¹² Case C-497/09 *Bog and Others* paras 50–62.

¹¹³ Ibid paras 62 and 76.

¹¹⁴ Ibid paras 62–81.

¹¹⁵ Case C-44/11 *Deutsche Bank* EU:C:2012:484 [2012] paras 9–15.

¹¹⁶ Ibid paras 16–21.

¹¹⁷ Ibid para 21.

contains a statement regarding the nature of the average consumer as an objective criterion rather than a subjective criterion. According to AG Sharpston, the point of view of the average consumer as used by the CJEU is general in nature, compared to specific nature of the view of a particular consumer.¹¹⁸ Thusly, according to the AG, the average consumer concept is by definition objective.¹¹⁹

The average consumer concept has also been used by the CJEU to provide criteria to determine the extent of the exemption for sporting activities. In *Město Žamberk*, the CJEU was asked to clarify the extent of the applicability of article 132(1)(m) of the VAT Directive to sporting activities of a non-organised, unsystematic and recreational character as well as whether the supply for consideration of access to the complex where said activities were taking place should fall under that exemption.¹²⁰ The CJEU held that, if the access for consideration to the complex should fall under the exemption, the average consumer of the supply should see it as an opportunity to engage in sporting activities, rather than pure rest and amusement.¹²¹ Echoing the same argumentation as laid forth in earlier caselaw, the CJEU underlined the need for an overall assessment of the supply – including the nature of the supply itself but also the characteristics of the complex.¹²² Lastly, the CJEU pointed out that the intentions of some visitors are of no matter for the outcome of the determination of the character of the supply, as such an approach would undermine legal certainty and the correct and straightforward application of the relevant exemption.¹²³ The approach should instead be more objective, as pointed out by Henkow.¹²⁴ This underlines the nature of the average consumer concept as a form of benchmark, while not further elaborating on how the balancing between intentions of some visitors versus the application of the average consumer concept should be carried out.

2.2.2. Similar Supplies

In order for the neutrality inherent to the VAT system to be achieved and continuously upheld, it is vital that similar supplies are subjected to similar VAT treatment.¹²⁵ The average consumer concepts plays a part in this similarity assessment.

¹¹⁸ Opinion of Advocate General Sharpston in *Deutsche Bank* EU:C:2012:276 [2012] para 27.

¹¹⁹ Ibid.

¹²⁰ Case C-18/12 *Město Žamberk* EU:C:2013:95 [2013] paras 9–15.

¹²¹ Ibid para 33.

¹²² Ibid paras 29–37.

¹²³ Ibid paras 35–36.

¹²⁴ Henkow (2014).

¹²⁵ Terra and Kajus (2019) pp. 248–250.

The Rank Group case¹²⁶ dealt with the VAT treatment of gambling machines in the UK. One of the questions referred to the CJEU for preliminary ruling (question 1) explicitly mentioned identical and similar supplies from the point of view of the consumer.¹²⁷ Furthermore, the CJEU clearly used the both terminology “typical consumer”¹²⁸ and “average consumer”¹²⁹ in order to answer the questions posed by the referring court. It should also be noted that this case shows that fiscal neutrality is infringed by a difference in tax treatment of similar/identical services which are similar in the eyes of the consumer.¹³⁰ Moreover, when comparing whether two supplies (in the case, two types of slot machines) are similar enough in order to warrant the same tax treatment, the point of view of the average consumer and the meeting of said consumers same needs by the supplies in question was held to be a central component of this process.¹³¹

In *Pro Med*¹³², the CJEU was called upon to evaluate the distinction between two different types of transport services under German law – taxis and minicabs. Taxis were subject to a reduced rate while minicabs were subject to a standard, higher rate. It is also important to note that the circumstances in the case were largely centred around medical transports – transports of patients in relation to hospital visits and similar services.¹³³ However, certain other on-demand transport services were also provided by the companies in question.¹³⁴ In the assessment of the facts, the CJEU identified the need for prior booking as a key factor distinguishing minicab services from taxi services.¹³⁵ In summarizing the reasoning from *The Rank Group*, the CJEU held that determination of the similarity between two services is built on the average consumer concept, with a clear ambition to avoid differing between similar supplies if the differences are of little significance.¹³⁶ Again relying on the same considerations as presented in *The Rank Group*, similarity in characteristics and in consumer need met as well as the influence possible differences between supplies might have on choice, were presented as key factors.¹³⁷ Based on these factors, as well as contextual and regulatory considerations, the CJEU held that the difference in VAT treatment of minicabs contra taxis was not in violation of the principle of neutrality.¹³⁸ The CJEU underlined that the “average user”

¹²⁶ Joined Cases C-259/10 and C-260/10 *The Rank Group*.

¹²⁷ Ibid para 28.

¹²⁸ Ibid para 43.

¹²⁹ Ibid para 44.

¹³⁰ Ibid para 36.

¹³¹ Ibid para 58.

¹³² Joined Cases C-454/12 and C-455/12 *Pro Med*.

¹³³ Ibid paras 22–37.

¹³⁴ Ibid.

¹³⁵ Ibid paras 57–60.

¹³⁶ Ibid para 53.

¹³⁷ Ibid para 54.

¹³⁸ Ibid paras 55–60.

would use the different services for different needs and thusly not confuse the two – the need for pre-booking of minicabs vis-à-vis the on-demand nature of taxis made for such a distinction, which was for the referring court to investigate whether such aspects were prevalent in the case at hand.¹³⁹

A relatively recent case where the average consumer concept was used is the *K* case.¹⁴⁰ The case, which dealt with the (then) different tax treatment of e-books on physical means of support and traditional physical books, clearly shows how the average consumer concept (or “typical consumer”) can be a decisive element in determining whether supplies are similar enough to warrant similar VAT treat (ergo, be subject to the same rate). Drawing on criteria established in *The Rank Group*, the Court held that if e-books on physical means of support are, in the eyes of the average consumer, similar to physical books, not extending the reduced rate to e-books would not be justified.¹⁴¹ Essentially, if the average consumer considers the content of books to be similar, regardless of which medium the book is housed on, books of all types are similar for VAT purposes.¹⁴² In his Opinion, AG Mengozzi underlined the fact that the average consumer is not the same in all member states, which should be taken into account by the national courts.¹⁴³ The basis for this argument was that the technology allowing for the use of the e-books is not evenly distributed across the member states.¹⁴⁴

Building on *K*, the CJEU made similar arguments when answering the request for a preliminary ruling in *AZ*. The case, which dealt with whether pastries with different shelf lives were to be considered as comparable products or not, explicitly mentions the average consumer concept in the bulk of the reasoning of the Court.¹⁴⁵ As the principle of neutrality precludes similar competing supplies from being subject to different VAT treatments, the CJEU held that the Polish court needed to ascertain if “fresh” pastries¹⁴⁶ where in competition with “preserved” pastries¹⁴⁷ on the Polish market. The method (or benchmark) which the CJEU instructed the referring court make use of was to investigate whether the two categories of products were similar in the eyes of the average consumer, making the usage of either product interchangeable with the latter.¹⁴⁸ If such would be discovered to be the case, the applicable Polish VAT regime could be incompatible with the principle of neutrality as the consumer would be unduly influenced by the

¹³⁹ Ibid paras 58–59.

¹⁴⁰ Case C-219/13 *K*.

¹⁴¹ Ibid para 33.

¹⁴² Ibid.

¹⁴³ Opinion of Advocate General Mengozzi in *K* EU:C:2014:321 [2014] paras 53–55.

¹⁴⁴ Ibid para 54.

¹⁴⁵ Case C-499/16 *AZ* paras 31–36.

¹⁴⁶ With a shelf life not exceeding 45 days, Case C-499/16 *AZ* para 32.

¹⁴⁷ With a shelf life exceeding 45 days, Case C-499/16 *AZ* para 32.

¹⁴⁸ Case C-499/16 *AZ* paras 30–33.

applicable nation provisions.¹⁴⁹ In other words, the choices of the consumer could be made as an effect of the different VAT rates – violating the neutrality aspect that is a core concept of the VAT system.

Finally, *Regards Photographiques*¹⁵⁰ deals with the distinction between photographs which are to be considered as works of art under article 311 of the VAT Directive and thus be subject to a reduced rate under article 103 of the same directive. *Regards Photographiques*, a company specialized in portrait and wedding photography sold photographs on which a reduced VAT rate of 5.5% was applied. The French tax authority was of the meaning that these photographs were to be subject to the standard rate of VAT and issued additional assessments of VAT.¹⁵¹ *Regards Photographiques* brought the additional assessments before the French court system, leading to a court process where eventually the Council of State brought a number of questions regarding the interpretation of articles 103 and 311, as well as point 7 of Part A in Annex IX of the VAT directive to the CJEU for preliminary ruling.¹⁵² According to the CJEU, if the sole criteria for determining whether specific photographs qualify for the reduced rate of VAT would be the existence of artistic character of the photographs, the principle of fiscal neutrality could be infringed.¹⁵³ This due to the fact that certain photographs, regardless of whether they are defined as artistic or not by the tax authority, fulfil the same needs and are similar in the eyes of the average consumer.¹⁵⁴ A portrait photos which fulfil objective criteria listed in point 7 of Part A of Annex IX to the VAT Directive can be subject to a reduced rate of VAT regardless of their artistic merit.¹⁵⁵ In other words, the CJEU justifies the reliance on objective criteria laid down in the VAT Directive over the subjective assessment carried out by tax authorities of a Member State partly through using the average consumer as a reference point.

2.3. Analysis of VAT Caselaw

The CJEU consistently builds on the approach taken in *CPP*, using the average consumer concept as a benchmark from which to assess whether the transaction should be split or not. Transactions assessed from this benchmark tend to be considered as single composite transactions where the CJEU provides a complete assessment of the transaction. In cases where the elements of a composite supply are widely different, the CJEU tends to take the approach that the part of the supply which can stand independently takes

¹⁴⁹ Ibid para 34.

¹⁵⁰ Case C-145/18 *Regards Photographiques*.

¹⁵¹ Ibid paras 14–15.

¹⁵² Ibid paras 16–18.

¹⁵³ Ibid para 36.

¹⁵⁴ Ibid para 36.

¹⁵⁵ Ibid paras 36–40.

precedence over dependent aspects.¹⁵⁶ A consumer purchasing furniture on credit is not principally interested in the option to pay by credit, the “end goal” is to buy furniture. The same conclusion was presented when in relation to the supply of telecommunications services – a consumer does not choose a category of products or services due to payment options.¹⁵⁷ Similarly, the average consumer is not likely to purchase the installation or customisation of a good or a service without purchasing the object of installation or customisation itself – thusly a transaction containing both of these elements should be treated as a composite supply.¹⁵⁸ However, if an element is distinct enough, it can be regarded as a separate supply.¹⁵⁹ The perspective of the average consumer does have substantial weight in the assessment in more recent caselaw.¹⁶⁰ The characterisation of the average consumer concept as an objective criterion by AG Sharpston¹⁶¹ lends further credence to importance of the concept in the assessments made by the CJEU.

The average consumer can seemingly be focused on content, rather than format, when comparing products.¹⁶² The use of products also plays a part in the comparison of products.¹⁶³ When comparing supplies, seems that the CJEU assumes that the average consumer is lacking in specialist knowledge of the supplies consumed, instead focusing on the primary characteristics of the supply rather than smaller, more esoteric aspects.¹⁶⁴ The average consumer is defined as being able to distinguish between services which share the same principle characteristics but differ in how they are presented to the consumer – an on-demand nature of a service is enough to make different enough from a service of the same character but which requires pre-booking.¹⁶⁵ The average consumer is seemingly not interested in how certain supplies are defined by the tax authorities of Member States – if wedding photographs are considered “artistic” or not – these supplies fulfil the same needs of the average consumer regardless of definition.¹⁶⁶ In essence, regulatory definitions are of no interest to the average consumer when they compare products, it is the content of the supplies which matters.

A key issue which must be addressed is whether the average consumer is the same in all the Member States. While the CJEU has not explicitly made any

¹⁵⁶ See Case C-34/99 *Primback* paras 41–45.

¹⁵⁷ See Case C-276/09 *Everything Everywhere* paras 27–32.

¹⁵⁸ See Case C-41/04 *Levob* paras 17–26 and Case C-111/05 *Aktiebolaget NN* paras 23–25.

¹⁵⁹ See Case C-94/09 *Commission v France* EU:C:2010:253 [2010] paras 35–40.

¹⁶⁰ See Case C-497/09 *Bog and Others* paras 62 and 76 and Case C-44/11 *Deutsche Bank* para 21.

¹⁶¹ See Opinion of Advocate General Sharpston in *Deutsche Bank* para 27.

¹⁶² See Case C-219/13 *K* para 33.

¹⁶³ Case C-499/16 *AZ* paras 30–34.

¹⁶⁴ See Joined Cases C-259/10 and C-260/10 *The Rank Group* para 58.

¹⁶⁵ See Joined Cases C-454/12 and C-455/12 *Pro Med* paras 58–59.

¹⁶⁶ See Case C-145/18 *Regards Photographiques* para 36.

statement on this topic in the presented caselaw, there are indications that the average consumer concept might shift depending on market factors in a specific member state.¹⁶⁷ The frame of reference for determining the needs of the average consumer can therefore not be the entire Union, as it is the notion the of average consumer in each member state that is relevant.¹⁶⁸ Essentially, the Average Consumer concept is part of the greater context of the VAT directive, allowing for equal treatment of similar supplies in accordance with the principle of neutrality.¹⁶⁹ Therefore it seems counterintuitive for the CJEU to argue for a differentiated average consumer concept varies from member state to member state. Especially in relation to reduced rates, such as in *K*, could the consequences be at odds with the underlying goal of neutrality and the harmonization of the VAT system.¹⁷⁰ Thusly, the notion of a non-consistent average consumer is not without its negative aspects – especially as it can cause discord amongst the principles of the VAT system.

2.4. Conclusion

The average consumer concept is not defined independently by the CJEU but instead always in relation to a transaction. This means that the average consumer of one type of supply cannot be assumed to be exactly the same as the average consumer of another type of supply. However, some consistencies how the CJEU perceives the characteristics of the average consumer can be seen in the caselaw. Moreover, the average consumer is not necessarily identical across the member states but is instead varied due to factors relating to the supply and the market in question. In short, the average consumer concept in EU VAT is a concept which is not easy to conclusively define as it is subject to a large degree of variation. The CJEU is, however, fairly consistent in its use of the concept – even if said concept is not clearly defined.

¹⁶⁷ See Opinion of Advocate General Mengozzi in *K* paras 53–55.

¹⁶⁸ Ad van Doesum, 'Taxable Amount and VAT Rates' in Michael Lang et. al. (eds), *CJEU – Recent Developments in Value Added Tax 2015* (Linde 2016) p. 267.

¹⁶⁹ Marta Papis-Almansa, *Insurance in European VAT – On the Current and Preferred Treatment in the Light of the New Zealand and Australian GST Systems* (Dept. of Business Law, LUSEM, Lund University 2016) p. 61.

¹⁷⁰ Paolo Centore and Maria Teresa Sutich, 'Publishing Industry and Reduced VAT Rates: An Open Question' (2015) 26 Intl. VAT Monitor 1 25.

3. The Average Consumer Concept in Excise Duty Law

3.1 Section Outline

This section of the thesis deals with relevant caselaw from the CJEU regarding excise duties and miscellaneous indirect taxation. First, caselaw concerning the Average Consumer Concept in relation to excise duties is discussed. Secondly, the caselaw presented is analysed in subsection. Thirdly, intermediate conclusions are drawn and presented.

3.2 Excise Duty Caselaw

The CJEU has in several cases used variations on the average consumer concept in order to determine whether product or categories of products are similar enough to warrant to be subject to the same excise duties. The majority of these cases originated in the Member State taxation schemes for alcoholic beverages. In *REWE*, the CJEU was called upon to decide if, amongst other things, if a West German taxation scheme which imposed different tax rates on imported and domestic alcohol constituted an infringement of EU law.¹⁷¹ Part of the analysis carried out by the Court in order to determine if the West German method of calculating the tax on imported alcohol was based on the needs of the consumer.¹⁷² It can be inferred from the ruling of the Court that similar products which are in the same situation and meet the same needs from the point of view of the consumer, should be treated in the same manner for tax purposes.

In *Commission v France*¹⁷³, the Court was called to rule on infringement proceedings initiated against France by the Commission. The reason for the bringing of the infringement proceedings was that the member states were considered to have violated article 95 of EEC Treaty¹⁷⁴, the prohibition of discriminatory taxation of products on the internal market, through their schemes for spirits which detrimentally effected non-domestic products.¹⁷⁵ Building on *REWE*, the Court pointed out that the similarity analysis based on the consumer concept is flexible, two similar products need not be exactly identical.¹⁷⁶ Essentially, all products within the category of spirits have some form of general similarities, while still maintaining specific characteristics relating to the mode of manufacturing and/or raw materials used and essentially being used in the same fashion by consumer, with

¹⁷¹ Case 45/75 *REWE* paras 10–17.

¹⁷² *Ibid* para 12.

¹⁷³ Case 168/78 *Commission v France* EU:C:1980:51 [1980].

¹⁷⁴ Now article 110 TFEU.

¹⁷⁵ Case 168/78 *Commission v France* paras 3–10

¹⁷⁶ *Ibid* paras 4–5.

specific differences in consumption depending on product specialisation.¹⁷⁷ The CJEU maintained that there was a certain amount of similarity in all spirits.¹⁷⁸ In the end, the CJEU held that the French “manufacturing tax” that certain types of spirits were subject to, was incompatible with article 95 of the EEC Treaty.¹⁷⁹ However, the Court more or less avoided making a detailed ruling on whether the products were similar or not – acknowledging the complexity of consumer behaviour as being unsuitable as a criterion for establishing a suitable distinction justifying a differentiated tax treatment of the products in question.¹⁸⁰

There are several cases of same type as *REWE* and *Commission v France*, building on essentially the same use of the average consumer concept by the CJEU and originating in similar circumstances in the respective member states. Infringements of article 95 of the EEC Treaty by Italy¹⁸¹, the United Kingdom¹⁸² and Denmark¹⁸³ have been assessed by the CJEU through extensive usage of the average consumer concept. As the cases are quite similar in reasoning and *Commission v France*, the circumstances of these will not be further presented here.

*Roders and Others*¹⁸⁴ is an especially instructive case, showcasing how the CJEU applies the average consumer concept to similarity-assessments of alcoholic beverages. As part of its answer to the Tarifcommissie of the Netherlands on the similarity of Benelux grape and fruit wines to various imported alcoholic beverages, the CJEU held that red table wines were similar in the eyes of the average consumer, regardless of whether these wines were made of grapes or fruit, whereas quality red wines were left for the national court to decide on.¹⁸⁵ Liqueur wines (sherry and madeira), as well as vermouth, were not considered as similar products to fruit or grape wines, due to differences in usage of the different products and in the sensory perception of the consumer imbibing the products.¹⁸⁶ The CJEU also held that champagne and sparkling fruit wine could not be held to be similar products, due to differences in the manufacturing process, in organoleptic properties and the celebratory nature of the usage of champagne.¹⁸⁷ The conclusions drawn by the CJEU echoed the assessment of AG Tesouro, who placed extensive emphasis on the characteristics of the

¹⁷⁷ Ibid para 11.

¹⁷⁸ Ibid para 12.

¹⁷⁹ Ibid paras 28–42.

¹⁸⁰ Ibid paras 36–40.

¹⁸¹ Case 169/78 *Commission v Italy* EU:C:1980:52 [1980]; Case 216/81 *Cogis* EU:C:1982:275 [1982].

¹⁸² Case 170/78 *Commission v United Kingdom* EU:C:1983:202 [1983].

¹⁸³ Case 171/78 *Commission v Denmark* EU:C:1980:54 [1980] and Case 106/84 *Commission v Denmark* EU:C:1986:99 [1986].

¹⁸⁴ Case C-367/93 *Roders and Others* EU:C:1995:261 [1995].

¹⁸⁵ Ibid paras 29–31.

¹⁸⁶ Ibid paras 32–33.

¹⁸⁷ Ibid paras 35.

products as part of the similarity analysis.¹⁸⁸ While all of these assessments were subject to the further determination and investigation of the national court, they nonetheless provide for an comprehensive overview of the CJEU's approach to similarity assessments of products. In *Walker*¹⁸⁹ the outcome was different, even though the CJEU built on the same line of caselaw as the previous mentioned cases. In a comparison between Scotch whiskey and fruit wine, the CJEU held that the characteristics of the compared products were too dissimilar in terms of raw materials, manufacturing process and alcoholic strength. Even though the Scotch whiskey could potentially be consumed in the same fashion as fruit wine (as an diluted aperitif), the CJEU held that the characteristics of the products were so fundamentally different that likeness in use was not enough to render the products similar.¹⁹⁰

*Commission v Sweden*¹⁹¹ is an example of more recent caselaw which has explanatory value regarding the similarities between products.¹⁹² The Commission instituted infringement proceedings against Sweden on the grounds that the Swedish legislation regarding excise duties on alcoholic beverages lead to protectionist effects, which is a violation of (then) article 90 of the EC Treaty¹⁹³. According to the Commission, beer (generally a domestic good) enjoyed a lower rate of taxation than comparable wines (generally a imported good) in Sweden.¹⁹⁴ Sweden, on the other hand, argued that the price difference between beer and wine was inherently such that the different tax rates did not impact the final prices – an identical quantity of wine and of beer, each the most popular of the respective categories, differed in price significantly even if the excise duty rates would be the same.¹⁹⁵ The CJEU held that the difference in excise duties, on strong beer and comparable wines, was of such a nature that the wines were subject to a rate of taxation which was higher than that of strong beer.¹⁹⁶ As the Swedish excise duty system had only a marginal impact on the price, due to the inherently large price differences between the products, it was not likely not influence consumer behaviour or preferences.¹⁹⁷ Thusly, the Swedish excise duty system was not in violation of article 90 of the EC Treaty.¹⁹⁸ While the average consumer concept is not explicitly mentioned in the case,

¹⁸⁸ Opinion of Advocate General Tesauro in *Rodgers and Others* EU:C:1995:11 [1995] paras 13–21.

¹⁸⁹ Case C-243/84 *Walker*.

¹⁹⁰ *Ibid* paras 11–14.

¹⁹¹ Case C-167/05 *Commission v Sweden* EU:C:2008:202 [2008].

¹⁹² Ben Terra and Julie Kajus, *Introduction to the European Excises (2008/118/EC), Commentaries on the European VAT Directives* (IBFD 2016) p. 68.

¹⁹³ Now article 90 TFEU.

¹⁹⁴ Case C-167/05 *Commission v Sweden* paras 16–17.

¹⁹⁵ *Ibid* para 33.

¹⁹⁶ *Ibid* para 46–51.

¹⁹⁷ *Ibid* paras 52–60.

¹⁹⁸ *Ibid* paras 58–62.

the reasoning of the CJEU still relies on a consumer point of view analysis. The consumers of beer and wine are, according to the Court, not very likely to adjust their spending habits due to the excise duties – if the effect of such duties is insignificant due to pre-existent price differences between the products.¹⁹⁹ It is important to note that in earlier caselaw, the CJEU has held that an unduly high tax rate on imported alcoholic beverages in comparison with the tax rate levied on domestic products could still be tantamount to a violation of Union law.²⁰⁰ This threshold seemed to be set at 58% to 77% higher tax burden on the imported goods.²⁰¹

*Commission v France*²⁰², an infringement procedure regarding excise duties on cigarettes, illustrates that the approach taken by the CJEU in the caselaw presented above is not exclusively applicable to alcoholic beverages. By building on the process showcased in *Rodgers and Others*, the CJEU assesses the similarity between dark- and light-tobacco cigarettes.²⁰³ The characteristics of the two types of cigarettes were held to be similar, including the sensory perception that the average consumer has of the products. Moreover, the products were held to satisfy the same needs, regardless of the difference in age of the typical consumer of dark-tobacco compared to the average consumer of light-tobacco.²⁰⁴ As stated by AG Alber, the existence of distinct separate consumer groups rule out similarity between products – in fact, demographic differences in consumer bases are not a consequence of the needs of consumer, nor of the characteristics of the products.²⁰⁵ Due to the similarity of the products and the fact that geographical manufacturing patterns were such that the French regulatory system favoured the product almost exclusively produced in France (dark-tobacco cigarettes), the CJEU held that France had infringed EU law, even though there was no explicit distinction based on origin in the French system.²⁰⁶ The Opinion of AG Alber further shows how the evolution of how the CJEU has approached the similarity assessment of products. According to the AG, the CJEU has shifted its assessment from an approach based on characteristics of the products and whether said products fulfil the same needs in the eyes of the consumer, to an approach based on product characteristics and the same needs of the consumer.²⁰⁷ This approach is characterised by the AG as objective, as it does not place decisive emphasis

¹⁹⁹ Terra and Kajus (2016) p. 68.

²⁰⁰ Case 170/78 *Commission v United Kingdom*.

²⁰¹ Ibid para 25–28.

²⁰² C-302/00 *Commission v France* EU:C:2002:123 [2002].

²⁰³ Ibid paras 22–23.

²⁰⁴ Ibid paras 24–26.

²⁰⁵ Opinion of Advocate General Alber in *Commission v France* EU:C:2001:449 [2001] paras 71–72.

²⁰⁶ Terra and Kajus (2016) p. 75.

²⁰⁷ Opinion of Advocate General Alber in *Commission v France* paras 64–66.

on subjective consumer assessments.²⁰⁸ Under this approach the AG considered the products under consideration in the case to be similar, as they share similar characteristics in the form of manufacturing processes and fulfil the same consumer need, namely the need for nicotine.²⁰⁹

3.3 Analysis of Excise Duty Caselaw

The concept of the average consumer is continuously coupled with assessment of product characteristics similarity in the judgements of the CJEU and oftentimes given less weight in the decisions. Initially envisioned as a criterion of the similarity assessment under article 95 EEC (now article 110 TFEU), the consumer was only characterised as having needs which could or could not be met by the products under assessment.²¹⁰ This does not necessarily mean that the consumer was monolith in nature, as the CJEU did not deny the existence shifting consumer habits or preferences over the Community – though such characteristics were held to be too subjective to base a assessment regarding article 95 EEC on.²¹¹ Instead, the choices made by the consumer were held to be a consequence of the characteristics of the products themselves.²¹² The CJEU subsequently held that the criterion based on the needs of the consumer should encompass the habits of the consumer throughout the Community.²¹³ This has been further affirmed by the CJEU, underscoring the fact that arguments based on consumer habits, due to the spatial and temporal variability of such habits, cannot be limited to the level of Member States or regions.²¹⁴ Instead, assessing similarity of products according to the needs of the consumer need be based on the characteristics of the products, such as alcoholic strength, and price difference incurred by the tax burdens on the products.²¹⁵ Similarity in characteristics of products cannot be disregarded due to consumer preferences differing on the Member State level – the overlap in characteristics of products subject to different excise duty classifications is enough to establish similarity.²¹⁶ The CJEU has even gone as far as to establish that, even though the concept of similarity should be interpreted widely, the assessment of whether products fulfil the same needs from point of view of consumer should not be based on existent consumer habits but of the prospective developments of said habits, based on the objective characteristics of the products.²¹⁷ Furthermore, even the existence of significant differences between the average consumer bases of

²⁰⁸ Ibid, para 66.

²⁰⁹ Ibid, paras 67–73.

²¹⁰ Case 45/75 *Rewe* para 12.

²¹¹ Case 168/78 *Commission v France* paras 36–40 and Case 169/78 *Commission v Italy* paras 32–35.

²¹² Ibid, para 40.

²¹³ Case 216/81 *Cogis* para 8.

²¹⁴ Case 170/78 *Commission v United Kingdom* para 8.

²¹⁵ Ibid, paras 20–27.

²¹⁶ Case 171/78 *Commission v Denmark* para 35–37.

²¹⁷ Case 106/84 *Commission v Denmark* para 12–15.

the products under comparison has been held not to affect assessment of the fulfilment of needs of consumers.²¹⁸ The importance of objective factors in the form of product characteristics (origin, manufacturing process and organoleptic properties) was further emphasised by the CJEU in *Roders and Others*.²¹⁹ As one could expect, extensive dissimilarity in characteristics between products means the products cannot be regarded as similar.²²⁰ However, similarity in the fulfilment of the needs of the consumer can also be determined in the light of the circumstances of the use of the products – i.e. whether the products are consumed and associated with special occasions.²²¹ Overall, it is quite clear from caselaw that CJEU consistently prioritises making assessments based on the characteristics of products rather than the needs of the average consumer as such.

Regarding the nature of the average consumer concept, the following can be inferred from the caselaw. The CJEU does not contest that there might be variations in the groups of consumers of similar products within member states, but it does not consider these to be relevant. This is seemingly part of an approach towards a more objective assessment of the needs of the consumers.²²² In essence, there seems to be several types of consumers in the eyes of the CJEU – regional or member state variations as well as a pan-Union variation. Arguably, it is the latter that the CJEU considers relevant from a legal perspective.

What can be established about the identity of the average consumer in excise duty law? When the CJEU has chosen to elaborate upon this, it has been done in relation to the characteristics of products – indicating that the consumer is quite focused upon these characteristics when surveying products.²²³ Moreover, it is apparent that differences in price, both as a function of member state levying of excise duties and due to other facts, play a substantial part in the eyes of the average consumer.²²⁴ Consequently, the average consumer in excise duty caselaw is boiled down to a narrow set of preferences, allowing for a largely homogenous picture of the consumer.

3.4 Conclusion

In its caselaw on excise duties, the CJEU tends to focus more heavily on the characteristics of products rather than assessing the product from the point of view of the average consumer. The CJEU does not contest that there are variations in the groups of consumers throughout the EU, but it does not

²¹⁸ Case C-302/00 *Commission v France* para 26.

²¹⁹ C-367/93 *Roders and Others* paras 26–36.

²²⁰ 243/84 *Walker* paras 11–14.

²²¹ C-367/93 *Roders and Others* para 35.

²²² Opinion of Advocate General Alber in *Commission v France* paras 64–66.

²²³ Case 216/81 *Cogis* para 8 and Case 170/78 *Commission v United Kingdom* paras 20–27.

²²⁴ Case 170/78 *Commission v United Kingdom* para 25–28 and Case C-167/05 *Commission v Sweden* paras 56–62.

consider these to be particularly relevant for a legal perspective on the EU level. The image presented of average consumer which is relevant in the eyes of the CJEU in this area of law is a quite simplified, homogenous version of what is an acknowledged heterogenous group.

4. The Average Consumer Concept in Trademark Law

4.1 Section Outline

The purpose of this section is to explore the usage of the average consumer concept in the area of trademark law in the EU. Firstly, overarching attributes is presented, showing how the concept is used in caselaw and which implications such usage has. Secondly, relevant caselaw is presented in a chronological fashion in an effort to map out the aspects of concept. Thirdly and lastly, the average consumer concept in trademark law and caselaw is analysed, followed by a conclusion in a separate subsection.

4.2 Central aspects of the Average Consumer Concept in Trademark Law

There are many notions regarding the substance of the average consumer concept within the scope of trademark law – even both from a legal theory point of view but also from an practical perspective.²²⁵ Dalgard Lautsen argues that the average consumer concept is a form of legal fiction, a figure consisting of both factual and normative elements.²²⁶ A legal fiction is essentially a simplification of reality, used for legislative purposes.²²⁷ The usage of this figure has varied widely in caselaw and legal doctrine, with the concept being defined as number of different standards and reference points.²²⁸ A key usage of this concept is as a form of criterion for determining if two trademarks are confusingly similar.²²⁹ Dalgard Lautsen maintains that the average consumer concept is part of the same family of legal fictions and concepts as those found in EU design law, patent law and tort law.²³⁰ The average consumer acts as a proxy for the public in trademark law, the public that might be confused by trademarks which are too similar.²³¹ In short, the average consumer should be seen as a representative of the public, created by the CJEU as a part of the assessment

²²⁵ Dalgard Lautsen (2020) pp. 5–6.

²²⁶ Ibid p. 6.

²²⁷ Ibid pp. 138–139.

²²⁸ Ibid pp. 128–131.

²²⁹ Ibid p. 5.

²³⁰ Ibid pp. 149–199.

²³¹ Ibid p. 5.

made in line with the Trade Mark Regulation²³² and the Trade Mark Directive²³³.²³⁴

4.3 Relevant Caselaw

An early landmark case wherein the CJEU used the wording is the judgement *Gut Springenheide*.²³⁵ While the case as such dealt with marketing standards for eggs in the context of unfair practices law it has had considerable impact on the interpretation of the average consumer concept within EU trademark law.²³⁶ A German company, Gut Springenheide, sold eggs contained in packaging which extolled the virtue of a specific type of feed – claiming that the feed, due to its composition would beneficially impact the quality of the eggs.²³⁷ The relevant German supervisory authority notified the company that the claims on the packaging and on papers echoing the same information enclosed in each package would have to be removed.²³⁸ This decision was brought the attention of the judicial system through application of the company, leading to an appeals process where finally the Federal Administrative Court (the Bundesverwaltungsgericht) decided to refer a number of questions to the CJEU.²³⁹ These questions centred around the interpretation of the concept of the consumer, alongside the appropriate interpretation in relevant legislation²⁴⁰ on the matter of marketing standards of eggs. The CJEU answered these questions through the definition and subsequent creation of a standardized legal concept of consumers. Referring to earlier caselaw relevant to the consumer concept, the CJEU held that the point of view of average consumer is a vital to the analysis of whether information marketed to consumers is likely to mislead said consumers.²⁴¹ Furthermore, the CJEU clearly established that the average consumer concept, with all the characteristics presumed to be inherent to said concept, is established without the search for relevant empirical data to ascertain the validity of the concept.²⁴² It was also underlined by the CJEU that the national courts of the Member States have the mandate and general ability to conduct analyses on the same type, provided that they adhere to the standard set up by the CJEU in caselaw.²⁴³

²³² Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154.

²³³ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks OJ L 336.

²³⁴ Dalgard Lautsen (2020) p. 3.

²³⁵ Case C-210/96 Gut Springenheide EU:C:1998:369 [1998].

²³⁶ Dalgard Lautsen (2020) pp .285–286.

²³⁷ Case C-210/96 Gut Springenheide para 9.

²³⁸ Ibid para 10.

²³⁹ Ibid paras 11–15.

²⁴⁰ Article 10(2)(e) of Regulation (EEC) No 1907/90 on the marketing standard of eggs.

²⁴¹ Case C-210/96 Gut Springenheide paras 30–31.

²⁴² Ibid para 31.

²⁴³ Ibid para 32.

However, if need be and national law allows it, national courts can utilize empirical evidence in order to support an investigation into the possible misleading nature of a trademark or a product description.²⁴⁴ In the end, the CJEU defined the average consumer as “reasonably well-informed and reasonably observant and circumspect” individual, the expectations of which act as a benchmark for national courts to utilize when determining whether promotional statements or descriptions are liable to mislead purchasers of (in this case) eggs.²⁴⁵

*Sabel*²⁴⁶ is in the same vein of caselaw as *Gut Springenheide* and was decided in the same era.²⁴⁷ While this particular case does not go as deeply into the definition of the average consumer concept as *Gut Springenheide*, it is nonetheless a case of note in the development of the concept in trademark law.²⁴⁸ The case, which originated as a request for a preliminary ruling from the German courts, deals with the determination of likeness between trademarks and where that likeness might lead to confusion on the part of the consumer in regards to which trademark is actually viewed by said consumer.²⁴⁹ In other words, the German court needed guidance on how to assess if the logo of the Dutch brand *Sabel* was too similar to logo of the brand *Puma*.²⁵⁰ If such confusion would be held to be likely, the registration of the temporarily latter of the similar trademarks could be refused under EU law. As part of its analysis of the criterion set out by the relevant directive, the CJEU clarified that the average consumer concept should serve as a benchmark for when such confusion exists.²⁵¹ The average consumer is stated to not be interested in the particulars of trademarks, instead assessing the mark or logo as a whole.²⁵² This type of holistic approach was termed the “global appreciation test” by the CJEU.²⁵³ The approach has had substantial influence on subsequent caselaw.²⁵⁴ Thusly, when are trademarks conceptually similar but there with a discrepancy in how well-known each logo is and the earlier logo is unoriginal, there is no probability of confusion on part of the public.²⁵⁵ The average consumer is not particularly sophisticated in the perception of brands – broad strokes are vital, not nuances.

²⁴⁴ Ibid paras 35–36.

²⁴⁵ Ibid para 37.

²⁴⁶ Case C-251/95 *Sabel*.

²⁴⁷ *Gut Springenheide* was decided in 1998 and *Sabel* was decided in 1997.

²⁴⁸ Dalgaard Lautsen, pp. 225–226.

²⁴⁹ Case C-251/95 *Sabel* paras 10–11.

²⁵⁰ Ibid paras 1–5.

²⁵¹ Ibid paras 21–23.

²⁵² Ibid para 23.

²⁵³ Ibid paras 22–23.

²⁵⁴ Dalgaard Lautsen (2020) p. 281.

²⁵⁵ Case C-251/95 *Sabel* para 25.

*Lloyd*²⁵⁶ was also decided in the same era as *Gut Springenheide* and *Sabel*, forming part of that particular trifecta of caselaw on the average consumer concept. The case is quite similar to *Sabel*, as both cases actualize the same provisions of EU law and concern similar circumstances in Germany. Lloyd, a company specializing in the sale of footwear, brought a complaint to the German court system regarding a competing company, Klijsen and its usage of the trade mark “Loint’s”.²⁵⁷ Lloyd argued that “Loint’s” was too aurally similar to “Lloyd”, making consumers likely to confuse the two as both brands were active in the same market, selling the same products.²⁵⁸ Additionally, Lloyd argued that their trademark was very specific and had been present and known in the German market for a long period of time.²⁵⁹ Klijsen counterargued that the two brands did not exactly compete in the same market, as each brand manufactured and sold different types of shoes. According to Klijsen, the Lloyd brand was not as established as argued by the counterparty, nor was the average consumer liable to be confused by the aural likeness between the brands – only the characteristics of actual logotype could lead to such confusion.²⁶⁰ The German court, after considering empirical research on the public’s recognition of shoe brands, decided to stay the proceeding and refer a number of questions concerning the confusion-benchmark to the CJEU.²⁶¹ By building on both *Gut Springenheide* and *Sabel* the CJEU argued that the average consumer considers trademarks as a totality without regarding details of said mark, while at the same time being adequately informed, observant and circumspect about the products intended.²⁶² The CJEU added two additional dimensions to the average consumer concept – lack of opportunity to directly compare different trademarks and the category-dependent level of attention.²⁶³ The average consumer relies on the recollection of trademarks as the opportunity for direct comparison seldom reveals itself.²⁶⁴ Moreover, the CJEU acknowledged the fact that the average consumer is not likely to be equally attentive when consuming every category of goods or services – the level of attention varies.²⁶⁵ How this criterion should be evaluated is not elaborated upon by the CJEU, instead a comprehensive approach to analysis on a case-by-case basis, wherein each of the elements should be weighted appropriately due to the relevant circumstances is advocated.²⁶⁶

²⁵⁶ Case C-342/97 *Lloyd*.

²⁵⁷ *Ibid* paras 5–7.

²⁵⁸ *Ibid* para 7.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* para 8.

²⁶¹ *Ibid* paras 9–10.

²⁶² *Ibid* paras 25–26.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid*.

²⁶⁶ *Ibid* paras 26–28.

In more recent caselaw wherein the average consumer concept is employed, *Adidas/Marca*²⁶⁷ should be mentioned. The case, which deals with the interpretation of certain provisions of the (then applicable) Trademark Directive²⁶⁸ in relation to the “three-stripes-motif” famously used by the brand Adidas, showcases an interesting approach to the average consumer concept. A number of clothing retailers active in the Netherlands were selling items of clothing bearing similar markings as those extensively used by Adidas. This led to litigation on part of Adidas, on the basis that the companies in question were committing trademark infringement, culminating in the Supreme Court of the Netherlands referring a number of questions to the CJEU.²⁶⁹ As has been delved deeply into elsewhere, the *Adidas/Marca* case essentially boils down to whether consumers can tell the difference between two stripes (as used by the defendants in the case) and three stripes (as used by Adidas, the litigants), in relation to symbols which are extensively associated with a particular brand.²⁷⁰ Building on *Sabel* and *Lloyd*, the CJEU assessed the situation present in the case from the perspective of potential confusion on part of the consumers. The CJEU held that the possibility of such potential confusion must be assessed on comprehensive basis, echoing the wording of the 10th recital of the TM Directive.²⁷¹ While the CJEU did not determine that all forms of stripe motifs might lead to infringement of the Adidas trademarked symbol, allowing competing companies free use of similar stripe motifs would undermine the relevant provisions of the Trademark directive and potentially confuse consumers.²⁷² In short, the CJEU held that the national court needed to decide upon whether the average consumer, upon viewing clothing of a similar type as those retailed by Adidas, with stripe motifs in the same places and of the characteristics as the motif used by Adidas, would be confused as to whether the items of clothing were marketed by Adidas or a competitor, even if the number of stripes were two instead of three.²⁷³

4.4 Analysis of Caselaw and Concept in Trademark Law

The average consumer concept in trademark law is explicitly based on a legal fiction determination, supplemented only with empirical evidence when such needs arise and national law allows it. In *Gut Springenheide*, the

²⁶⁷ C-102/07 *Adidas Marca*.

²⁶⁸ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

²⁶⁹ C-102/07 *Adidas Marca* paras 8–19.

²⁷⁰ Lotte Anemaet, ‘The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?’ (2020) 51 IIC - *International Review of Intellectual Property & Competition Law* 187.

²⁷¹ C-102/07 *Adidas Marca* paras 28–29.

²⁷² *Ibid* paras 31–32.

²⁷³ *Ibid* para 35.

average consumer is presumed to be a well-informed individual, presumably invested into the product which is to be purchased. Consequently, the average consumer is perhaps not easily influenced by marketing claims. However, this consumer still has to be supplied with the right information – it is the analysis of such information that the average consumer is responsible for.²⁷⁴ Moreover, such an analysis can prove to be dependent on the context in which the average consumer acts.²⁷⁵ In other words, the average consumer in trademark law is not infallible – the legal system should afford the individuals represented by this concept a higher standard of legal protection if need be. The image of the average consumer presented in *Sabel* indicates that a basic assumption on which the concept rests is that extensive analyses of trademarks are not performed by the average consumer. Trademarks are perceived as a totality, rather than as a nuanced sum of parts.²⁷⁶ Decisive weight is given to the average consumer in the global appreciation test, emphasising the importance of the consumer perspective. This is further echoed in *Lloyd*, where the concept is nuanced in terms of the approach taken by the average consumer when they perceive trademarks – acknowledging that consumers do not have access to perfect information at all times, as well as underlining that the attention consumers paid by consumers is variable.²⁷⁷ The power of association is arguably acknowledged by the CJEU in *Adidas/Marca*, as primary characteristics (such as nature and placement) of trademarks can potentially lead to confusion on part of the average consumer.²⁷⁸ The average consumer in trademark law is constantly shown to be primarily focused on central aspects of trademarks, while more minute differences are not given much consideration in legal assessment.

Purnhagen argues that the Average Consumer benchmark (in both trademark law and other areas) has historically been a restrictive and formulaic legal concept.²⁷⁹ While Purnhagen notes that there has been some divergence in this approach from the CJEU, these instances are too few to draw a general conclusion from.²⁸⁰ These instances seem to point towards a more liberal approach to the application of the average consumer concept. However, the approach taken by the CJEU in *Adidas/Marca* is arguably anything but liberal – instead it is a rather strict and formulaic, with the average consumer being characterised as focused on fairly blunt aspects of a trademark. It should be noted that the geographical scope of the average

²⁷⁴ Kai Purnhagen, ‘More Reality in the CJEU’s Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices?’ (2017) 8 *European Journal of Risk Regulation* p. 437.

²⁷⁵ *Ibid.*

²⁷⁶ Case C-251/95 *Sabel* paras 21–23.

²⁷⁷ Case C-342/97 *Lloyd* paras 25–26.

²⁷⁸ C-102/07 *Adidas Marca* paras 28–35.

²⁷⁹ Purnhagen (2017).

²⁸⁰ *Ibid.*

consumer concept is quite variable in trademark law. As noted by Dalgaard Lautsen, it seems that EU law allows for a variable definition of the relevant market and often the relevant consumer group.²⁸¹ The geographical scope can therefore be larger or smaller depending on the facts of a specific case.

4.5 Conclusion

The average consumer in trademark law is defined by a certain degree of knowledge about the field of products that the trademarks assessed refers to. Portrayals of the average consumer showcase a degree of variability, allowing the concept to be quite adaptable to different situations. The concept is asymmetrical in nature, used as a sophisticated standard in some areas while more blunt in others – arguably meaning that the CJEU perceives the average consumer as unevenly sophisticated dependent on which part of the market the average consumer interacts with. The consumer is not an ideal as such, as it is subject to certain imperfections – such as not having access to perfect information at all times. Essentially, the average consumer does not perceive trademarks in a detailed manner. A recurring notion in caselaw is that the average consumer perceives trademarks as portrayed by their primary characteristics – details are of lesser importance. Given the circumstances of caselaw, the geographical scope of the concept can differ.

²⁸¹ Dalgaard Lautsen (2020) pp. 266–269.

5. Comparison of Concepts

5.1 Section Outline

In this section, the average consumer concept as it stands in VAT law, excise duty law and trademark law are compared. The comparison is carried out in the following subsection, where the identity, use and geographical scope of the average consumer is discussed. This is followed by a concluding subsection.

5.2 Comparison between the areas of law

5.2.1 Who is the average consumer?

From the investigation into caselaw conducting the preceding sections, it is apparent that the average consumer in EU VAT law is not defined independently of transactions which are analysed by the CJEU. Heterogenous caselaw spanning widely different transactions do not readily lead to a decisive definition of the average consumer, at least not as a consumer in the commonplace meaning of the word. As an outlier, the average consumer of undersea fibreoptic cables²⁸² arguably quite different from the average consumer of more mundane supplies. The caselaw, while heterogenous, does however grant certain insights to how the CJEU envisions the average consumer's assessment of transactions. A clear commonality in the caselaw is that the average consumer prioritizes the main component of a supply over various auxiliary aspects – for example, payments methods are not considered to be independent supplies.²⁸³ Moreover, preliminary steps needed to make the supply fulfil the purpose intended by the consumer and which lack independent purpose in themselves are regarded as part of the main supply – such as customisation of software²⁸⁴ and preliminary financial analysis²⁸⁵. Both the use and the content of supplies play a role when the average consumer compares supplies.²⁸⁶ Furthermore, small differences do not impact the similarity of supplies in the eyes of the average consumer.²⁸⁷ The needs of the average consumer can overtake member state legal definitions of supply²⁸⁸ but this does not hold true if the legally different element of a supply is sufficiently concrete and defined as different to the main supply.²⁸⁹ Intentions of some

²⁸² See Case C-111/05 *Aktiebolaget NN*.

²⁸³ Case C-34/99 *Primback* paras 41–46 and Case C-276/09 *Everything Everywhere* 21–32.

²⁸⁴ Case C-41/04 *Levob* paras 17–26.

²⁸⁵ Case C-453/05 *Ludwig* paras 15–20.

²⁸⁶ Case C-219/13 *K* para 33 and Case C-499/16 *AZ* paras 30–33.

²⁸⁷ Joined Cases C-454/12 and C-455/12 *Pro Med* para 53.

²⁸⁸ Case C-145/18 *Regards Photographiques* EU:C:2019:668 [2018] para 36.

²⁸⁹ Case C-94/09 *Commission v France* paras 35–40.

consumers which partake in a supply cannot undermine the definition of said supply.²⁹⁰ This indicates that the average consumer is not represented in all consumer who might be party to a transaction, there is differentiation.

The average consumer in excise duty law is built on a homogenous definition, which is consistent across the member states. While the CJEU acknowledges that consumers differ from member state to member state, the average consumer concept does not account for such variations.²⁹¹ Instead, the average consumer concept is focused on the price and characteristics of goods.²⁹²

The average consumer as presented in trademark caselaw is portrayed differently. Focus in these cases is more centred on the characteristics of the average consumer as such, building on the notion of the average consumer as “reasonably well-informed and reasonably observant and circumspect” individual.²⁹³ The average consumer is defined as not being particularly nuanced in their assessment of trademark, perceiving them as a totality, and as not having access to perfect information at all times.²⁹⁴ In essence, the average consumer is not a perfect observer – while well-informed, the level of attention paid by the average consumer is variable.²⁹⁵

From the preceding paragraphs, it can be ascertained that the average consumer is not the across the areas of law analysed. In VAT law, the average consumer has some characteristics which are echoed in several cases but the approach of the CJEU to the concept is quite different in VAT law compared to excise duty law and trademark law. The VAT law definition of the average consumer concept lacks both the homogenous nature seen in excise duty law and the clear definition present in trademark law.

5.2.2 The use of the Average Consumer Concept

The use of the average consumer concept in VAT law is twofold – the determination of whether a multi-elemental transaction should be split into multiple supplies or be defined as a singular composite supply²⁹⁶ and the determination whether two supplies are similar enough in order to warrant the same treatment for VAT purposes²⁹⁷. These approaches, as showcased in

²⁹⁰ Case C-18/12 *Město Žamberk* EU:C:2013:95 [2013] paras 35–36.

²⁹¹ Case 216/81 *Cogis* para 8; Case 170/78 *Commission v United Kingdom* para 8 and Case 106/84 *Commission v Denmark* paras 12–15.

²⁹² Terra and Kajus (2016) p. 68; Case 216/81 *Cogis* para 8; Case 170/78 *Commission v United Kingdom* paras 20–27 and Case C-167/05 *Commission v Sweden* paras 56–62.

²⁹³ Case C-210/96 *Gut Springenheide* para 37.

²⁹⁴ C-251/95 *Sabel* para 23 and C-342/97 *Lloyd* paras 25–26.

²⁹⁵ C-342/97 *Lloyd* paras 24–26.

²⁹⁶ See for example Case C-349/96 *CPP* paras 26–32 and Case C-88/09 *Graphic Procédé* paras 14–20 amongst others.

²⁹⁷ Joined Cases C-259/10 and C-260/10 *The Rank Group* para 36 and Joined Cases C-454/12 and C-455/12 *Pro Med* paras 53–54.

subsections 2.2.1 and 2.2.2, have been quite consistent, if nuanced over time by the CJEU.

In excise duty caselaw, use of the average consumer concept provides a basis for comparing the similarity of products. It is a point of comparison between a multitude of products in order to determine whether the taxation scheme used by member states in relation to the products is congruent with EU law. Focus is placed on both the characteristics and the uses of the products, which in turn are viable metrics for determining how the average consumer perceives the products. The notion that the needs of the average consumer are subjective and that the characteristics of a products are objective forms a clear communality in excise duty caselaw.²⁹⁸ According to AG Alber, the current approach taken by the CJEU is based on objectivity and not subjective consumer assessment.²⁹⁹ The use of the average consumer concept in excise duty caselaw is arguably secondary to comparisons based on the characteristics of the products, as these are held to be more objective in nature.

The use of the average consumer concept in trademark law emanates from the notion of the global appreciation test, termed in *Sabel*.³⁰⁰ A notion of the average consumer is as a benchmark for whether trademarks are confusingly similar.³⁰¹ In the caselaw, this is employed consistently by the CJEU – further nuance is added but the focus is on the likeness of trademarks.³⁰²

5.2.3 The geographical frame of reference

A key difference between the concepts in each area of law is the geographical frame of reference which is relevant for assessments based on the average consumer concept. The CJEU has not explicitly defined whether the average consumer is to be considered as a union-wide concept in VAT. However, in recent caselaw there are indirect references to the average consumer concept as being defined by national context.³⁰³ Moreover, AG Mengozzi argued explicitly for a average consumer as a concept differing between the member states, depending on the characteristics of the markets.³⁰⁴ Arguably, due to national nature of the context wherein most of the relevant cases are decided, the average consumer concept will often be

²⁹⁸ Case 168/78 *Commission v France* paras 36–40; Case 169/78 *Commission v Italy* paras 32–35; Case 171/78 *Commission v Denmark* para 35–37 and Case C-367/93 *Rodgers and Others* paras 26–36.

²⁹⁹ Opinion of Advocate General Alber in *Commission v France* paras 64–66.

³⁰⁰ Case C-251/95 *Sabel* paras 22–23.

³⁰¹ Dalgaard Lautsen (2020) p 5.

³⁰² C-251/95 *Sabel* paras 21–23; C-342/97 *Lloyd* paras 25–28 and C-102/07 *Adidas Marca* paras 28–32.

³⁰³ Case C-499/16 *AZ* paras 30–33.

³⁰⁴ Opinion of Advocate General Mengozzi in *K* paras 53–55.

confined to member state circumstances. Furthermore, since the average consumer concept is not an independent benchmark but an benchmark dependent on the transactions which it is used analyse, the national context of the transaction impacts the average consumer as well.

In excise duty law, the CJEU has repeatedly held that the average consumer is defined as a being the same across the EU and that local variations in consumer behaviour does not impact this fact.³⁰⁵ While the CJEU admits that that consumer habits and characteristics can differ even within a member state, these do not impact the fulfilment of consumer need of the product³⁰⁶, nor do they take precedence over the similarity of products³⁰⁷. The approach of the CJEU in regards to the average consumer in trademark law is not as apparent. The law as it stands allows for variation in this matter, depending on the relevant set of circumstances. While there seems to be a sufficiently clear definition of the characteristics of the average consumer, there might be smaller variations depending on market factors and variables.³⁰⁸ Regardless, assessments built on the concept in caselaw generally follow the same approach.³⁰⁹ Moreover, the role of the average consumer concept as a proxy for the public adds additional consistency to the concept overall.

Establishing the average consumer as a frame of reference dependent on a member state context is not without problems. When national courts are called upon to render judgement in cases where CJEU caselaw is relevant, the probability of outcomes which are consistent unionwide is hardly helped by subjective concepts being part of the guidance of the CJEU.³¹⁰ As illustrated by Centore and Sutich as well as Cannas, in the context of the VAT treatment of e-books, the average consumer concept can lead to increased fragmentation of the VAT system.³¹¹ While such fragmentation can be dealt with through amending the VAT directive, a consistent approach from the CJEU is preferable. Introduction of subjective criteria which are variable due to member state circumstances is hardly beneficial from a legal certainty point of view, nor is it without its implementation challenges for member state courts.³¹²

³⁰⁵ Case 216/81 *Cogis* para 8; Case 170/78 *Commission v United Kingdom* para 8 and Case 106/84 *Commission v Denmark* paras 12–15.

³⁰⁶ Case C-302/00 *Commission v France* para 26.

³⁰⁷ Case 106/84 *Commission v Denmark* para 12–15.

³⁰⁸ Dalgaard Lautsen (2020) pp. 266–269.

³⁰⁹ Purnhagen (2017) p. 437.

³¹⁰ Paolo Centore and Maria Teresa Sutich, ‘Publishing Industry and Reduced VAT Rates: An Open Question’ (2015) 26 *Intl. VAT Monitor* 1 25.

³¹¹ Centore and Sutich (2015) pp. 27–28 and Francesco Cannas, *Reduced Rates and the Digital Economy: The Treatment of (E-)Books Highlights Some Possible Inconsistencies of the EU VAT System* (2017) 2 *EC Tax Review* 96 p. 104.

³¹² *Ibid.*

5.3 Conclusion

There are a number of key differences in the uses of the average consumer concept in each of the compared areas of law. Especially the degree of characterisation of the average consumer differs substantially, with concept in VAT law being at the un-defined end of the spectrum whereas the concept in trademark law is comparatively well-defined. While some commonalities can be found in how the CJEU defines the average consumer in VAT law, the heterogenous nature of the caselaw does contribute to a measure of uncertainty as to whether the concept is equally applicable in a similar manner in regards to all supplies. The use of the average consumer concept by the CJEU in VAT law is however consistent over time, follow to separate lines of caselaw. Further nuance has been added in recent caselaw but the core elements remain the same. This is similar to how the CJEU has used the average consumer concept in excise duty law and trademark law.

6. Conclusion

Who is the average consumer in EU VAT law? The answer to this question has proven to be quite multifaceted. Due to the fact that the average consumer concept is always related to a specific transaction when used in caselaw, it is difficult to establish concisely define a “general” average consumer. However, some aspects regarding the characteristics of the average consumer can be gleaned from the caselaw. The average consumer in VAT has been defined as focused on supplies which are independent in nature, while regarding supplies depending on the independent supply as part of said supply. This also holds true for preliminary steps which serve no purpose without the main supply, these are not regarded seen as separate supplies by the average consumer. When comparing supplies, the average consumer focuses on the content and use of supplies, while not placing decisive weight on esoteric differences between the supplies. In certain circumstances, the average consumer is defined as not being impacted by the member state legal definitions of supplies. In essence, the average consumer concept is still largely heterogenous in nature but the CJEU has, over time, added certain consistent nuance to the concept.

Still, the identity of the average consumer in VAT law is not nearly as clearly defined as the average consumer in trademark law, which rests on a specific definition of the average consumer. Moreover, the concept of the average consumer in trademark law is more general in nature than the average consumer concept in VAT law, as it is essentially a proxy for the public. Still the average consumer concept is variable due to the relevant circumstances in cases, but not to the extent that the average consumer concept is.

In the same vein, the average consumer in excise duty law is comparatively consistently defined. While the image of the average consumer in this area of law primarily rests on a focus on product characteristics and price sensitivity, the CJEU has explicitly limited the average consumer concept to not include national or regional differences in order to achieve an EU-wide consistent concept. This is not echoed in caselaw relating to the average consumer concept in VAT.

Given these findings in caselaw, it can be held that the average consumer is not the same these areas of law. Characteristics of the average consumer in either excise duty law or trademark law cannot be extrapolated to apply to the average consumer in VAT law. The concepts are simply too different in current caselaw.

The use of the average consumer concept by the CJEU is consistent in VAT law, following two separate lines of caselaw. While the use has been more

nuanced over time, it still follows the same basic structure – as a point of reference when analysed the potentially splitting of transactions and as a benchmark when comparing the similarity between supplies. In both excise duty law and in trademark law the same trend holds true, showing a commonality between the approaches by the CJEU across these areas of law.

The key problem with the average consumer concept in VAT law is that it has potential to cause unnecessary fractions in the VAT system, which is detrimental to harmonization of VAT. While a certain degree of flexibility is necessary for the system to function and to achieve neutrality in context of member states, it is important that the criteria set up the CJEU are not too subjective. While the heterogenous nature of all the transactions subject to VAT might prohibit establishing a true independent average consumer concept which can always be applicable regardless of the transaction, inspiration can be drawn from the approaches to the concept in trademark and excise duty law. Additional consistency from the CJEU furthers legal certainty within the EU, allowing for further realisation of the internal market and the definitive VAT system. While the approach taken by the CJEU to the average consumer concepts in excise duty law and in trademark law cannot be readily applied to the concept in VAT law, inspiration can be drawn from these approaches. It would be preferably, in order to ascertain further legal certainty, for the CJEU to continue to provide consistent characteristics and definition to the average consumer concept in VAT law when possible. Thus, the average consumer concept can continue to be a relevant tool in the VAT caselaw of the CJEU.

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