

## Empirical evidence in consumer law cases: what are “up to” claims up to?

(working paper)

### 1. Introduction.

Empirical evidence can provide us with the useful knowledge as to how things work and how people behave in practice. This knowledge is obtained through means of observation and experimentation<sup>2</sup>. On the one hand, it would seem that in consumer law cases empirical evidence should play a major role in the decision-making of courts and other enforcement authorities since it would illuminate the particularities of a given case. For example, it could illustrate whether a certain consumer good performs conforming the concluded consumer contract, which would be decisive for determining consumers’ rights to remedies under the Consumer Sales Directive<sup>3</sup> regime. It could also clarify the consumer’s motivation and her decision-making process, which could enable courts and other enforcement authorities to establish the existence of an unfair commercial practice under the Unfair Commercial Practices Directive<sup>4</sup> (hereafter, the “UCPD”). To be more specific, when courts examine fairness of a certain marketing behaviour the empirical evidence could be decisive in determining whether the advertising claim was true and not deceitful<sup>5</sup>; whether the consumer was convinced to conclude a transaction, she would not have otherwise concluded<sup>6</sup>; what benchmark of an average consumer test to apply<sup>7</sup>; etc. On the other hand, the use of empirical evidence in consumer law cases may also has drawbacks. To account for all circumstances the court or enforcement authority would need to commission various empirical tests, delaying the dispute resolution and increasing its costs<sup>8</sup>. Additionally, the data gathered through empirical tests is not always straightforward and not

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<sup>2</sup> See more on empirical legal research in: Robert M. Lawless, Jennifer K. Robbennolt & Thomas S. Ulen, *Empirical Methods in Law* (Wolters Kluwer 2009).

<sup>3</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales Directive), arts 3-4.

<sup>4</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

<sup>5</sup> Unfair Commercial Practices Directive (n 4), art 6.

<sup>6</sup> Unfair Commercial Practices Directive (n 4), art 2e.

<sup>7</sup> See more on the normative concept of the average consumer e.g.: Jens-Uwe Franck & Kai Purnhagen, ‘Homo Economicus, Behavioural Sciences, and Economics Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis’ in Klaus Mathis (ed), *Law and Economics in Europe: Foundations and Applications* (Springer 2014), 335-338; Bram Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015).

<sup>8</sup> It may be easier for the court to hire an expert to answer some questions on these matters instead. See e.g.: Brigitta Lurger, ‘Empiricism and Private Law: Behavioral Research as Part of a Legal-Empirical Governance Analysis and a Form of New Legal Realism’ [2014] 1 *Austrian Law Journal* 35-36; Anne-Lise Sibony, ‘Can EU Consumer Law Benefit From Behavioural Insights? An Analysis of the Unfair Practices Directive’ in Klaus Mathis (ed), *European Perspective on Behavioural Law and Economics* (Springer 2015), 100-101.

always easy to interpret and apply<sup>9</sup>. This could explain why courts and other enforcement authorities might seem somewhat reluctant to request empirical evidence from the parties or even experts.

In this contribution I argue that in certain consumer law cases providing empirical evidence is necessary and that specific standards of proof should then apply. Only through analysing evidence of actual consumer behaviour as well as of trader's commercial practices courts and enforcement authorities may guarantee strong consumer protection. However, due to the lack of standardisation and a rather blithe judicial and regulatory approach in testing the submitted empirical evidence, currently, there is a significant uncertainty as to what courts would and should recognize as sufficient and reliable empirical evidence. I illustrate this thesis through the analysis of a specific type of unfair commercial practices, namely, so-called "up to" claims, and their perusal in the Dutch legal practice. The Netherlands has chosen to provide specific consumer remedies to its consumers using the freedom granted in the UCPD to the Member States regarding enforcement of consumer protection against unfair commercial practices<sup>10</sup>. Since Dutch consumers could claim damages or even terminate the contract in case of an unfair commercial practice, they should have sufficient incentive to claim protection against such practices. Consequently, I chose to examine Dutch legal practice in this contribution since it should provide plenty of opportunities to examine how courts and other enforcement authorities approach empirical evidence in such cases<sup>11</sup>. The examined case law clearly demonstrates the need for the introduction of a specific standard of proof for substantiating advertising claims, specifically "up to" claims. Moreover, it indicates that more attention should be paid to consumers' actual beliefs not only in legal scholarship but also in legal practice. This could, of course, occur on the national level, but in order to further harmonize and strengthen consumer protection in Europe, the European institutions would be best positioned to change this enforcement policy.

Traders and advertisers use "up to" claims when instead of quantifying the savings that a consumer could reach either through purchasing their product (price "up to" claims) or through using it (performance "up to" claims), they define the maximum amount of savings that only some consumers could gain (e.g. "sale up to 50%")<sup>12</sup>. The following paragraph defines more in depth "up to" claims and illustrates when such claims could be perceived to constitute an unfair commercial practice. Generally, in order for these claims not to be misleading under Article 6 of the UCPD a two-pronged test has to be met. An "up to" claim has to be truthful and may not deceive an average

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<sup>9</sup> See e.g.: Lurger (n 8) 35-36; Sibony (n 8) 95-98; Alberto Alemanno & Anne-Lise Sibony (eds), *Nudge and the Law. A European Perspective* (Hart Publishing 2015 forthcoming), epilogue.

<sup>10</sup> Dutch Civil Code, art 6:193j para 2 and 3. Unfair Commercial Practices Directive (n 4), art 11.

<sup>11</sup> Not all Member States provide specific remedies to consumers against unfair commercial practices, see e.g. on Germany: Civic Consulting for European Commission DG Justice, 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU. Part 1 – Synthesis Report' (2011) <[http://ec.europa.eu/justice/consumer-marketing/files/ucpd\\_final\\_report\\_part\\_1\\_synthesis.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucpd_final_report_part_1_synthesis.pdf)> accessed 21 May 2015, 34; Orkun Akseli, Willem van Boom & Amandine Garde, *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Ashgate Publishing 2014), 12, 250.

<sup>12</sup> Shannon Harell, 'What's Up with Up To Claims' (2013) InformationLawGroup blog <<http://www.infolawgroup.com/2013/08/articles/advertising-law/whats-up-with-up-to-claims/>> accessed 21 May 2015.

consumer, that is to say a reasonably well-informed, circumspect and observant consumer, convincing her to take a transactional decision she would otherwise not have been likely to make<sup>13</sup>.

In order to fulfil the first part of this test, the test of truthfulness and accuracy, a trader or an advertiser needs to be able to substantiate his “up to” claims. As paragraph three shows Dutch courts and other Dutch enforcement authorities generally expect parties to provide empirical evidence while substantiating “up to” claims in proceedings evaluating their truthfulness and accuracy. Currently, however, there are no standards set for the assessment of the validity and reliability of such empirical evidence. This means that consumers and traders may not be certain as to what standard of proof they have to meet in substantiating the (non-)truthful and (non-)accurate character of such claims. It is also difficult to objectively assess whether decisions of Dutch courts and other enforcement authorities sufficiently protect consumers against untrue and inaccurate “up to” claims.

The use of empirical evidence in assessing unfairness of a commercial practice should, however, go beyond examining the truthfulness of a particular “up to” claim. The second part of the test qualifies as misleading also factually correct information that still would or would be likely to deceive an average consumer. We could, therefore, expect courts also to empirically examine consumer behaviour in order to determine the impact of a given “up to” claim on the average consumer’s decision-making as well as the deceptive potential of a given claim. So far, Dutch courts have not yet applied findings of empirical research to evaluate consumer behaviour from the above-mentioned angle. In paragraph four I present what form such empirical research could take and how such additional empirical evidence on consumer behaviour with respect to “up to” claims could influence the assessment of the fairness of an “up to” claim. Namely, I introduce the American *Bristol Windows* study<sup>14</sup>, in which the American Federal Trade Commission<sup>15</sup> (hereafter, the “FTC”) requested such empirical evidence from consumer behaviour. The evidence from consumer behaviour led to a significant adjustment of the FTC’s consumer protection policy concerning “up to” claims<sup>16</sup>. It is, therefore, likely that such additional empirical evidence could also influence the evaluation of unfairness of a commercial practice conducted by Dutch courts, if it was considered.

Instead, it seems that Dutch courts and other enforcement authorities focus their empirical assessment only on the first part of the unfairness test and even then use subjective standards to determine the truthfulness of “up to” claims. This is to be regretted since empirical research could indicate that consumers are much more susceptible to deceit through advertising than the legislators and enforcement authorities had realized, which could lead to the standard of proof for substantiating advertising claims being raised. While courts and other enforcement authorities may have good reasons to hesitate to empirically assess certain consumer law issues due to the complexity of this process, this paper shows that in certain areas this testing should not be avoided. It could be, however, more useful to expect such empirical research from enforcement authorities

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<sup>13</sup> See more on the normative standard of the average consumer: n 7.

<sup>14</sup> Manoj Hastak & Dennis Murphy, ‘Effects of a Bristol Windows Advertisement with an “Up To” Savings Claim on Consumer Take-Away and Beliefs’ (May 2012) report to FTC, <<https://www.ftc.gov/reports/effects-bristol-windows-advertisement-savings-claim-consumer-take-away-beliefs>> accessed 21 May 2015.

<sup>15</sup> The United States’ Federal Trade Commission was created in 1914 to prevent unfair methods of competition in commerce and has been granted authority by Congress to fight various anticompetitive practices. See: <<https://www.ftc.gov/>> accessed 21 May 2015.

<sup>16</sup> See further paragraph 4.

and consumer organisation rather than from courts. The last paragraph – paragraph five – summarizes these findings while addressing the issue of the European courts’ current ignorance of the empirics in consumer law cases. In the conclusions, I present an option of introducing European guidelines determining the standard of proof for truthful and accurate advertising claims as well as obliging courts and other enforcement authorities to empirically examine whether average consumers could be deceived by a given practice.

## 2. Misleading facets of “up to” claims.

### 2.1. Low frequency of the advertised maximum amount of savings.

Due to a fierce competition amongst traders in most consumer markets, it does not surprise that traders and advertisers increased the frequency of their various promotional offers, as well as their marketing and advertising efforts to attract new and retain old customers<sup>17</sup>. Through the use of promotions the trader hopes to encourage consumers to shop in his establishment instead of those of his competitors, as well as relies on consumers not resisting the purchase of products offered at a regular price that have been placed in the vicinity of the marked down goods<sup>18</sup>. One promotional tactic involves announcing a sale of merchandise, whereby the trader uses “up to” claims to make the amount of savings that his customers could reach less specific<sup>19</sup>. Such a price “up to” claim refers to the maximum amount of savings that a consumer could achieve, but it still allows the trader to discount various goods at a lower than advertised level. For example, when an “up to” claim states “sale: up to 50% off” the trader would be selling some of his merchandise at a 50% discount, but he may discount his goods also at 15%, 20%, 30% etc.

With such price “up to” claims it is important to examine the accuracy and truthfulness of the advertising claim. The trader’s claim that he discounts his merchandise up to 50% could mislead consumers if the probability of reaching the advertised maximum amount of savings is very low. Imagine that in a big department store out of 100 goods on sale only 1 would be available at the advertised maximum discount. Meanwhile, the consumer could be enticed by the promise of achieving maximum savings to enter this department store, thereby making a transactional decision she might not have taken if she had realized the low frequency of the maximum discount<sup>20</sup>. Obviously, whether consumers would suffer a particular detriment in this case and therefore could, e.g., claim damages from a trader, would depend on the specific circumstances of the case. It is important to note here, however, that in order to claim the existence of an unfair commercial practice, the consumer does not have to suffer any damage<sup>21</sup>. It suffices to prove that a consumer

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<sup>17</sup> Rajiv Lal & Carmen Matutes, ‘Retail Pricing and Advertising Strategies’ [1994] 67 *Journal of Business* 345-370; Elizabeth J. Warner & Robert B. Barsky, ‘The Timing and Magnitude of Retail Store Markdowns: Evidence From Weekends and Holidays’ [1995] 110 *Quarterly Journal of Economics* 321-352; Daniel Hosken & David Reiffen, ‘How Retailers Determine Which Products Should Go on Sale: Evidence From Store-Level Data’ [2004] 27 *JCP* 141-177.

<sup>18</sup> Francis J. Mulhern & Daniel T. Padgett, ‘The Relationship between Retail Price Promotions and Regular Price Purchases’ [1995] 59 *Journal of Marketing* 83-90.

<sup>19</sup> On how presentation format may influence the marketing strategy see e.g.: Rajesh Chandrashekar & Dhruv Grewal, ‘Anchoring Effects of Advertised Reference Price and Sale Price: The Moderating Role of Saving Presentation Format’ [2006] 59 *Journal of Business Research* 1063-1071.

<sup>20</sup> See on this: case C-281/12 *Trento Sviluppo and Centrale Adriatica* [2013] ECLI:EU:C:2013:859.

<sup>21</sup> Unfair Commercial Practices Directive (n 4), art 11 para 2.

has taken a transactional decision that she otherwise would not have been likely to take, as well as that the trader's statement was either untrue or deceptive<sup>22</sup>.

The question then arises as to how many goods a trader would need to discount at the advertised maximum savings level to use an "up to" claim without misleading consumers by providing them with inaccurate or untrue information. It is imaginable that courts and other enforcement authorities could apply a certain objective standard in determining the truthfulness of such "up to" claims. For example, 10%, half, most of or almost all discounted goods would need to be offered at the advertised maximum savings level for the claim to be fair. As paragraph three shows, such a standard has not yet been established at least by Dutch courts and other enforcement authorities.

## 2.2. Consumers' belief that "up to" equals "of".

Another marketing strategy consists of traders and advertisers encouraging consumers to purchase products or services from them through the use of performance "up to" claims. In an advertisement the trader or his advertiser states then that if a consumer uses a particular product or a service she will save in comparison to what she would spend if she purchased a similar product or service from the trader's competitors. Again, due to the use of an "up to" claim the trader or an advertiser only needs to specify the maximum amount of the achievable savings<sup>23</sup>. For example, the trader could claim that if a consumer purchases his, instead of his competitor's, showerhead then the consumer would save up to 70% on water usage. Again, an average consumer should be aware that not all consumers purchasing this showerhead will save 70% on water usage but only some of them.

Obviously, the above-described problem of consumers not easily or not often reaching the advertised maximum amount of savings may apply also to this category of "up to" claims. However, the second part of the test for a misleading commercial practice, namely, of its deceptive character, may be a more prominent issue with respect to performance rather than price "up to" claims. That is to say, it seems that with performance "up to" claims average consumers' expectations as to the amount of savings they would be able to reach could be much higher than with price "up to" claims. First, performance savings are more difficult to measure and foresee than price savings, since a consumer may need time to assess the performance of the goods she purchased and compare it to other goods' performance. Second, performance savings may require consumers to adjust their behaviour, e.g., with regard to water usage. Due to performance savings occurring in the future, and often depending on a switch of or a consistency in consumer behaviour, an average consumer may have difficulties validating performance "up to" claims. Many behavioural studies have already documented consumers' mistaken expectations as to their behavioural patterns in the future (due to

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<sup>22</sup> Unfair Commercial Practices Directive (n 4), art 6.

<sup>23</sup> In this way the trader does not have to determine the specific amount of savings that each customer would receive, which minimalizes the risk of understating or overstating product's attributes and failing to fulfil consumer expectations, see, e.g.: Richard A. Spreng & Cornelia Dröge, 'The impact of satisfaction of managing attribute expectations: should performance claims be understated or overstated?' [2001] 8 *Journal of Retailing and Consumer Services* 261-274.

procrastination bias, *status quo* bias etc.)<sup>24</sup>. Contrarily, with price “up to” claims the validation is instantaneous and should as such remain within an average consumer’s capacities.

If the assumption that consumers have severe difficulties correctly estimating achievable performance savings holds true, this finding could be relevant while assessing whether a certain commercial practice was deceitful to an average consumer. Specifically, in order to protect consumers against deceitful and, therefore, misleading commercial practices, their susceptibility to believe performance claims should be considered. The European legislator chose to limit the scope of consumer protection against unfair commercial practices by adopting a strict objective test of an average consumer as a benchmark. Therefore, the Court of Justice of the European Union (hereafter, the “CJEU”) applies high standards to the average consumer test<sup>25</sup> and an “up to” claim that led to the above-described mistaken consumer beliefs would currently rarely be assessed as a misleading commercial practice. A reasonably circumspect, observant and knowledgeable consumer should, in most cases, not easily assume she would be able to achieve the advertised maximum amount of savings. However, empirical evidence into consumers’ beliefs could prove that reasonably observant and circumspect consumers believe that they could reach the maximum amount of performance savings in significantly more cases than the European legislator had expected. If there is an immense inconsistency between consumer beliefs and the regulatory assumptions about them, this could be an argument to adjust the current benchmark of an average consumer or adopt more consumer-friendly standards of proof<sup>26</sup>. While the European legislator may make a political choice as to the scope of protection it wants to grant consumers, this decision should not be completely detached from reality. This will be further elaborated on in paragraph four.

### 3. Substantiating “up to” claims – from the Dutch perspective.

#### 3.1. Assessment of the misleading character of “up to” claims in the Netherlands.

The UCPD has been implemented in Articles 6:193a-193j of the Burgerlijk Wetboek (hereafter, the “Dutch Civil Code”) through the Law on Unfair Commercial Practices<sup>27</sup>. The positioning of provisions on unfair commercial practices amongst provisions of Dutch tort law in the Dutch Civil Code is relevant to determine the level of consumer protection granted to consumers. As a result of the integration of these provisions in the tort law section of the Civil Code, consumers may claim remedies under Dutch law if they prove existence of an unfair commercial practice. For example, they may demand damages, if they can prove that they suffered damage as a consequence of an

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<sup>24</sup> See e.g.: Maurice Schweitzer, ‘Disentangling Status Quo and Omission Effects: An Experimental Analysis’ [1994] 58 *Organizational Behavior and Human Decision Processes* 457-476; Ted O’Donoghue & Matthew Rabin, ‘Doing It Now or Later’ [1999] 89 *The American Economic Review* 103-124; Ted O’Donoghue & Matthew Rabin, ‘Choice and Procrastination’ [2001] 116 *The Quarterly Journal of Economics* 121-160; Robin J. Tanner & Kurt A. Carlson, ‘Unrealistically Optimistic Consumers: A Selective Hypothesis Testing Account for Optimism in Predictions of Future Behavior’ [2009] 35 *Journal of Consumer Research* 810-822.

<sup>25</sup> See e.g. case C-210/96 *Gut Springenheide* [1998] ECLI:EU:C:1998:369.

<sup>26</sup> Some scholars have already argued for examining results of behavioural studies in assessing the real preferences and beliefs of consumers, instead of relying blindly on the average consumer standard. See, e.g. Anne-Lise Sibony (n 8) 74-75, 77

<sup>27</sup> Wet van 25 september 2008 tot aanpassing van de Boeken 3 en 6 van het Burgerlijk Wetboek en andere wetten aan de richtlijn betreffende oneerlijke handelspraktijken van ondernemingen jegens consumenten op de interne markt, Stb. 2008, 397 (NL) (Law on Unfair Commercial Practices).

unfair commercial practice<sup>28</sup>. Moreover, when the Dutch legislator implemented the Consumer Rights Directive<sup>29</sup>, it chose to include an additional remedy for consumers. Since recently, under Dutch law consumers may also avoid a contract concluded as a result of an unfair commercial practice<sup>30</sup>. This means that consumers have individual remedies against the use of unfair commercial practices, which they may claim in Dutch courts. However, due to the usual low level of consumer detriment in such cases, it is rare to encounter a court case on unfair commercial practices where consumers are the claimants<sup>31</sup>. It is more likely that consumers would file a complaint against such unfair commercial practices to relevant consumer protection authorities and consumer organisations. For example, the Autoriteit Consument & Markt (The Netherlands Authority for Consumers and Markets, hereafter, the “ACM”) has the authority to sanction traders engaging in unfair commercial practices with fines<sup>32</sup>. Consumers could be even more likely to submit a complaint to the Reclame Code Commissie (Dutch Commission on the Code of Advertising, hereafter, the “RCC”), since, as will be further described below, this complaint procedure is the most accessible to them.

The RCC has been founded by the Stichting Reclame Code (Foundation of the Code of Advertising, hereafter, the “SRC”), active in the Netherlands already since 1963. Even before the adoption of the UCPD or the previous Misleading Advertising Directive<sup>33</sup>, the SRC aimed to protect fair advertising practices to strengthen consumers’ trust<sup>34</sup>. Therefore, the advertisers, advertising agencies and media representatives set up as self-regulation the Nederlandse Reclame Code (Dutch Code of Advertising, hereafter, the “NRC”)<sup>35</sup> establishing general rules that all advertisements need to comply with. The RCC supervises the advertisers’ compliance with the NRC. Article 2 of the NRC prescribes that the advertisement has to be in accordance with the law, including the UCPD and its implementation in the Netherlands. Guidelines to this provision reiterate that an advertisement may not be unfair and that a misleading advertisement is always unfair<sup>36</sup>. If Dutch consumers believe certain advertising to be misleading, they may submit a complaint to the RCC and the RCC will quickly determine whether to investigate the matter. If the claim is considered, the president of the RCC, who is a lawyer or a judge, will test the contested advertisement against the NRC. The RCC requires an advertiser or a trader to disprove the unfair character of a contested advertisement. In case of “up to” claims this means that a trader or an advertiser needs to substantiate the claim that consumers may achieve the advertised maximum amount of savings by purchasing a given product or a service. The procedure is fast and the consumer does not need to be represented by a lawyer. She may just fill in an online form on which she indicates the advertising claim, why she considers it

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<sup>28</sup> Dutch Civil Code, art 193j para 2.

<sup>29</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64 (Consumer Rights Directive).

<sup>30</sup> Dutch Civil Code, art 193j para 3.

<sup>31</sup> B2B court cases regarding “up to” claims are also rare. See e.g.: Rb Den Haag, 24 May 2007 (Aquafox v Aqualock), KG ZA 07-352, 284695, IEPT20070524.

<sup>32</sup> See: <<https://www.acm.nl/en/about-acm/mission-vision-strategy/our-powers/>> accessed 21 May 2015.

<sup>33</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17.

<sup>34</sup> See, e.g.: <<https://www.reclamecode.nl/consument/default.asp?paginaID=141&hID=102>> accessed 21 May 2015.

<sup>35</sup> See: <<https://www.reclamecode.nl/consument/default.asp?paginaID=28&hID=41>> accessed 21 May 2015.

<sup>36</sup> See: <<https://www.reclamecode.nl/nrc/pagina.asp?paginaID=0&deel=2>> accessed 21 May 2015.

to be misleading or unfair, as well as what problems it may have caused her<sup>37</sup>. Consumers do not need to pay for the procedure, which makes it more easily accessible to them. Either party may appeal from the decision of the RCC, which appeal will then be presided over by the whole Commission, whose members are nominated by consumer organisations. If the RCC recognizes that the advertisement violated the NRC, it will require the advertiser to stop broadcasting or publishing it. The RCC may also request assistance of the ACM in enforcing its decision.

Since the RCC is easily accessible to consumers, as well as reaches its decisions fast, many consumers submit their complaints to the RCC rather than Dutch courts<sup>38</sup>. Therefore, the following paragraphs discuss decisions of the RCC on the misleading character of “up to” claims rather than court cases. As it has previously been mentioned, empirical evidence is used in Dutch cases only to substantiate the truthfulness and accuracy of an “up to” claim and not to provide evidence from consumer behaviour that such a claim was not deceitful. The RCC decisions illustrate the lack of one objective standard for substantiating truthfulness and accuracy of advertisers’ “up to” claims, as well as the RCC’s lack of interest in empirically investigating consumers’ beliefs as to “up to” claims. Moreover, these decisions show various problems related to traders’ and advertisers’ presentation of empirical evidence in order to substantiate their “up to” claims. As we will see in the following paragraph these issues include, but are in no way limited to, problems with the reliability of the empirical evidence, its sample size, as well as with biases of the parties providing empirical evidence.

### 3.2. Standard of proof.

When the RCC requires the advertiser to substantiate a certain “up to” claim as not misleading to consumers, this advertiser needs to submit empirical evidence showing that it is possible for its clients to achieve the advertised maximum amount of savings. Therefore, the advertiser or trader needs only to prove the truthfulness and the accuracy of the advertising claim, and not its non-deceitful character. Moreover, currently there is no standard of proof set for evaluating the truthfulness and accuracy of the contested advertising claim. First, this could mean that advertisers and traders could freely decide on the size of the consumers’ sample they would examine to determine how many consumers have reached which level of advertised savings. Second, traders and advertisers may not know how many consumers should be able to reach the advertised maximum amount of savings in order for them to make a truthful and accurate “up to” claim.

In the RCC case of 16 March 2012<sup>39</sup> a consumer complained about an advertisement of Yellowbrick stating that if consumers used their mobile phone applications to find a parking spot in one of the Dutch cities they would save up to 20% on on-street parking. The claimant questioned this claim’s truthfulness, since aside parking costs the company would charge users also its transaction costs. Yellowbrick claimed that many consumers currently overpay for on-street parking since they either overestimate their parking time or, when they underestimate it, are likely to pay exuberant fines. Yellowbrick allows its clients to pay after the parking transaction occurred, exactly for the amount of used parking time, which should lead to consumer savings even with added transaction costs. To substantiate this claim Yellowbrick ordered a survey among 500 of its clients

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<sup>37</sup> See: <<https://www.reclamecode.nl/consument/default.asp?paginaID=72&hID=2>> accessed 21 May 2015.

<sup>38</sup> 836 complaints received only in the 4th quarter of 2014. See: <<https://www.reclamecode.nl/consument/default.asp?paginaID=146&hID=2>> accessed 21 May 2015.

<sup>39</sup> RCC, 16 March 2012, 2011/01026.



and asked the RCC for more time to present this survey's results. The RCC prolonged the deadlines for submitting empirical evidence a few times. Finally, to substantiate the truthfulness of the claim at the moment of making it, Yellowbrick filed results of the empirical research examining 251 parking transactions, which showed that on average clients saved 21,76%. The research documentation was, however, not submitted to the RCC. Therefore, the RCC could not ascertain whether these research results substantiated the advertiser's claim, especially considering that originally results of 500 transactions were promised. The RCC declared the Yellowbrick's "up to" claim misleading for consumers.

Even though in the above-described case the trader has used a rather substantial sample size of his transactions, the RCC questioned the reliability of the presented empirical evidence since not all promised research results have been delivered. Moreover, the RCC had no insights into the structure of the research, how the sample was chosen and as to how the final conclusions were drawn. This is relevant since parties who present empirical evidence in such cases could easily fall victim to the confirmation bias. This is to say, they could interpret the gathered evidence in their own favour or present only a part thereof that substantiates their claims<sup>40</sup>. This could be an argument in favour of courts or other enforcement authorities appointing independent experts to gather such empirical evidence and to interpret it. This practice could help fight the confirmation bias, since it would not be left to the parties to present their findings or the findings of experts hired by them.

What mostly draws attention in the above-presented case is the lack of a specific standard set by the RCC for providing empirical evidence. They neither asked Yellowbrick to provide evidence of 500 studies nor clarified in how many of these studies the maximum amount of savings would have to be reached by consumers to guarantee the assessment of the commercial practice as a fair one, nor insisted on the random selection within the sample. Additionally, the RCC seems ready to grant the fairness label to an advertising claim just on the basis of its truthfulness and accuracy, without examining its deceitful character.

The RCC set a more specific standard of proof in the case of 14 October 2013<sup>41</sup>, where a consumer complained about the advertisement of a website "Hotels.com Nederland". Through this website consumers may book hotel accommodation worldwide. "Hotels.com Nederland" sent an advertisement e-mail to their clients titled: "3 days sale of 50%". The e-mail further stated: "72-hours sale. Save up to 50%". The consumer claimed that out of 104 advertisements only 6 offered such maximum savings (ca 5%). The advertiser countered that this was true for European accommodations, but worldwide out of 341 advertisements 47 advertisements offered discounts of 50% (13,8%). The RCC followed the advertiser's reasoning that if in more than 10% of cases consumers achieved, or could achieve, the maximum amount of savings this constituted a significant number of consumers being able to reach the advertised level of savings and, therefore, the advertisement would not be perceived as misleading.

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<sup>40</sup> Clifford R. Mynatt, Michael E. Doherty & Ryan D. Tweney, 'Confirmation Bias in a Simulated Research Environment: An Experimental Study of Scientific Inference' [1977] 29 Quarterly Journal of Experimental Psychology 85-95; Martin Jones & Robert Sugden, 'Positive Confirmation Bias in the Acquisition of Information' [2001] 50 Theory and Decision 59-99.

<sup>41</sup> RCC, 14 October 2013, 2013/00703.

The RCC, thus, identifies here a specific standard of proof that the advertiser or trader would need to meet. It is, however, not explained why the standard of 10% consumers being able to achieve the maximum amount of savings would be deemed as a sufficient threshold for disproving the misleading character of an “up to” claim. Considering that this standard has not been mentioned in other decisions issued until the time of writing this paper, it seems to have been chosen randomly. Again, the RCC focuses on the accuracy of the advertising claim and ignores the second part of the misleading test.

Additionally, in the above-mentioned decision the RCC considers only the number of hotels that offered accommodation at a discount and not the amount of hotel accommodation available at a discount. The examined sample size and the standard of proof have been set even lower in the RCC case of 6 August 2014<sup>42</sup>. A consumer questioned the truthfulness of an advertisement offering a sale “up to 75%” on Eve jewellery in the Lucardi shop in Amsterdam. The consumer could not find any item on sale at 75%. The advertiser submitted a photo of the shop’s window with one jewellery item discounted at 75% during the sales period. The RCC decided that the advertiser substantiated the advertising claim that ‘one or more’ items were being sold at a discount of 75%. According to the RCC, from the advertising claim “up to 75%” average consumers should have deduced that items could be discounted by less than 75%. Only one item on sale at the advertised maximum level of savings suffices to prove the accuracy of the advertising claim, pursuant to the RCC. The RCC again does not examine how many jewellery items have been put on sale and how many copies of each item, at each discount level, could consumers purchase.

Only in its most recent decision of 26 March 2015<sup>43</sup> the RCC acknowledged the importance of more detailed evaluation of the provided empirical evidence in assessing the truthfulness and accuracy of an “up to” claim. In this case a fashion store advertised a supersale of 300 brands by announcing discounts “up to 80%”, naming also a possibility of consumers reaching specific levels of savings (20%, 30% etc. up to 80%). The consumer who contested this advertisement’s fairness did not find any fashion items on sale at 80% discount in the store. The trader submitted that the range of fashion items on sale at 80% discount was smaller than of fashion items with lower rebates and could have been difficult to spot among the great number of marked down items. However, the trader still claimed that consumers could have reached the maximum amount of savings in the substantial amount of purchase decisions. The RCC disagreed and established that the trader failed to prove that a significant amount of fashion items of even just one of the advertised brands was offered on sale at 80%. Empirical evidence presented by the trader in this case consisted mainly of a list of marked down fashion items, however, without information as to how many of these fashion items have been offered on sale. This means that even if 20 fashion items were marked down at 80%, there could only be 1 copy of each of these items available at this rebate. Since the trader did not prove that the advertised maximum savings could be reached in the significant amount of cases, the advertising claim was assessed as providing consumers with misleading information.

In this most recent case the RCC pays more attention to the presented empirical evidence, the sample size and the reliability of the evidence. However, the assessment of the “significance” of the presented empirical evidence is still conducted randomly without the RCC mentioning any

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<sup>42</sup> RCC, 6 August 2014, 2014/00520.

<sup>43</sup> RCC, 26 March 2015, 2015/00017.

specific standard of proof. Furthermore, while the RCC labels the advertising claim as misleading it does so by only examining one aspect thereof, namely, its untruthful and inaccurate character.

As we could see on the example of the above-described Yellowbrick decision, the advertiser should be able to prove that the claim he made in his advertisement was true at the moment he had made it. To demonstrate this, advertisers should have gathered all the necessary empirical evidence in advance rather than try to establish the facts after the advertisement was published. This may not only enable them to meet short deadlines for substantiating “up to” claims set by the RCC, but also increase the reliability of the empirical evidence that is not gathered just to disprove a certain consumer’s concern. This was the case in the RCC decision of 11 November 2010<sup>44</sup>. A consumer claimed that an advertisement of Michelin Energy Saver tires was misleading when it stated that a consumer could save up to 80 litres of gasoline by using them instead of other tires. The consumer’s concern was that the advertisement did not specify which consumers and under what conditions could achieve this maximum amount of savings. The advertisement contained a small font disclaimer that this statement was made on the basis of tests conducted by TÜV SÜD Automotive company in 2009 and that more information about these tests may be found on the Michelin website. The information available on the website clarified that the maximum savings of 80 litres of gasoline were calculated on the basis of the average life cycle of a Michelin tire (45.000 km). Moreover, these savings would be the result of a specific characteristic of the Michelin Energy Saver tires. The RCC based its assessment that this statement is not misleading on the fact that the website clearly documented how the savings were calculated. It also believed that the advertisement did not guarantee all clients that they would reach the maximum amount of savings and, therefore, was accurate.

Also in this older decision the RCC did not set any standard for assessing the truthful and accurate character of an “up to” claim. The RCC did not investigate the sample size of the tests conducted for Michelin, nor did it clarify in how many of the conducted tests a consumer could reach the maximum amount of savings. The question remains unanswered whether a trader needs to present evidence that a consumer could reach the maximum amount of savings in 1 on 10 conducted tests, or 1 on 50, or 1 on 100 etc.

The waters are further muddled by the only Dutch court case that, at least partially, deals with the issue of the truthfulness and accuracy of “up to” claims<sup>45</sup>. It is a B2B case, in which Aqualock, the producer of an automated water-dosage system used by restaurants and bars in washbasins, claimed that the use of its product would lead to up to 70% of savings on water usage. The competitor, Acquafox, claimed, amongst other, that this statement could be misleading since even customers who would be conservative with their water usage would not manage to save this much water. Aqualock provided empirical evidence from one restaurant that the installation of its automated water-dosage system saved 50% on the restaurant’s water usage. Aqualock further claimed that this evidence was gathered in a busy restaurant and in a less popular place the saving would be higher, as advertised, up to 70%. Since Acquafox did not question the reliability of this evidence and this statement, the court dismissed the claim that this advertising claim was misleading.

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<sup>44</sup> RCC, 11 November 2010, 2010/00647.

<sup>45</sup> Rb Den Haag, 24 May 2007 (Acquafox v Aqualock), KG ZA 07-352, 284695, IEPT20070524.

Even though this is not a consumer case its findings are relevant for this paper. It is clear that the sample size for the empirical evidence presented in this case was insufficient. Further, the trader did not prove that any of his customers could reach the advertised maximum amount of savings. Only because the other party did not dispute the presented findings the court accepted the delivered evidence as a sufficient substantiation of the accuracy and truthfulness of the “up to” claim. The question arises whether we may expect a consumer to challenge the relevance of the presented empirical evidence, if a professional party does not do so. Most consumers would not have the necessary knowledge to demand additional proof or to challenge uncertain findings. In such a situation, in order to provide sufficient level of consumer protection courts and other enforcement authorities could be expected to *ex officio* assess the reliability of the presented empirical evidence and at least have an obligation to indicate to consumers any lacks therein.

Aside the introduction of an *ex officio* test by courts of the reliability of the empirical evidence, consumers could benefit from a set standard of proof for substantiating the truthfulness and accuracy of “up to” claims. This could result in the creation of a more consumer-friendly market, where traders and advertisers would be prohibited from making certain marketing claims without meeting specific standards. Ultimately, such a standardisation would also benefit traders and advertisers by setting clear rules for fair competition and eliminating the uncertainty and the risk of litigation.

### 3.3. Average consumers’ beliefs.

An average consumer may be expected to realize that an advertisement of a range of savings does not signify that she will achieve a specific saving within that range, but rather that she will be likely to fall somewhere within the advertised range of savings. Still, even average consumers, i.e. reasonably circumspect, observant and knowledgeable consumers, may expect a higher frequency of the occurrence of the maximum amount of savings than the trader or advertiser provided. Additionally, it is feasible that certain advertisements with “up to” claims may deceive consumers more than others, e.g. by drawing more attention to the amount of the maximum discount, while minimizing the font of the “up to” phrase. As previously mentioned, also performance “up to” claims may easier deceive consumers due to consumers not being able to immediately verify them and their effect often depending on the consumers’ future behaviour. Therefore, it seems relevant to inquire as to consumers’ beliefs and expectations with regard to a specific “up to” claim in order to assess whether while it may be truthful and accurate it does not remain deceitful. The RCC seems to ignore this second prong of the misleading test.

In a few cases the RCC addresses the issue of the presentation of an “up to” claim to consumers and its effect on consumers’ beliefs without, however, gathering any empirical evidence thereon. In this evaluation the RCC stresses the need to consider all circumstances of a given case<sup>46</sup>. In the above-discussed case of 14 October 2013 the consumer claimed to be misled by the design of the advertisement containing an “up to” claim. On the one hand, the advertisement mentioned a possibility for all consumers to save 50% (discount “of 50%” notified in the title of the e-mail), while on the other hand it promised such savings only to some consumers (“up to 50%” in the text of the e-mail). The RCC followed the reasoning of the advertiser that the advertisement should always be evaluated as a whole as to its misleading character. The advertiser claimed thus that an average

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<sup>46</sup> RCC, 14 October 2013, 2013/00703.

consumer would not be misled by the title of the advertisement if the content thereof clarified that not all consumers could reach the maximum amount of savings.

While average consumers could expect that they may not achieve the advertised maximum amount of savings, it is important that the chances of achieving this discount are realistically presented. In the RCC case of 14 July 2014<sup>47</sup> the advertiser encouraged consumers to purchase trader's goods by offering them discounts "up to 100%", which they could play for on a spin wheel. The spin wheel placed online differed, however, from the one in the shop. The spin wheel in the shop had more numbers on it, which diminished the chances of winning the highest offered savings. Moreover, some of its fields offered 0% savings. In general, the RCC estimated that consumers upon seeing the online advertisement would be misled as to their chances of reaching the advertised maximum amount of savings and as to the height of the achievable discounts. Similarly, in the RCC case of 19 February 2014<sup>48</sup> the advertisement announced savings "up to 70%", but all the products to which various categories of discounts applied to were discounted at a lower than advertised ceiling. For example, next to the text "Notebooks up to 40% cheaper" the advertisement by the use of arrows pointed to two notebooks, one discounted at 13% and the other at 30%. Again, the RCC decides that even an average consumer may get an impression that the maximum discount would apply at least to the specific products indicated in the advertisement from a given category of discounted products.

In the two above-discussed cases the RCC believed that the frequency of achieving the advertised maximum amount of savings would have seemed higher than it was even to average consumers due to the applied presentation method. It seems, therefore, that the RCC examines the deceitful character of an advertisement only as far as the presentation of a particular advertising claim is concerned. Furthermore, the RCC seems to make assumptions as to the average consumers' attitudes and beliefs on such occasions, without empirically investigating consumers' actual behaviour.

The RCC has considered consumers' attitudes and beliefs also in its most recent decision of 26 March 2015<sup>49</sup>. As has been mentioned above, in this case a fashion store advertised a supersale by announcing discounts "up to 80%". The RCC stated in its decision that the trader invoked a belief in consumers that a significant amount of fashion items would be offered at a discount of, among other, 80%. Namely, the trader advertised a supersale, mentioned 300 brands would be on sale, as well as listed many specific discount levels that consumers could reach. The average consumer could infer from the advertisement that the advertised discounts would apply to fashion items of various brands offered by the trader, pursuant to the RCC. Empirical evidence presented by the trader in this case consisted mainly of a list of marked down fashion items, however, without information as to how many of these fashion items have been offered on sale. The trader failed thus to prove that a significant amount of fashion items of an advertised brand was offered on sale at 80%.

In these few cases the RCC clearly refers to the beliefs of an average consumer and finds her capable of being misled by the presentation of "up to" claims. It does not, however, examine empirically actual consumers' attitudes and beliefs, as well as it does not set the standard of proof in

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<sup>47</sup> RCC, 14 July 2014, 2014/00432.

<sup>48</sup> RCC, 19 February 2014, 2014/00067.

<sup>49</sup> RCC, 26 March 2015, 2015/00017.

relation to these attitudes and beliefs. While the deceitful character of an “up to” claim may be more relevant in case of performance “up to” claims, the RCC completely neglects this part of the misleading test in its only decision on such claims<sup>50</sup>. Unfortunately, ignoring actual consumer behaviour seems to be a firm standard in the European unfair commercial practices case law, which will be further addressed in paragraph five. First, however, the following paragraph shows how actual beliefs and attitudes of consumers with regard to “up to” claims may significantly differ from what we would expect from reasonably knowledgeable and observant consumers. This difference could justify the introduction of the empirical test of these beliefs by courts and other enforcement authorities, if the (European) legislator aimed at providing a high level of consumer protection.

#### 4. Empirical evidence from consumer behaviour in the *Bristol Windows* study.

The FTC monitors the American market for any practices that may harm the interests of either consumers or competitors and tries to prevent them by setting high fines on companies that infringe US trade rules<sup>51</sup>. In its fight against unfair and misleading advertising it is supported by the non-profit network of Better Business Bureaus (hereafter, the “BBB”)<sup>52</sup> and, more specifically, by the National Advertising Division (hereafter, the “NAD”)<sup>53</sup>. This self-regulatory body reviews, just like the RCC, national advertising for truthfulness and accuracy. The Federal Trade Commission Act in its Section 5 bans unfair and deceptive commercial acts or practices<sup>54</sup>. The misleading advertising test, similarly to the European one, examines whether a reasonably acting consumer under given circumstances would have been likely to be misled as to the material characteristics of the transaction<sup>55</sup>.

Just like in Europe an advertiser or trader needs to be able to substantiate its “up to” claim to avoid a misleading label for its marketing practices. However, contrary to the Dutch practice, American enforcement authorities attempt to set a threshold for the standard of proof. Namely, if the empirical evidence shows that an “appreciable” number of consumers could reach the maximum amount of savings under normal purchasing conditions or consumers receive “consistently significant” results, the FTC would consider such an advertisement as not misleading<sup>56</sup>. This standard is still not very specific and has, therefore, been further elaborated in the Code of Advertising<sup>57</sup>, introduced by the BBB, and the decisions of the NAD. These transformed this vague rule into a more

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<sup>50</sup> See above the Michelin tires case, RCC, 11 November 2010, 2010/00647.

<sup>51</sup> See: FTC, ‘A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority’ (July 2008) FTC <<https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>> accessed 21 May 2015.

<sup>52</sup> See: <<https://www.bbb.org/council/about/>> accessed 21 May 2015.

<sup>53</sup> See: <<https://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/national-advertising-division/>> accessed 21 May 2015.

<sup>54</sup> 15 U.S.C. § 45.

<sup>55</sup> See: FTC Policy Statement on Deception (14 October 1983) <FTC Policy Statement on Deception \_ Federal Trade Commission> accessed 21 May 2015.

<sup>56</sup> See on the review of FTC decisions: Joel Winston, “‘Up To’ Advertising Claims: The FTC Weighs In’ [2012] *The Antitrust Source* <[http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/oct12\\_winston\\_10\\_22f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct12_winston_10_22f.authcheckdam.pdf)> accessed 21 May 2015, 5. The author claims that the FTC did not further define what it considers to be an appreciable number of consumers but, e.g., in the case *FTC v. Pacific Medical Clinics Management, Inc.*, No. 90-1277, 1992 U.S. Dist. LEXIS 6247 (S.D. CAL. April 7, 1992), 1.07% consumers was considered as not ‘an appreciable number’.

<sup>57</sup> See: <<https://www.bbb.org/council/for-businesses/code-of-advertising/>> accessed 21 May 2015.

fixed standard that maximum savings should comprise a significant percentage, typically 10%<sup>58</sup>. As NAD stated in one of its cases ‘using language to render a claim less absolute does not obviate the need for competent and reliable substantiation for that claim’<sup>59</sup>. In comparison to Dutch authorities, American enforcement authorities seem, indeed, to evaluate the “up to” claims much more thoroughly with respect to the presented empirical evidence on these claims’ truthfulness and accuracy<sup>60</sup>. We could, of course, debate whether a 10% standard is sufficient for guaranteeing efficient consumer protection, but at least both consumers as well as traders and advertisers have more certainty when this protection would be granted.

This standard has, however, recently become controversial when the FTC published results of the *Bristol Windows* consumer survey commissioned by them<sup>61</sup>. In 2012 the FTC was negotiating five settlements with companies who claimed that if consumers purchased their brand of windows they would be able to save up to 50% on their energy bills<sup>62</sup>. Aside asking these companies to substantiate the truthfulness and accuracy of their “up to” claims by presenting empirical evidence showing that an “appreciable” amount of consumers, presumably 10%, could reach the advertised maximum amount of savings, the FTC commissioned an independent consumer survey of consumer beliefs and attitudes.

The results of the study are fascinating and clearly show that most consumers would not qualify as average consumers under the European understanding thereof, i.e., they are not reasonably observant and circumspect when faced with an “up to” claim. An interview was conducted within a mall-intercept design in different US markets with, altogether, 360 consumers who were paid 5 US dollars to answer the questionnaire<sup>63</sup>. The interviewers showed consumers one of the three printed advertisements of Bristol windows. The advertisement’s text either stated that the installation of these windows was “proven to save 47% on your heating and cooling bills” or “up to 47%”, or “up to 47%” with the following disclosure added below: “The average Bristol Windows owner saves about 25% on heating and cooling bills”. Consumers would, subsequently, fall into one

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<sup>58</sup> See: <<http://www.bbb.org/houston/for-businesses/advertising-review-services/ad-review-handbook-and-guidelines-for-businesses/up-to-savings-claims/>> accessed 21 May 2015; Roy L. Moore, Carmen Maye & Erik L. Collins *Advertising and Public Relations Law* (Routledge 2011) 376. See e.g. NAD, 6 March 2003, case report #4023 (*Dental Whitening Corporation of America*) where 5% was seen as ‘atypical and unrepresentative’, 14; NAD, 9 September 2010, case report #5213 (*Consumer Club, Inc*) where NAD stated that ‘to support an “up to” savings claim an advertiser must offer at least 10% of the inventory included in the offer at the maximum advertised savings’ contrary to the advertisers attempt to prove that at least 10% of its entire inventory were offered at the maximum advertised savings, 8;

<sup>59</sup> NAD, 6 March 2003 (n 58), 14.

<sup>60</sup> See e.g.: NAD, 11 March 2009, case report #4983 (*Royal Purple, LTD*) where NAD stated that ‘customer testimonials are not sufficiently reliable to provide claim substantiation’, 10, as well as questioned empirical research were, among other, ‘tests were not repeated under different conditions and loads, no statistical analysis was performed’, 11. See also NAD, 28 September 2007, case report #4734 (*Santech Industries*) stating that ‘anecdotal evidence, like consumer endorsements, is, as a general rule, insufficient to support specific claims of product performance’, 3. See also NAD, 30 April 2014, case report #5707 (*Mars Petcare US*), where NAD repeats that it questions ‘the validity of a post-hoc statistical analysis (...) because it deviates from the underlying study’s protocol and ultimately undermines the reliability of the results’, 8.

<sup>61</sup> Hastak & Murphy (n 14).

<sup>62</sup> Harell (n 12); Jennifer Tucker, ‘Litigation: FTC Whittles Away “up to” Claims’ [2013] *Inside Counsel* blog <<http://www.insidecounsel.com/2013/01/03/litigation-ftc-whittles-away-up-to-claims>> accessed 21 May 2015; Winston(n 56) 2-3.

<sup>63</sup> Hastak & Murphy (n 14) 3.

of the three categories: consumers who received a “non-up to” claim advertisement, an “up to” claim advertisement or a “disclosure” advertisement<sup>64</sup>. The main findings of this study showed that the inclusion of an “up to” claim language had no meaningful impact on consumer’s expectations as to the amount of maximum savings she would be able to reach<sup>65</sup>. In all test conditions a significant proportion of consumers seemed to anchor on the mentioned amount of 47% savings. Differences in the amount of consumers who expected to be able to achieve the advertised maximum savings were statistically insignificant between various scenarios. Even the additional disclosure, placed on the advertisement below the “up to” claim, did not significantly change the consumer’s interpretation of the advertisement<sup>66</sup>. Moreover, some of the questions inquired as to consumers’ attitudes towards the “up to” claims and the results showed that consumers are overwhelmingly convinced that such advertisers’ claims are substantiated<sup>67</sup>. That is to say, consumers believe in the truthfulness of the “up to” claims, while at the same time they misunderstand their expected effects, which in the end leads to them being deceived by these claims.

Consequently, the FTC revised its opinion as to the threshold for submitting empirical evidence for substantiating “up to” claims. It announced that advertisers and traders should present ‘competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to achieve the maximum savings claimed’<sup>68</sup>. Therefore, they replaced the previous standard of proof for traders and advertisers, which required that an “appreciable” number of consumers achieves the advertised maximum amount of savings, with a much stricter one. Currently, traders and advertisers should be able to prove that “all or almost all” consumers would receive the advertised maximum discount. This shift was justified by the survey’s findings that most consumers actually expect to reach the advertised maximum level of savings. This signified that consumers would end up being deceived if a trader or an advertiser issued an “up to” claim while guaranteeing only ca. 10% of them the possibility to achieve the advertised maximum discount level.

Instead of increasing consumer protection by raising the applicable standard of proof, the publication of the FTC’s report might have introduced more uncertainty as to the threshold for this standard of proof. Since the publication of this report decisions of NAD either refer to the old rule of

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<sup>64</sup> Hastak & Murphy (n 14) 4, Appendix A.

<sup>65</sup> Hastak & Murphy (n 14) 17-19. For example, in two open-ended questions between 36% and 45.6% of all respondents from the “up to” claim advertisement group replied that the advertisement ‘stated or implied savings of 47% on heating and cooling bills without mentioning the “up to” qualifier’. 48.2% respondents from the same group indicated that half or more users could expect to save about 47% on their heating and cooling bills. See also: Hastak & Murphy (n 14) Table 1 at 7, Table 4 at 10, Table 5 at 11.

<sup>66</sup> Hastak & Murphy (n 14) For example, in two open-ended questions between 27% and 36.5% of all respondents from the “disclosure” advertisement group replied that the advertisement ‘stated or implied savings of 47% on heating and cooling bills without mentioning the “up to” qualifier’. 46.1% respondents from the same group indicated that half or more users could expect to save about 47% on their heating and cooling bills. See also: Hastak & Murphy (n 14) Table 1 at 7, Table 4 at 10, Table 5 at 11.

<sup>67</sup> Hastak & Murphy (n 14) 20. 45.8% of all respondents were convinced that ‘Bristol Company had done tests to support their savings claim’. See also: Hastak & Murphy (n 14) Table 8 at 16.

<sup>68</sup> FTC, ‘FTC Report: Many Consumers Believe “Up To” Claims Promise Maximum Results’ (29 June 2012) FTC press release <<https://www.ftc.gov/news-events/press-releases/2012/06/ftc-report-many-consumers-believe-claims-promise-maximum-results>> accessed 21 May 2015. See also: Harell (n 12); Tucker (n 62); Winston (n 56) 3.



an ‘appreciable number of consumers’, presumably 10%<sup>69</sup>, or to the adjusted FTC’s standard reformulated to mean that most or majority of consumers should be able to reach the advertised maximum amount of savings<sup>70</sup>. A commentator to the *Nest Labs* case suggests that since the NAD seems more likely to apply this new standard with respect to performance “up to” claims within the energy savings, which is precisely what the FTC study examined, the applicability of this new standard might be limited solely to such cases<sup>71</sup>. This would mean that at least in all cases with price “up to” claims instead of performance “up to” claims the old rule of ca. 10% could remain applicable<sup>72</sup>.

Such a distinction as to the standard of proof for performance and price “up to” claims could be justified by the fact that, as mentioned before, with regard to performance “up to” claims consumers may not immediately and easily assess what savings they would be able to reach. This could justify the introduction of a stricter standard of proof for traders and advertisers using performance “up to” claims, especially in the view of consumers’ gullibility proven in the *Bristol Windows* survey. It needs to be mentioned that the sector in which the FTC and the NAD adopted a stricter standard, namely environmental advertising and energy savings claims, could be perceived as a sensitive one. Regulators and consumers began to give priority to issues of sustainability and such advertising claims are more common nowadays, which could also explain why the FTC and the NAD paid more attention to consumers’ beliefs in these cases. However, the NAD applied also the same, higher standard of proof to a performance “up to” claim in the telecommunication sector where health and safety issues were concerned<sup>73</sup>.

Even if the FTC accepts a different standard of proof for performance and price “up to” claims, what is of paramount importance is that standards of proof are being developed and that the US authorities apply them. This gives more legal certainty to consumers, traders and advertisers as to which claim would be perceived as misleading, which should not only positively influence consumer protection standards in the US but also protect fair competition. Contrary to the American practice, the examined Dutch practice does not show any consistency as to the standard of proof

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<sup>69</sup> See e.g. NAD, 12 December 2012, case report #5532 (*Fareportal, Inc.*) where NAD stated that ‘an advertiser must offer at least 10 percent of the inventory included in the offer at the maximum advertised savings’, 15; NAD, 7 February 2013, case report #5553 (*Rug Doctor, Inc.*) where NAD refers to the standard of an ‘appreciable number of consumers’ while at the same time mentioning the recent FTC study; NAD, 30 April 2014 (n 60) where NAD stated that ‘in most cases, there is no set percentage’ although it evaluates whether an ‘appreciable number of consumers should be able to achieve the maximum results’, 9. See also: Harell (n 12); Amy Mudge & Randy Shaheen, ‘NAD Not Shaving “Up To” Claims’ (16 May 2013) All About Advertising Law blog <<http://www.allaboutadvertisinglaw.com/2013/05/nad-not-shaving-up-to-claims.html>> accessed 21 May 2015.

<sup>70</sup> NAD, 15 November 2012, case report #5523 (*Pong Research Corporation*), 10; NAD, 29 May 2013, case report #5595 (*Nest Labs, Inc.*), 25. See also: Harrell (n 12); ‘NAD Recommends Nest Labs Modify, Discontinue Certain Advertising Claims for Nest Programmable Thermostats; Claims Challenged by Honeywell’ (20 June 2013) ASRC Reviews <<http://www.asrcreviews.org/2013/06/nad-recommends-nest-labs-modify-discontinue-certain-advertising-claims-for-nest-programmable-thermostats-claims-challenged-by-honeywell/>> accessed 21 May 2015; Randy Shaheen & Amy Mudge, ‘How to Keep Cool with all of the Confusing Cases with ‘Up To’ Claims?’ (5 August 2013) All About Advertising Law blog <<http://www.allaboutadvertisinglaw.com/2013/08/how-to-keep-cool-with-all-of-the-confusing-cases-with-up-to-claims.html>> accessed 21 May 2015.

<sup>71</sup> Harell (n 12).

<sup>72</sup> Whether this was the intention of the FTC is unclear, see e.g.: Winston (n 56) 6-7.

<sup>73</sup> NAD, 15 November 2012 (n 70).

required from advertisers and traders in substantiating the truthfulness and accuracy of their “up to” claims. Dutch enforcement authorities have also expressed barely any interest in examining consumers’ beliefs and attitudes with regard to “up to” claims. The fact that the use of empirical evidence in such cases is hardly supported on the European level may explain this gap in enforcement practices.

#### 5. Empirical evidence in European consumer law.

In general, the UCPD seems designed to discourage courts and enforcement authorities from empirically examining consumers’ beliefs and attitudes towards specific “up to” claims. After all, Recital 18 of the UCPD clearly states that ‘the average consumer test is not a statistical test’. The European legislator made a political choice to limit the scope of consumer protection under the UCPD by adopting a strict benchmark for the average consumer test. It assumes that an average consumer is reasonably knowledgeable, observant and circumspect and, therefore, would not be easily misled. This political choice may, however, undermine the whole concept of granting consumers additional protection through the introduction of the UCPD when empirical evidence shows that the significant majority of consumers may in fact be much more easily misled than the European legislator had anticipated<sup>74</sup>. In this respect, if courts and other enforcement authorities required empirical statistical evidence as to consumers’ beliefs and attitudes on the misleading character of a certain commercial practice this could prove to better reflect the needs of consumer protection. Such a practice should not negatively influence the market, since traders and advertisers usually gather empirical evidence on the impact of their marketing strategies on consumers prior to implementing them. They would, therefore, not need to make additional costs in implementing this practice. What would likely change is the advertising practice, since traders and advertisers would need to be more careful not to deceive consumers, if empirical research would consistently prove that consumers are easy to deceive. However, no doubt partially as a result of the second sentence of Recital 18 of the UCPD, so far national courts and authorities seem to be more prone to hypothesise what an average consumer would think and do rather than to empirically examine these issues.

Interestingly, the guidance note to the UCPD encourages courts and enforcement authorities to examine “all features and circumstances” of a given commercial practice while establishing its non-misleading character. This involves looking into ‘the current state of scientific knowledge, including the most recent findings of behavioural economics’<sup>75</sup>. While this guidance document still does not invite courts and other enforcement authorities to request empirical evidence on consumers’ beliefs and attitudes towards advertising claims, it appeals to them to consider such evidence if it is presented. It could, therefore, be left to regulators, consumer organisations and researchers to examine or commission examination of the impact of certain advertising claims. One option could be to follow the FTC’s example and to commission certain surveys on consumer behaviour independently from the specific court or enforcement proceedings<sup>76</sup>. Even if the survey

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<sup>74</sup> See previous paragraph as well as e.g. Duivenvoorde (n 7) 215-227.

<sup>75</sup> Commission Staff Working Document, ‘Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices’ (2009) SEC 1666, 32. See also: Anne-Lise Sibony (n 8) 89.

<sup>76</sup> Some scholars have already argued for including insights from behavioural studies in the process of establishing unfairness of a commercial practice, see, e.g., Anne-Lise Sibony (n 8) 74.

results would not then be relevant for the solution of a given case, they could influence general consumer policy, e.g., with regard to setting a certain standard of proof for future cases.

This above-discussed solution could negate the reluctance of courts and other enforcement authorities to require parties to gather empirical evidence due to this process' complexity and long duration. Moreover, it could put courts and other enforcement authorities at ease since they would not have to face difficulties in assessing the reliability and validity of such empirical evidence, as has been outlined previously. They could use the expertise of third parties in interpreting the results of such empirical studies. Furthermore, the prolongation of the enforcement proceedings would be less of an issue if the empirical evidence was gathered independently from them. In any case, if the judicial branch were to get more involved, due to the unequivocal wording of Recital 18 of the UCPD the European legislator may need to interfere and adjust this provision. Then national courts and authorities could justifiably require more empirical tests as evidence in unfair commercial practices cases.

When we examine again the Dutch practice it seems reassuring that at least in the process of substantiating the truthfulness and accuracy of "up to" claims traders and advertisers need to submit empirical evidence. However, the lack of a specific standard of proof as well as of a more extensive inquiry into the second prong of the misleading test, namely, whether consumers might have been deceived by the "up to" advertising claim is troubling. Obviously, the easiest way to introduce a fixed standard of proof for substantiating the truthfulness and accuracy of "up to" claims would be for the CJEU to set the bar. In order to do so, the CJEU would, however, need to better understand what empirical evidence is and what its impact on the case could be. In a series of judgments pertaining to establishing the distinctive nature of a shape of product mark, the CJEU showed its own interpretation of a word "empirical"<sup>77</sup>. In the CJEU's definition the knowledge of how people behave is not based on observation or experimentation but rather on an assumption made by the Court that is then subsequently frequently repeated until it becomes an "empirical rule". Admittedly, the CJEU's seeming lack of understanding or even acceptance of empirical studies may also be the result of the CJEU only rarely having been faced with arguments based on empirical studies<sup>78</sup>. This misunderstanding should be clarified starting from the highest level so that all courts and other enforcement authorities could take the role that an empirical evidence could play in substantiating parties' claims more seriously.

## 6. Conclusions.

This paper analysed the current enforcement of consumer protection against a specific type of unfair commercial practices, namely "up to" claims, in Dutch practice. It is clear from the above-presented arguments that without the introduction of a fixed standard of proof for submitted empirical evidence both consumers and traders suffer. At least in the Netherlands, traders and advertisers have currently no legal certainty with regard to the standard that will be applied to assess the truthfulness and accuracy of "up to" claims. Consumers cannot be sufficiently protected against unfair commercial practices if traders and advertisers have no set rules to follow on how not

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<sup>77</sup> See case C-53/01 *Linde and Others* [2003] ECLI:EU:C:2003:206, para 48; case C-25/05 *Storck v OHIM* [2006] ECLI:EU:C:2006:422, para 27; case C-265/09 *OHIM v BORCO-Marken-Import Matthiesen* [2010] ECLI:EU:C:2010:508, para 26.

<sup>78</sup> See also: Anne-Lise Sibony (n 8) 75.

to mislead consumers with their advertising claims. Considering that the examination of both prongs of the misleading test should rely on empirical evidence as to these claims' influence on consumers' behaviour, it is unlikely that the CJEU would soon be ceased to address these issues. It may, therefore, be necessary for the European legislator to prepare guidelines on this matter for national legislators, courts and other enforcement authorities to follow. Clearly, the level of consumer protection would depend on the standard of proof chosen in such guidelines and, therefore, a political choice would need to be made. If traders or advertisers would need to guarantee that the majority of consumers could achieve the advertised maximum amount of savings consumers would be less likely to be deceived by such an advertisement than if only 10% of consumers would have to reach this savings' level. However, currently, at least Dutch enforcement authorities may not even apply the 10% standard and, therefore, the actual scope of enforced consumer protection may be low. Additionally, these guidelines should underline the importance of the second part of the misleading test, with courts and other enforcement authorities having to test a commercial practice as to its deceitful character. A careful analysis of consumers' beliefs and attitudes towards "up to" claims, considering how easily they may deceive consumers, should also guide the regulators and the judicial branch in setting the above-mentioned standard of proof.