

THE IMAGE OF THE CONSUMER IN EU TRADE MARK LAW

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Scholars working in the field of consumer law have commented on the ‘pluriform’ nature of the ‘average consumer’ in EU law.¹ And that observation rests in part upon analysis of trade mark law, among other areas of law which the ‘average consumer’ inhabits. In fact, there is a variable concept of the consumer *within* EU trade mark law and this chapter sets itself the task of mapping these variations. We suggest that for structural reasons EU trade mark law may be compelled to work with a differentiated concept of the consumer that varies depending upon whether courts are assessing the validity of rights or their infringement, and by reference to the national or European nature of the marks at issue.

Despite these variations, we argue that most efforts by courts to identify or construct consumers and the marketplace they inhabit are blended exercises that are part-empirical and part-normative. Explicitly recognising this blend and identifying the mechanisms by which a consumer-based assessment is informed by empirical evidence or framed by normative considerations will, we believe, enable a richer debate about the role played by the consumer in EU trade mark law. It also allows us to explore whether EU trade mark law ought—either to achieve its own objectives or to contribute to the broader European project—to adopt an approach to the consumer that is more empirically or normatively grounded. This acknowledgment also prompts consideration of whether different national courts are (despite different methodological traditions that survive European harmonisation) converging on a common approach to the ‘trade mark consumer’, and raises for debate the extent to which harmonised EU trade mark law is beginning to (further) subsume aspects of the allied regimes of passing off and unfair competition law supposedly reserved for Member States.

Part I of the chapter sets out the structure of EU trade mark law as established by two pieces of secondary legislation, one Directive and one Regulation, a quarter of a century ago. Part II investigates the principal doctrinal contexts in which the consumer appears. Although the average consumer is often presumed to be a stable constant, the structural bifurcation of EU trade mark law and the different contexts in which this consumer surfaces accounts for the conceptual variation that we describe. Finally, in Part III we step into largely uncharted territory, considering the extent to which these different conceptions of the consumer in EU trade mark law currently do (or ideally should) reflect empirical or normative assessments.

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¹ See V Mak, ‘Standards of Protection: In Search of the “Average Consumer” of EU Law in the Proposal for a Consumer Rights Directive’ (2011) 19 *Euro Rev Priv L* 25, 30.

Underlying these variations is a fundamental set of questions, relating to the characterisation of this consumer construct and its functions. For example, in any given legal setting, is the consumer construct normatively ‘loaded’, perhaps implementing policy preferences by being predisposed to or resistant to being confused through the use of legal presumptions? To what extent can empirical evidence be accommodated—to offset such legal presumptions, or to further flesh out the construct, or to pursue a more real-world assessment? Alternatively, to what extent is this trade mark law consumer an unreflexive, formalistic construct, imported from EU free movement or consumer law but left underdeveloped in significant ways and thus failing to reflect the distinct normative basis of trade mark law? Developing responses to these questions matters, because the consumer construct is at the core of trade mark law both normatively and doctrinally.

Despite the centrality of the consumer to EU trade mark law, there has been little scholarly effort to articulate precisely his or her characteristics, beyond rehashing abstract principles.² An emerging judicial consensus (at least in the UK) now suggests that the average consumer is a normative legal fiction whose reactions are not to be determined by mere statistical analysis (ie the behaviour of a mean, median or mode consumer). But that assertion does not tell us how the content of that fiction is to be determined, nor does it foreclose a role for empirical evidence of marketplace realities. In the concluding part of the chapter, we offer a preliminary sketch of how these questions might be disentangled and usefully approached.

I. The Structure of EU Trade Mark Law

The initial treatment of trade mark law by the Court of Justice of the EU (CJEU) arose in cases adjudicated under primary EU law, mostly involving claims that assertions of national trade mark rights served to impede the free movement of goods within the EU.³ From the earliest days of the European Communities, however, efforts have been underway to address trade marks in secondary legislation.⁴ These efforts came to fruition with the adoption of two instruments: the Trade Mark Directive and the Community Trade Mark Regulation.⁵

² The most notable exception has been Jennifer Davis who has authored two important assessments. See J Davis, ‘Locating the Average Consumer: His Judicial Origins, Intellectual Influences and Current Role in European Trade Mark Law’ (2005) *Intellectual Property Quarterly* 183; J Davis, ‘Revisiting the Average Consumer: An Uncertain Presence in Trade Mark Law’ (2015) *Intellectual Property Quarterly* 15.

³ See, eg Joined Cases 56 and 58/64 *Consten v Commission* [1966] ECR 299.

⁴ See, eg Commission, ‘Memorandum on the Creation of an EEC Trade Mark’ SEC (76) 2462 final.

⁵ See Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L299/25 (Trade Mark Directive), consolidating and replacing Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1990] OJ L40/1 (original Trade Mark Directive); Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1 (Trade Mark Regulation), replacing Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1. The two instruments were designed in tandem, and their status as an integrated ‘package’ is evident again from the current legislative revision process. See Max Planck Institute for Intellectual Property and Competition Law, ‘Study on the Overall Functioning of the European Trade Mark System’ (Munich, 15 February 2011) (Max Planck Study); Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark’ COM (2013) 161 final (Proposed Regulation); Commission ‘Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks’ COM (2013) 162 final (Proposed Directive).

The Trade Mark Directive purported to be a limited harmonisation of national registered trade mark laws of the Member States.⁶ It expressly did not harmonise protection of unregistered marks under allied regimes such as passing off or unfair competition.⁷ However, it is increasingly apparent that the harmonisation was in fact close to maximum harmonisation, imposing both floors and ceilings on the extent of protection that Member States could provide under national law. The Court of Justice has given very little scope to those areas where the Directive appeared explicitly to reserve discretion to Member States.⁸ And its reading of the Directive has arguably intruded on matters that might have been thought to be questions of unfair competition.⁹ As a result, the Directive has begun to mimic a uniform law, and the pending legislative reform of the Directive would take this process even further, making many optional provisions mandatory.¹⁰

The Directive thus effected substantial convergence in the legal norms applicable throughout the Member States. However, under the Directive, both the rights-conferring and enforcement authorities remained national in nature; the Directive simply harmonised national trade mark laws, but did nothing to disrupt the feature of national trade mark rights that had long presented obstacles to the free movement of goods.¹¹ This explains the necessity for the Community Trade Mark Regulation that created an industrial property title, the Community Trade Mark (CTM), which confers EU-wide protection. It is granted by a dedicated EU agency, the Office for Harmonisation in the Internal Market (trade marks and

⁶ Recital 3 of the original Trade Mark Directive (now recital 4 of the consolidated Trade Mark Directive) stated that it was not necessary to undertake ‘full-scale approximation’. Rather, the Directive claimed to tackle only those national provisions most directly affecting the functioning of the internal market.

⁷ See Trade Mark Directive, recitals 5, 7. Some aspects of national unfair competition laws might however be pre-empted by other bodies of EU law that regulate unfair trading such as 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) 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive). See A Ohly, ‘Interfaces between trade mark protection and unfair competition law: Confusion about confusion and misconceptions about misappropriation?’ in N Lee, G Westkamp, A Kur and A Ohly (eds), *Intellectual Property, Unfair Competition and Publicity: Convergences and Development* (Cheltenham, Edward Elgar Publishing, 2014) 58-59 (discussing the possible restriction of Member State autonomy to hold search engines liable for the sale of keyword advertising under unfair competition law, while noting that the CJEU implicitly rejected part of this argument in *Google France*). And immunity conferred under Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive) also effects some harmonisation of the scope of possible unfair competition liability. See GB Dinwoodie, ‘Secondary Liability for Online Trademark Infringement: The International Landscape’ (2014) 37 *Columbia Journal of Law & the Arts* 463, 486.

⁸ See GB Dinwoodie, ‘The Europeanisation of Trade Mark Law’ in A Ohly and J Pila (eds), *The Europeanisation of Intellectual Property Law* (Oxford, Oxford University Press, 2013) 81-83; cf *Oracle America Inc v M-Tech Data Ltd* [2012] UKSC 27, [2012] 4 All ER 338 [12] (Lord Sumption) (suggesting that the ‘efficacy [of the Trade Mark Directive] as a harmonising measure uniformly applicable across the whole of the EU depends on treating it as an exhaustive statement of the rights of trade mark proprietors’); see generally S Weatherill, ‘Consumer Policy’ in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (New York, Oxford University Press, 2011) 850-51 (discussing minimum and maximum harmonisation in the context of consumer protection rules).

⁹ See GB Dinwoodie, ‘Dilution as Unfair Competition: European Echoes’ in RC Dreyfuss and JC Ginsburg (eds), *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge, Cambridge University Press, 2014) 90-92.

¹⁰ See, eg Proposed Directive, arts 5(3), 10 (2)(c).

¹¹ Trade Mark Regulation, recital 4 (‘[t]he barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws’).

designs) (OHIM) based in Alicante.¹² The substantive conditions on which the CTM is granted and the scope of protection it receives parallel (with minor modifications related to geography that will be discussed below) the provisions that the Directive imposes on national offices and national courts with respect to national trade marks.¹³

The principal feature of the CTM was its unitary character. Thus, Article 1(2) of the Trade Mark Regulation provides that:

A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle shall apply unless otherwise provided in this Regulation.

That is to say, a CTM is valid for the entire EU, or not at all. So goods bearing a valid CTM can (with few exceptions) freely move throughout the EU without fear of a conflicting national right.¹⁴ Consequently, the ‘footprint’ of the CTM is impressive: a unitary right to be relied upon by the 500 million residents of the EU, with all the accompanying variations in income, age, education, locations (urban or rural), languages and national cultural contexts that this entails.¹⁵

If the unitary character of the CTM was *its* defining feature, the intention underlying the package of reforms *as a whole* was to ensure co-existence between the national regimes and the EU-level CTM regime.¹⁶ Thus, the EU legislature recognised that certain businesses of a more local nature would not wish protection for the entire EU and thus should not be compelled to incur the costs of such an application. Moreover, where the business operates in only one or two Member States, protection across the EU via a CTM would clutter trade mark registers throughout Europe.¹⁷ Such ‘deadwood’ (as US courts call unused marks) would effectively limit the marks that could be used by other producers, even if they were only seeking national protection.¹⁸ The proliferation of ‘earlier’ marks makes it harder for producers to select and clear marks with certainty that they are not intruding on the rights of others. Finally, given that trade marks are (unlike patents or copyrights) potentially perpetual,

¹² Thankfully, the Proposed Regulation would rename the OHIM. For present purposes, think of it as the EU Trade Mark Office.

¹³ The Trade Mark Regulation also had to address procedural matters (which were not tackled in the Trade Mark Directive) and had to make decisions on provisions that were left optional for Member States in the Directive. See Dinwoodie, ‘The Europeanisation of Trade Mark Law’ (n 8) 87.

¹⁴ With the expansion of the EU since 1994, first from 15 to 25 and now to 28 Member States, transitional provisions have blurred this principle at the edges. See Trade Mark Regulation, art 165(5).

¹⁵ European Commission, Eurostat and Directorate-General for Health and Consumers, *Consumers in Europe* (Luxembourg, Office for Official Publications of the European Communities, 2009).

¹⁶ See Max Planck Study (n 5) 45, para 1.1 (‘One of the core elements in European trade mark law is the principle of coexistence. Recital 6 in the preamble to the [Regulation] voices this principle by stating that the Community trade mark law does not replace the law of the Member States on trade marks and that national trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level’).

¹⁷ See G von Graevenitz et al, ‘Trade Mark Cluttering: An Exploratory Report’ (2012/11, UK Intellectual Property Office, 19 April 2012).

¹⁸ Prior CTMs are earlier rights for the purpose of determining priority under all national regimes in the EU. See Trade Mark Directive, art 4(2)(a)(i).

a large number of earlier national trade mark rights were in existence in 1996 when the first CTMs were issued. Any of these existing national marks could have priority over applications for CTMs.¹⁹ With so many potential obstacles to CTM registration, national registrations in those Member States where no conflicting mark existed were an important fallback. Thus, whether for reasons of minimising applicant costs, public interest in an uncluttered register, or practical necessity derived from existing rights, the national systems would have to continue even after the creation of the CTM.

After years of debate,²⁰ the principle of co-existence was understood to require broadly similar substantive provisions in the Directive and Regulation.²¹ As the *substantive* provisions in the Directive and Regulation are largely the same, we will address below the role which the consumer plays in trade mark law with respect to both instruments, noting the important points of divergence. However, the overall structure of the system we have described in this Part means that EU trade mark law encompasses a consumer concept that operates on two entirely different planes—at the national level and at the unitary or pan-European level. Along with the theoretical complexity we outline below, this difference in market scales helps to explain some of the variations in the concept of the consumer in trade mark law.

II. The Consumer in EU Trade Mark Law

The consumer is ubiquitous in trade mark law. This ubiquity takes two forms. First, the protection of the consumer is a universal justification for trade mark law as a whole.²²

¹⁹ Under the Regulation, prior conflicting rights may consist of a number of different earlier rights: applications or registrations for CTMs, applications or registrations in a Member State of the EU or the Benelux, international registrations having effect in an EU Member State, marks that are well-known in an EU Member State, and even unregistered marks or other signs that are of more than mere local significance (provided that the law of the Member State governing such mark or sign grants its proprietor the right to prohibit the use of a subsequent mark). See Trade Mark Regulation, arts 8, 42.

²⁰ At different stages in the legislative process, different solutions were contemplated. For example, if the rights secured by the CTM were far easier to acquire and conferred far more extensive protection, applicants would be incentivised to pursue the CTM. See A Sattler, ‘Dilution of Well-Known Trademarks – An Analysis of its Foundations in Germany and The European Union’ (2011) 3 *Zeitschrift für Geistiges Eigentum / Intellectual Property Journal* 304, 320. A shift to EU-wide marks would enhance the free movement of goods, as well as facilitate the expansion of national businesses to EU-wide enterprises that is one of the other stated objectives of the unitary right. See Trade Mark Regulation, recitals 2, 4; but see GG Howells, ‘The Rise of European Consumer Law—Whither National Consumer Law’ (2006) 28 *Sydney Law Review* 63, 67 (‘in reality consumers’ willingness to shop overseas is likely to have less to do with their substantive rights and be more connected to convenience, language and practical questions of complaining about faulty goods and services and access to justice’). Instead novel mechanisms were introduced to encourage applicants with existing national rights to apply for the parallel CTM without imperilling the priority of their national protection, see Trade Mark Regulation, arts 34-35 (seniority), and to ensure that applicants unsuccessful in securing a CTM because of a prior right (or other problem) in a particular Member State could convert their CTM to a bundle of national applications in the other Member States without loss of priority based on their CTM filing date. See Trade Mark Regulation, arts 112-14 (conversion).

²¹ Nevertheless, there are advantages in applying for the CTM, such as the greater territorial scope of protection, the absence of a requirement to show an intent to use the mark, and the relatively inexpensive application fees.

²² Max Planck Study (n 5) 55, para 1.40 (describing the interests protected by trade mark law as those of applicants in a smoothly functioning registration system; trade mark proprietors in full and efficient protection of their rights; the interests of consumers in protection against confusion that potentially affects their decision-making; and the interest of other market actors in maintaining free competition); S Rep No 79-1333, at 3 (1946) (offering as one purpose of protection ‘to protect the public so that it may be confident that, in purchasing a

Second, even where trade mark protection is justified on other terms (such as protecting producer goodwill or investments in reputation), consumer interests still play an epistemic role when deciding discrete legal issues. For example, where third parties make unauthorised use of a sign that is the same as or similar to a registered trade mark, confused consumers are unable to claim in their own right. Their actual or presumed reaction to the third party use will however determine whether the trade mark owner's action to protect its property interest is successful.²³ Indeed, consumer perceptions and interests function as the litmus test both for the existence and scope of protection; there are few areas of trade mark law where the concept of the consumer is not relevant.²⁴

For the purposes of this chapter, we will focus on two crucial doctrinal questions: proof of distinctiveness, and determination of confusion. And in so doing we will differentiate between two procedural contexts where these questions arise: assessments of validity (where questions of distinctiveness and confusion can both arise) and analysis of infringement (where confusion is central).²⁵ In order to frame our analysis in Part III, we will highlight in particular where the approach to the consumer presents (or perhaps conceals) a tension between an empirical and normative conception of the consumer.

An empirical conception of the consumer involves an assessment grounded in actual measured behaviour. In characterising the trade mark law consumer as 'normative', we mean that that consumer is deemed to have certain attributes or default characteristics, such as ascribed levels of attention, care or circumspection, which may be at odds with how some consumers actually behave in the marketplace. Instead, such consumer is premised on how consumers *should* be assumed to behave in a specific context, in part because by validating those assumptions we ensure an outcome that the law regards as prescriptively desirable (for reasons that may or may not have anything to do with consumer protection). This is a familiar argument for those who have encountered the 'reasonable person' in tort law.²⁶ This

product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get').

²³ Trade mark is not the only area of law where this approach to standing and enforcement occurs. See, eg F Henning-Bodewig (ed), 'International Handbook on Unfair Competition' (Munich, Hart Publishing, 2012) 256-57 (discussing German unfair competition action by trader against competitor for violation of, inter alia, consumer protection provisions). But it is unusual for a trader's property right to turn on consumer reaction.

²⁴ See J Mellor et al, *Kerly's Law of Trade Mark and Trade Names*, First Supp 15th edn (London, Sweet & Maxwell, 2014) (Kerly 2014 Supplement) 2, para 2-02n-02o ('The target for all the functions of a trade mark is the notional average consumer. Readers will be aware that the concept of the average consumer arises in many chapters in this work...For this reason, it may be useful to gather some propositions regarding the concept of the "average consumer" in this [chapter of the 2014 supplement], where we discuss some of the fundamentals of EU trade mark law').

²⁵ The *extent* of distinctiveness can be relevant to infringement, both as a factor in the confusion inquiry, and in establishing the 'reputation' of a mark (which triggers enhanced protection against dilution). See Case C-39/97 *Canon KK v Metro-Goldwyn-Mayer Inc* [1998] ECR I-5507, para 24; Trade Mark Directive, art 5(2) (dilution).

²⁶ M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford, Oxford University Press, 2003) 2 (referring to 'anxiety about the normative significance of the "default characteristics" of the reasonable person and the difficulty posed when those characteristics do not represent the person actually judged'); cf L Heymann, 'The Reasonable Person in Trade Mark Law' (2008) 52 *St Louis University Law Journal* 781 (emphasising that the notional 'reasonable consumer' in trade mark law is an artificial, monolithic construct, representing millions of real people with varying perceptions of the 'sight, sound and meaning' of trade marks, so that judicial abstractions – while necessary – should not stray too far from marketplace realities); V Mak, 'The "Average Consumer" of EU Law in Domestic and European Legislation' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford,

normatively-infused consumer construct offers (a more objective) vantage point from which to assess certain categories of empirical evidence relating to consumer perception or behaviour.

A. Distinctiveness: When Does a Sign Function as a Trade Mark?

Trade marks are signs that are used by traders to identify their goods or services and distinguish them from the goods or services of others.²⁷ This origin-indicating function remains the primary basis for trade mark protection around the world. Both the Trade Mark Directive and the Trade Mark Regulation explicitly identify this as the essential function of marks,²⁸ and the Court of Justice has in fact constructed a substantial body of doctrine around the principle that the rights of the owner are to extend no further than necessary to protect the functions of a mark.²⁹

Fortunately, the details of the Court's broader 'functions-based' doctrine, which have been the subject of extensive recent criticism, are not germane to this chapter.³⁰ However, to serve the foundational origin function and thus to warrant registration—to be 'distinctive' in doctrinal language—trade marks must be understood *by consumers* as pointing to a particular producer as the source of the goods (even if the consumers could not specifically name the producer).³¹

A mark may be inherently distinctive by its very nature. For example, if the sign is a word sufficiently disconnected from the nature of the goods or services on which it is used such that consumers will instantly see it as an indication of origin rather than a description of the characteristics of the goods.³² APPLE works better as a trade mark for computers than it does for fresh fruit. If registration is sought for a mark prior to its use in the course of trade—as permitted under both the Directive and the Regulation—then this must be the basis on which the applicant establishes distinctiveness. Inherent distinctiveness is in essence a prediction that consumers will see a proposed mark as a source-identifier by virtue of its

Bloomsbury Publishing, 2013) 335-37 (drawing parallels with other legal fictions such as the reasonable person in tort law).

²⁷ See Trade Mark Directive, art 2.

²⁸ Trade Mark Regulation, recital 8 ('[t]he protection afforded by a Community trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin'); Trade Mark Directive, recital 11 (same).

²⁹ See, eg Case C-482/09 *Budějovický Budvar, národní podnik v Anheuser-Busch Inc* [2011] ECR I-8701; Case C-235/09 *DHL Express France SAS v Chronopost SA* [2011] ECR I-2801.

³⁰ The Court has layered advertising and investment functions upon the origin and quality functions of marks. Defining these functions and justifying their protection has proved controversial. See generally DS Gangjee, 'Property in Brands: the Commodification of Conversation' in HR Howe and J Griffiths (eds), *Property Concepts in Intellectual Property Law* (New York, Cambridge University Press, 2013); A Kur, 'Trade Marks Function, Don't They? CJEU Jurisprudence and Unfair Competition Practices' (2014) 45 *International Review of Intellectual Property and Competition Law* 434.

³¹ Conversely, if the mark loses its significance to consumers as an indication of source (eg it becomes a generic term, like escalator) it will lose protection as a mark. See Case C-409/12 *Backaldrin Osterreich The Kornspitz Co GmbH v Pfahnl Backmittel GmbH* [2014] ETMR 30.

³² See Trade Mark Directive, art 3(1)(b); Trade Mark Regulation, art 7(1)(b); Joined Cases C-53 to 55/01 *Linde v DPMA* [2003] ECR I-3161, para 41 ('[a] trade mark's distinctiveness must be assessed by reference to, first, the goods or services in respect of which registration is sought and, second, the perception of the relevant persons, namely the consumers of the goods or services').

(oblique) relationship to the goods in question.³³ At the point of registration, there may be no possibility of the trade mark examiner making a targeted empirical assessment of whether that prediction is correct vis-à-vis the mark in question, although the empirical realities of the broader marketplace and the way that similar marks function might be relevant to any such prediction.³⁴ We refer to this latter aspect as empirical evidence relating to market conditions; it is essentially evidence that provides background context.³⁵ But the overall assessment of inherent distinctiveness is notional or predictive in nature, taking into account this market context.³⁶

Alternatively, a mark may acquire distinctiveness through use. For example, a term that is descriptive of the characteristics of goods will initially be denied registration. However, if the consistent and extensive use of the mark by a single manufacturer on its products and related advertising causes the consumer to understand the mark as pointing to a single source of the products, the sign will have become a registrable mark.³⁷ Clearly, here, the actual distinctiveness of the purported mark can be empirically tested; indeed, absent proof of that distinctiveness, the mark will not be admitted to the register. And the Court of Justice has in a series of cases identified the types of evidence that may be relevant to proof of acquired distinctiveness. This evidence includes a range of circumstantial matters: market share/sales, extent of geographical use, length of use, advertising spend, and statements from chambers of commerce and industry or other trade and professional associations.³⁸

Of most significance for present purposes, however, the Court has also indicated that public opinion polls or surveys may be relevant to prove acquired distinctiveness, even if they are not mandatory.³⁹ Such polls are direct evidence of what the Court in its list of factors

³³ See generally GB Dinwoodie, 'Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress' (1997) 75 *North Carolina Law Review* 471, 480-81, 486-87.

³⁴ See *ibid* at 585-97; see also J Bergquist and D Curley, 'Shape Trade Marks and Fast-moving Consumer Goods' (2008) 30 *European Intellectual Property Review* 17, 20, n 24 (noting that under CJEU case law, European consumers are presumed 'not [to be] in the habit of making assumptions about the origin of products, on the basis of either their shape or the shape of the packaging, in the absence of any graphic or word element. [However, when] assessing the habits of relevant consumers, the CFI subsequently held that the normal marketing practices of the product in question should be taken into account'; eg empirical evidence relating to consumer perception of automobiles features in general could be permitted).

³⁵ Overall, distinctiveness is very subjective (see Case C-191/01P *OHIM v Wrigley (Doublemint)* [2003] ECR I-12447, Opinion of AG Jacobs) and this factually-intensive inquiry generally makes courts and examiners wary of undue reliance on other registrations. See Bergquist and Curley, 'Shape Trade Marks' (n 34) n 24 (evidence of other CTMs on motor vehicle grilles). But in a use-based system, such registrations ought to be slightly more persuasive because they are theoretically more reflective of market conditions. See Dinwoodie, 'Reconceptualizing the Inherent Distinctiveness', (n 33) 591-92.

³⁶ The utility of any survey as regards inherent distinctiveness would depend upon what one thinks surveys are doing. *cf Marks & Spencer plc v Interflora Inc (Interflora I)* [2012] EWCA Civ 1501, [2013] 2 All ER 663 [35] ('[t]here is, of course, no doubt that a valid survey can be an accurate diagnostic or predictive tool') (emphasis added).

³⁷ See Trade Mark Directive, art 3(3); Joined Cases C-108 and 109/97 *Windsurfing Chiemsee Produktions v Walter Huber* [1999] ECR I-2779, paras 50-52.

³⁸ See, eg *Windsurfing*, para 51.

³⁹ See *ibid*, para 53 ('Community law does not preclude the competent authority, where it has particular difficulty in that connection, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment'); see also L Bently and B Sherman, *Intellectual Property Law*, 3rd edn (Oxford, Oxford University Press, 2008) 845, n 160 ('One of the factors is stated to be the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking [citing *Windsurfing*]. However, in our view this is not really a factor, so much as the essence of the inquiry. Consequently, we think it more helpful to distinguish... between primary and secondary evidence').

called ‘the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking’.⁴⁰ However, they also address with little mediation the ultimate legal question: whether ‘the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark’.⁴¹ And because that ultimate question is phrased in the past or present (as opposed to future) tense,⁴² it has the feel of an empirical inquiry.⁴³

Adoption of such evidence should not, however, be taken as a wholesale delegation of decision-making to statistical or empirical proof.⁴⁴ The Court has insisted that neither national courts nor the OHIM can require polls to demonstrate a particular percentage of association as a precondition to protection: all circumstances must be considered, suggesting that the empirical data produced by opinion polls remains an input to a broader legal analysis.⁴⁵ And in its endorsement of opinion poll evidence, the Court (while respecting varied national rules of evidence and procedure) arguably conditions the circumstances where use should be made of such optional evidence, noting that:

Union law does not preclude the competent authority, where it has particular difficulty in assessing the distinctive character acquired through use of the mark in respect of which registration or a declaration of invalidity is sought, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment.⁴⁶

This explanation of why courts might have regard to survey evidence—only as part of a broader legal test and where the facts present a particular difficulty for judges—has

⁴⁰ See *Windsurfing* (n 37), para 51.

⁴¹ See *ibid*, para 52.

⁴² See *Enterprise Holdings v Europcar Group UK Ltd* [2014] EWHC 2498 (Ch), [2014] ETMR 50 [33] (‘[a] further possible distinction between a confusion survey and a distinctiveness survey is that the former may involve a prediction as to the likelihood of something happening whereas a distinctiveness survey addresses the issue of whether something has happened’).

⁴³ See Bently and Sherman, *Intellectual Property Law* (n 39) 841, n 139 (‘acquired distinctiveness is normally a factual inquiry rather than one dependent on a legal construct’). This is not to say that one cannot make an empirically-grounded assessment of likely (future) effects; indeed, confusion surveys can be understood as such. But we do not intend to articulate a formal definition of “empiricism”, because confusion surveys are alternatively described in some countries as circumstantial evidence of “actual confusion” (with a resultant hint of looking backwards).

⁴⁴ The test of what must precisely be shown to establish acquired distinctiveness—association by consumers of the sign with a single trade source or consumer reliance on the sign as an indication of origin—is also presently being considered by the Court on reference from the UK courts. See *Nestle v Cadbury (Four-Finger Kit Kat)* [2014] EWHC 16 (Ch), [2014] ETMR 17. Some scholars have seen in the tentative endorsement by the UK courts of the latter standard a shift towards taking account of ‘reality’. See I Fhima, ‘Introducing Reality into Trade Mark Law’ (2014) 9 *Journal of Intellectual Property Law & Practice* 684. If correct, such a conceptual shift might in turn portend a move towards the introduction of different types of evidence. But the adoption of a different legal standard may not of itself necessarily lead down the path of greater empiricism; it might simply re-orient the empirical evidence towards the new legal question. That is, the legal test establishes the normative framework within which empirical assessments occur and provide the standard against which those assessments are measured.

⁴⁵ See *Windsurfing* (n 37), paras 51-52. See also Joined Cases C-217 and 218/13 *Oberbank AG v Deutscher Sparkassen- und Giroverband* [2014] ETMR 56, paras 43-44 (reaffirming that while a sufficiently significant percentage of those surveyed must view the sign as a trade mark, pre-determined percentages or cut-offs cannot be used to determine when this sufficiently significant threshold has been met).

⁴⁶ See *Oberbank*, para 43.

resonated generally with the judiciary at the national level.⁴⁷ The UK courts may be more sceptical about the value of surveys than their continental cousins,⁴⁸ and have developed increasingly rigorous gatekeeping devices that may preclude the admission of surveys into evidence.⁴⁹ However, it is also clear that even UK courts are more receptive to survey evidence in the distinctiveness context than elsewhere.⁵⁰ For example, in *Enterprise Holdings*, Morgan J distinguished between a survey measuring distinctiveness, on the one hand, and a survey of confusion, on the other, on the grounds (inter alia) that:

In the case of a survey as to confusion, the question whether the survey is likely to be of real value may readily be answered in the negative in a case where the goods or services in question are ordinary consumer goods or services and the judge feels that there will be no real difficulty in the court determining the issue of confusion without a survey. Conversely, in the case of a survey as to acquired distinctiveness, the court may feel that it is not able to determine such a dispute based on its own experience and/or the court may feel the need to guard against an idiosyncratic decision.⁵¹

That is to say, the reason for using a survey rests in part on the extent to which such evidence usefully fills a gap in judicial knowledge.⁵² Surveys do not replace judgment; they inform it,⁵³ especially when the judge is unable with any confidence to stand in the shoes of the consumer.⁵⁴ Thus, while the liberal accommodation of surveys within judicial analysis of

⁴⁷ The judicial inability to stand in a consumer's shoes in specialised markets provides some leeway for surveys to be admissible and we explore further reasons why courts could afford to be more open to surveys below (see below Part III, B). In contrast, if costs and unwarranted complexity are the principal concerns with surveys, directly correlated procedural or evidentiary responses may be more appropriate, as opposed to a judicial signal that surveys are generally undesirable. See below Part III.

⁴⁸ See Davis, 'Locating the Average Consumer' (n 2) 189 ('German courts tended to look favourably on opinion polls or surveys as evidence of consumer perceptions, both in cases of unfair competition and in judging distinctiveness in trade mark cases. By contrast, the UK courts traditionally had a "rather hostile attitude" to opinion poll evidence in trade mark cases').

⁴⁹ See text to nn 177-178 below.

⁵⁰ cp J Mellor et al, *Kerly's Law of Trade Mark and Trade Names*, 15th edn (London, Sweet & Maxwell, 2011), para 8-121 ('The ultimate source of evidence [of acquired distinctiveness] is the body of consumers of the goods or services in question. Well-conducted opinion polls can be persuasive, but require much thought and care and are often very expensive.') with *ibid* at para 21-022 ('Since their introduction in English litigation in the late 1960s and early 1970s surveys have not...achieved great impact, although there have been instances where they have been given great weight').

⁵¹ *Enterprise Holdings* (n 42) [34].

⁵² *Interflora I* (n 36) [54] (Lewison LJ).

⁵³ See T Cohen Jehoram, C van Nispen and T Huydecoper, *European Trademark Law: Community Trademark Law and National Harmonised Trademark Law* (Alphen aan den Rijn, Kluwer Law International, 2010) 291-92 (discussing Dutch case law).

⁵⁴ UK courts repeatedly distinguish between cases involving ordinary consumer goods and those with which judges will be unfamiliar. See *Interflora I* (n 36) [59], [90], [137] (in sceptical analysis of the use of survey evidence to assist analysis of likely confusion suggesting, however, that greater latitude might be allowed when the case involves goods with which judges would not be familiar). This seems to be a very small sub-set of cases, at least as regards confusion (but perhaps less so as regards acquired distinctiveness). Cp *Zee Entertainment Enterprises Ltd v Zeebox Ltd* [2014] EWCA Civ 82, [2014] FSR 26 (refusing permission for survey and allowing judge to make assessment in passing off case where claimant broadcast television channels from India) with *Enterprise Holdings* (n 42) [72] ('I do not consider that a trial judge in this case will be able to determine [the question of acquired distinctiveness of the logo of a car rental company] by using his own knowledge and experience. Even if a trial judge thought that he had relevant knowledge and experience, the trial judge would wish to guard against the possibility that his view might be somewhat idiosyncratic or not fully informed').

acquired distinctiveness throughout Europe might be thought to underscore the characterisation of the overarching enquiry as being factually-driven, the dispositive nature of the survey can easily be mis-stated; it is simply one piece of (powerful) evidence. The CJEU's all-circumstances test affirms that proposition.⁵⁵

Surveys have attracted considerable attention in recent months but they form part of a broader taxonomy of empirical evidence, which assists courts when applying the average consumer standard. In general, three categories of empirical evidence inform legal enquiries concerning consumer understanding in trade mark cases (largely, in assessing distinctiveness or confusion). First, parties can introduce circumstantial evidence relating to use of the sign by the particular mark owner or alleged infringer and the effects thereof. For example, when determining whether a mark is highly distinctive or has a reputation (which confers certain advantages during infringement proceedings) or has acquired distinctiveness over time, the OHIM trade mark registry guidelines permit evidence such as certifications or awards for the mark; press cuttings; samples of actual advertising materials; advertising expenditure relating to the mark; market share; and turnover.⁵⁶ Such evidence is treated as a circumstantial proxy for consumer perception. If the mark is well-advertised and very visible, it is likely that consumers will be familiar with it. Likewise, in assessing confusion, the Court of Justice has articulated a series of factors including real-world evidence of enhanced distinctiveness, which will enable it to determine whether marks are similar and in turn inform a global appreciation of whether confusion is likely.⁵⁷

Second, there can be evidence relating to market conditions—general yet empirically substantiated features of the market, as defined by the goods or services in question, including generalisations about consumer responses for a type of sign (eg colours) or type of product/service (eg internet services).⁵⁸ This is comprehensively illustrated in the *Interflora* trial court decision by Mr Justice Arnold, where extensive evidence was submitted regarding internet literacy (where the age of the user was highly relevant) and consumer understanding of keyword advertising in general (in particular, the issue of whether consumers were aware of or could conveniently distinguish between natural and sponsored search results).⁵⁹ Recent empirical work in the behavioural sciences have the potential to inform such generalisations

⁵⁵ This is consistent with the role that Lewison LJ appeared to contemplate for acquired distinctiveness surveys in *Interflora I*. See *Interflora I* (n 36) [35] ('a survey may accurately identify that proportion of the relevant public which recognises the mark as a badge of trade origin. It will then be for the fact finding tribunal, *with the aid* of such a survey, to decide whether a significant proportion of the relevant public identify goods as originating from a particular undertaking because of the mark') (emphasis added); *Enterprise Holdings* (n 42) [72] ('of course, the trial judge will have evidence on the question of distinctiveness over and above the survey evidence').

⁵⁶ Guidelines concerning proceedings before the Office for the Harmonization of the Internal Market (Trade Marks and Designs), Part B: Examination, Section 4: Absolute Grounds for Refusal (2015) 82-86; Guidelines concerning proceedings before the Office for the Harmonization of the Internal Market (Trade Marks and Designs), Part C: Opposition, Section 5: Trade Marks with reputation, Article 8(5) CTMR (2014), 31-37.

⁵⁷ See *Canon* (n 25), para 22; Case C-251/95 *SABEL BV v Puma AG* [1997] ECR I-6191; see also *WHG (International) Ltd v 32 Red plc* [2012] EWCA Civ 19, [2012] RPC 19 [79]; *Specsavers International Healthcare Ltd v Asda Stores Ltd (No 2)* [2012] EWCA Civ 24, [2012] ETMR 17 (No 2) [52]; *Red Bull GmbH v Sun Mark Ltd* [2012] EWHC 1929 (Ch), [2013] ETMR 53 [74].

⁵⁸ See *Kraft Foods Group Brands LLC v Cracker Barrel Old Country Store Inc* 735 F.3d 735, 742-43 (7th Cir 2013) (Posner J) (discussing alternatives to surveys 'including testimony by experts on retail food products about the buying habits and psychology of consumers of inexpensive food products').

⁵⁹ *Interflora Inc v Marks & Spencer plc* [2013] EWHC 1291, [2013] ETMR 35 [142]-[165].

about consumer perceptions and marketplace responses.⁶⁰ For instance, that scholarship reveals that context matters a great deal during the consumer decision-making process so a legal test which is more open to contextual cues would more accurately map decision making in the marketplace.⁶¹

Third, there is the potential for direct evidence of consumer perceptions as it relates to the signs in a specific dispute between parties. Frequently, litigants conduct opinion polls or surveys intended to measure whether a mark is distinctive or whether there is likely to be confusion between the proprietor's and a third party's use of similar signs. Alternatively, as to the latter question, parties in the UK have historically conducted so-called 'witness collection exercises', which are a process of identifying witnesses who (although not statistically representative) testify or submit witness statements as to their reactions. We include in this category particular instances demonstrating actual confusion as well as probabilistic assessments of the likelihood of confusion that surveys permit. Of course, surveys ultimately measure consumer responses to a stimulus in an artificial context, and thus might (if one treated this taxonomy as more important than we intend) be strictly classified as circumstantial evidence. In any event, it is often said that proof of actual confusion is the best evidence of likely confusion. And in the wake of the *Interflora* litigation in the UK, where the Court of Appeal provided a clear message that there should be reduced reliance on surveys, courts have tended to highlight particular instance of actual confusion in a number of cases.⁶²

However such empirical evidence (of any type) merely informs the perceptions of the hypothetical or notional average consumer, which remains the legal benchmark. The 'average consumer' was incorporated by the CJEU into EU trade mark law from its jurisprudence on regulation of misleading advertising.⁶³ In that context, it was clearly understood that the CJEU was articulating a normative conception of the consumer that would instantiate a particular (less paternalistic) European vision of the consumer than might have resulted from national assessment.⁶⁴ Trade mark courts appear mostly to have taken over this understanding

⁶⁰ See TR Lee, ED DeRosia, GL Christensen, 'An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness' (2009) 41 *Arizona State Law Journal* 1033; TR Lee, GL Christensen, ED DeRosia, 'Trademarks, Consumer Psychology, and The Sophisticated Consumer' (2008) 57 *Emory Law Journal* 575; TR Lee, ED DeRosia, GL Christensen, 'Sophistication, Bridging the Gap, and The Likelihood of Confusion: An Empirical and Theoretical Analysis' (2008) 98 *Trademark Reporter* 913.

⁶¹ Davis, 'Revisiting the Average Consumer' (n 2) 23-26.

⁶² See, eg *British Sky Broadcasting v Microsoft* [2013] EWHC 1826 (Ch) [143], [155] (confusion shown in .000011% of the calls to the customer helpline); *Comic Enterprises v Fox* [2014] EWHC 185 (Ch), [2014] ETMR 46 [120]-[121] (single witness of confusion during 5 years of a hit TV show); *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch), [2014] ETMR 57 [160] (evidence of confusion did not support a finding of confusion, but prevented the defendant from arguing that no evidence of confusion). If the effect of *Interflora* is in fact to switch focus on to particular instances of actual confusion, it will be important to inquire as rigorously of that evidence whether (as was asked of surveys and witness collection) it is representative of the average consumer. cf *British Sky Broadcasting* [144]-[145] (concluding that evidence of confused calls to helpline could not be regarded as skewed because of self-selection of callers and spontaneous reaction). Of course, the costs of doing so are far less than judicial scrutiny of surveys. And courts appear to accept very easily that the weight of such actual confusion evidence has to be considered as input data into a larger legal determination made through the eyes of the average consumer.

⁶³ See Davis, 'Locating the Average Consumer' (n 2); *Interflora* (n 59) [194]-[224]

⁶⁴ Davis (n 2) 197 ('the ECJ developed the concept of the "average consumer" largely in contrast to the empirical test for customer confusion which had been deployed by the German courts, in particular, and which has been described as "over-regulatory"'); Howells, 'The Rise of European Consumer Law' (n 20) 80 (noting

of the nature of the concept. And even UK courts (who historically might have offered the greatest resistance to the normative label)⁶⁵ have, in the last two years in particular, made frequent reference to the normative or fictional nature of the ‘average consumer’.⁶⁶ To be sure, the mathematical connotation of the term ‘average’ has tempted some British judges to muse about the concept in terms that have appeared to some commentators to contemplate (wrongly) a statistical exercise.⁶⁷ We find criticism of a statistical approach persuasive,⁶⁸ the average consumer offers a normatively-infused vantage point from which to assess (more objectively) subjective empirical evidence relating to actual consumer perceptions and behaviours.⁶⁹

Potential ambiguities of this sort can also be found in the approach of the CJEU to acquired distinctiveness. Although the CJEU has disavowed a numerical approach, its doctrinal formulations might at first glance suggest a greater attraction to empirical measures. Thus, in *Windsurfing*, the CJEU required that consumer recognition must subsist for ‘the relevant class of persons, or least a *significant proportion* thereof’.⁷⁰ But the CJEU has also stressed that the question has to be considered through the lens of the ‘average consumer’, which we have explained as a normative concept.⁷¹ This blending of empirical and normative assessments highlights that the binary choice between an empirical or normative approach to legal tests involving the consumer concept is a false one. In the end, there is a spectrum between empirical and normative assessments, and different issues may lend themselves to being addressed toward one end of that spectrum rather than the other. For instance, it would be uncontroversial to describe acquired distinctiveness as relatively positioned towards the

that the average consumer used by the Unfair Commercial Practices Directive assumes capacities superior to ordinary consumers but allows national courts to take into account social, cultural and linguistic factors).

⁶⁵ See text to nn 109-114 below.

⁶⁶ See, eg *Interflora* (n 59) [208]-[211] (Arnold J) (average consumer is a ‘legal construct’ that provides a ‘benchmark’); *Thomas Pink* (n 62) (Birss J) (accepting that the ‘average consumer test is normative’); *Jack Wills v House of Fraser* [2014] EWHC 110 (Ch), [2014] ETMR 57 [63-65] (Arnold J) (‘the average consumer provides a normative benchmark’); *Comic Enterprises* (n 62) [120], (Wyand QC) (‘[t]he average consumer is not a real person but is an artificial construct’). These formulations echo the legislative sentiments expressed in the Unfair Commercial Practices Directive, which itself reflected CJEU interpretations of prior consumer legislation. See Unfair Commercial Practices Directive, recital 18 (describing the average consumer as a ‘a notional, typical consumer’, and a ‘benchmark’ and emphasizing that the ‘average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the CJEU, to determine the typical reaction of the average consumer in a given case’). It should of course be noted that the normative basis of trade mark and consumer protection legislation is not identical. See Ohly, ‘Trade mark protection and unfair competition law’ (n 7) 46.

⁶⁷ See *Interflora I* (n 36) [35] (Lewison LJ); Kerly 2014 Supplement (n 24) 8-9, para 2-02n-02o (criticising the language of Lewison LJ in *Interflora I*).

⁶⁸ See *Hearst Holding v AVELA Inc* [2014] EWHC 439 (Ch), [2014] ETMR 34 [60] (Birss J) (‘[t]he word[] “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median’); *Schutz v Delta* [2011] EWHC 1712 (Ch) [98] (Briggs J) (‘[t]he search for a statistical average is neither warranted by European jurisprudence, nor sensible in the present context’); *Interflora* (n 59) [211] (Arnold J) (‘not a statistical test’).

⁶⁹ See nn 26-27 and accompanying text.

⁷⁰ *Windsurfing* (n 37), para 52 (emphasis added).

⁷¹ *cf* Bently and Sherman (n 39) 841, n 139 (‘In *Philips*, the ECJ stated that the tribunal is to assess acquired distinctiveness in “light of the presumed expectations of the average consumer”. This seems strange because acquired distinctiveness is normally a factual inquiry rather than one dependent on a legal construct. Nevertheless, it is a way of screening out the views of real people who are either very attentive or very inattentive’).

empirical end. But almost all conceptions of the consumer—as circumscribed by the applicable legal tests—reflect a blend.⁷²

There is clear evidence of this blended approach within the test for distinctiveness more generally. The fictional character of the average consumer has not stopped the CJEU from trying to put some flesh on its bones, which might be thought of as establishing a general normative framework within which to incorporate and assess empirical measurements. Thus, the CJEU has articulated *the type of consumer* from whose perspective the questions are to be assessed. The Court has offered several forms of guidance.

First, the Court has stressed that distinctiveness has to be assessed based upon ‘the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect’.⁷³

Second, the Court has detailed how this consumer perceives marks: the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. Thus, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered.⁷⁴

Third, the Court has (while nominally applying the same distinctiveness test to all types of marks) developed specific rules of thumb as regards the likelihood that consumers will treat certain categories of signs—often referred to as non-conventional—as marks. Thus, for example, consumers are *deemed in the normal course* not to regard the colour or shape of a product as a source-identifier.⁷⁵ Such marks will typically be protected only upon proof of acquired distinctiveness. Although the CJEU has denied this,⁷⁶ it might be thought that this relatively conservative characterisation of consumer responses to non-conventional marks in the context of inherent distinctiveness—nominally involving judicial assessment of likely ‘real world’ consumer reaction—is to some extent informed by normative concerns about the greater anti-competitive effects associated with protection for shape or colour marks.⁷⁷

⁷² See Dinwoodie, ‘Dilution as Unfair Competition’ (n 9) 93 (‘With respect both to absolute grounds for refusal such as distinctiveness and infringement tests such as likely confusion or association, trade mark law remains dominated by a legal fiction (the reasonably well-informed and reasonably observant and circumspect consumer) that is a mix of factual realities and legal policy’).

⁷³ Case C-342/97 *Lloyd Schufabrik Meyer & Co GmbH v Klijsen Handel BV* [1999] ECR I-3819, paras 26-28.

⁷⁴ *SABEL* (n 57), para 23; Case C-591/12 P *Bimbo SA v OHIM* [2014] ETMR 41, paras 20-21.

⁷⁵ See Case C-104/01 *Libertel Group BV v Benelux-Merkenbureau* [2003] ECR I-3793, para 66 (‘[i]n the case of a colour per se, distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific’); see also Case C-456/01 *Henkel v OHIM* [2004] ECR I-5089, para 38 (‘[a]verage consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging’).

⁷⁶ See Case C-144/06 P *Henkel v OHIM* [2007] ECR I-8109, paras 34-39 (‘[a]ccording to... consistent case-law, the criteria for assessing the distinctive character of three-dimensional trade marks consisting of the appearance of the product itself are no different from those applicable to other categories of trade mark’).

⁷⁷ *Société Des Produits Nestlé SA v Cadbury UK Ltd* [2013] EWCA Civ 1174 [13] (Mummery LJ) (endorsing the lower court’s opinion ‘that unconventional or “exotic” marks, such as colours, sounds and smells, give rise to conceptual problems, which are not encountered with more conventional trade names and logos. As the registration of a trade mark creates a form of intellectual property conferring a potentially perpetual monopoly in the mark and excluding everybody else from use in various ways, [the conditions under which they can be registered] has some public importance’).

This (not unreasonable) reticence relating to the registration of non-conventional marks such as colours or shapes in practice transfers across to acquired distinctiveness as well. Since the necessary degree of recognition by the relevant public (eg 60 per cent) is *not* specified by case law, which only refers to a ‘significant proportion’ of that public, some courts appear to require a relatively higher degree of consumer awareness for such marks, when compared with word marks.⁷⁸ As a result, despite CJEU protestations to the contrary in *Windsurfing*, even acquired distinctiveness should perhaps be seen as only a *predominantly* empirical assessment, with the space for accommodating normative agendas.⁷⁹

B. Infringement by Likelihood of Confusion

The consumer is also central to questions of infringement. Most importantly, the ‘consumer’ provides the perspective through which a court will view whether a defendant’s use is infringement under Article 5(1)(b) of the Directive, which requires proof of a likelihood of confusion.⁸⁰ In essence, this test is satisfied when (a) the identity or similarity of the two signs being compared and (b) that of the goods or services they are used on (c) combines to give rise to a likelihood that the public wrongly believe that the goods or services originate in the same enterprise, or otherwise presume a connection, in the nature of an economic link (eg an authorised licensing arrangement), between the two enterprises. Again, the CJEU has developed a series of guiding principles concerning the nature of the consumer for this analysis, which broadly correspond with those articulated for the purposes of determining distinctiveness.⁸¹ These considerations must be appreciated globally by a court, and this multi-factor, ‘global appreciation’ approach has become the hallmark of the CJEU’s approach to confusion.⁸²

⁷⁸ P Kutschke, ‘All Consuming – Consumer Surveys in Germany’ (May 2012) *Intellectual Property Magazine* 48, 49. And for word marks where the underlying meaning is generic for the goods or services, courts have been tempted to set a very high recognition threshold, to discourage exclusive rights in such terminology. This is illustrated by the application of the former German state monopoly in postal services to register the mark POST. Evidence showed that around 85% of the population associated the mark with the former state monopolist. Given its descriptiveness, the Federal Patents Court regarded this as insufficient for acquired distinctiveness and demanded a higher percentage. See BPatG, GRUR 2007, 714 – POST. The appeal was successful since the BGH held that in the light of *Windsurfing* there could be no fixed percentages, no exceptionally strict requirements for plainly descriptive marks and that the freedom of competitors to use the term descriptively was preserved via limitations. See BGH GRUR 2009, 669 - POST II.

⁷⁹ See A Kur, ‘Strategic Branding: Does Trade Mark Law provide for Sufficient Self-Help and Self-Healing Forces’ in I Govaere and H Ullrich (eds), *Intellectual Property, Market Power and the Public Interest* (Brussels, PIE Peter Lang SA, 2008) 213-16 (arguing that room for such an approach exists even after *Windsurfing*); see also *Oberbank* (n 45), paras 44-49.

⁸⁰ Even where consumer confusion is not a factor, such as in the double identity infringement test in art 5(1)(a) of the Trade Mark Directive, consumer perception remains relevant (eg when assessing whether marks are identical). See Case C-291/00 *LTJ Diffusion v Sadas Vertbaudet* [2003] ECR I-2799, para 52; cf *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159, [2004] ETMR 56 [25]. To the extent that art 5(1)(a) is simply the cause of action under art 5(1)(b) with a different burden of proof, then perhaps the assimilation is less problematic. However at the time of writing there is an unresolved debate as to whether the ‘reverse onus’ approach is correct. Contrast *Interflora Inc v Marks and Spencer plc (Interflora III)* [2014] EWCA Civ 1403, [2015] ETMR 5 [71]-[106]; [131]-[151] with *Supreme Pet Foods v Henry Bell & Co* [2015] EWHC 256 (Ch) [84]-[161].

⁸¹ See *SABEL* (n 57), para 23; *Canon* (n 25), para 16; Case C-361/04 P *Ruiz-Picasso v OHIM* [2006] ECR I-643, paras 36; *Lloyd Schuhfabrik Meyer* (n 73), para 26.

⁸² See, eg Case T-394/10 *Grebenshikova v OHIM* [2014] ETMR 22, para 16 (‘[the global appreciation approach] implies some interdependence between the factors taken into account, so that a low degree of similarity between the goods or services covered may be offset by a high degree of similarity between the marks, and vice versa’).

In addition to those characteristics noted above in the context of acquired distinctiveness, the Court has identified other attributes of the consumer relevant to assessment of confusion:⁸³

- The average consumer normally only rarely has the chance to make a direct comparison between different trademarks and instead must place their trust in the imperfect picture of them that they have kept in mind.
- Because the average consumer perceives a trademark as a whole and retains only an imperfect image of it, its predominant and distinctive components are of major importance and will more likely be retained in the mind.
- Consumer sophistication and levels of attention will vary according to the categories of goods and services under consideration. It is presumed to be low for ordinary consumer goods (fast moving consumer-goods, or FMCGs) but higher where the products are expensive, durable, relate to health or are intended for use by specialists.

In listing the types of considerations that might be relevant to determining confusion, the Court has again included the option (but not the requirement) of allowing the use of opinion polls. Despite recent judicial scepticism regarding the utility of surveys or polls, discussed below, this is another point at which empirical evidence relating to market conditions or context is potentially admissible, in an otherwise essentially non-empirical (or, as an OHIM ‘insider’ has credibly argued, formalistic) test.⁸⁴

This body of CJEU case law has grown up notwithstanding Recital 11 of the Directive. That recital recognises that although an EU-wide interpretation of concepts such as similarity of marks or similarity of goods was essential, ‘the ways in which likelihood of confusion may be established, and in particular, the onus of proof, should be a matter for national procedural rules’.⁸⁵ Thus, despite articulating these principles, the CJEU will routinely defer to national court application of its global appreciation test in confusion, absent reliance on an incorrect principle of law, and national courts have begun to flesh out the test at a level of detail that is more helpful than the formulaic incantations emanating from the CJEU.⁸⁶ And ultimately, of course, to the extent that these determinations *are* empirically grounded, national courts will (as fact-finders) assume greater influence in the outcomes.⁸⁷

⁸³ A convenient summary is found in OHIM Guidelines for Examination in the Office, ‘Part C: Opposition, Section 2: Double Identity and Likelihood of Confusion, ch 6: Relevant Public and Level of Attention’ (2015). The time for assessing likely consumer confusion is at the time of sale, although recent developments suggest that the door may be open for liability based on pre-sale and post-sale confusion. See *Och-Ziff Management Europe Ltd v OCH Capital LLP* [2010] EWHC 2599 (Ch), [2011] ETMR 1 [79]-[101]; *British Sky Broadcasting* (n 62) [82]; *DataCard Corp v Eagle Technologies Ltd* [2011] EWHC 244 (Pat), [2011] RPC 17 [276]-[289].

⁸⁴ R Morgan, ‘Ensuring Greater Legal Certainty in OHIM Decision-Taking by Abandoning Legal Formalism’ (2012) 7 *Journal of Intellectual Property Law & Practice* 408. We discuss the relationship between formalistic tests and empirical assessments below in Part III.

⁸⁵ But see Max Planck Study (n 5) 107, para 2.194 (proposing addition of detail about the confusion test to the preamble of the Directive).

⁸⁶ See, eg *WHG* (n 57) [79]; *Specsavers* (n 57) [52].

⁸⁷ See Dinwoodie, ‘Dilution as Unfair Competition’ (n 9) 93-95. In fleshing out the legal test, the Court no doubt has reflected and thus embedded some normative concerns as a matter of law. Thus, the Court has held that, consistent with growing international norms, the stronger the claimant’s mark the more likely that

C. The Likelihood of Confusion in Registration and Infringement

Unlike determinations of distinctiveness, the question of actionable confusion between competing uses of marks arises in two procedural contexts.⁸⁸ A comparison of the claimant's and defendant's use will be made if a registrant alleges infringement of its mark by a competing trader in the marketplace. But the comparison must also be made in the registration context (usually before the relevant trade mark office, but also potentially before a court)⁸⁹ when an opponent alleges that the mark for which registration is sought is confusingly similar to its earlier trade mark.⁹⁰ Such a ground for opposition to the registration of a mark is known as a 'relative' ground for refusal to register—the applicant encounters someone with prior rights relative to the applicant's filing date.

While the statutory 'likelihood of confusion' language is identical in both situations concerning potentially conflicting signs, the different procedural contexts generate divergences in the approach adopted.⁹¹ In the registration context, the comparison is between the allegedly conflicting earlier *mark* and the *mark* for which registration is sought. The comparisons are 'paper based'—the marks in question are the marks as represented on the register, not as used in reality by traders and perceived in fact by consumers.⁹² Again, this method is inevitable in a registration-based system, where registration is not dependent upon prior use. In many instances, the applicant will have not used the mark; indeed, in some instances neither will the opponent, given the five-year grace period in EU law.⁹³ If this is so, there will be no evidence of actual consumer confusion on which a court could proceed. It must make a prediction, and the comparison thus assumes a notional hue.⁹⁴ Moreover, in the

confusion will occur. *SABEL* (n 57), para 24. This could well be inconsistent with an empirical assessment. *cf Reed Executive* (n 80) [83]-[86] (Jacob LJ) (discussing comments by Pumfrey J [78] who found this 'surprising . . . but that is the law', and managing to explain the proposition in real world terms); A Griffiths, 'The Impact of the Global Appreciation Approach on the Boundaries of Trade Mark Protection' (2001) 4 *Intellectual Property Quarterly* 326, 336-37.

⁸⁸ To be sure, assessments of distinctiveness may occur in a number of settings: upon application, if infringement is asserted, or if revocation of the mark is sought. However, these are largely identical assessments, with small temporal adjustments. *cp* Trade Marks Act 1994, s 3(1) (proviso) *with* s 47(1).

⁸⁹ The comparison could come before a national court on appeal from a denial of registration, but could also arise if a defendant in an infringement proceeding alleges that the mark of which infringement is alleged was invalid on relative grounds.

⁹⁰ See Trade Mark Directive, art 4(1)(b). The earlier mark upon which an opposition is based can be a registered mark but it can also (in most, but not all, countries of the EU) be an unregistered mark. See Trade Mark Directive, art 4(4)(b). In the UK, the invocation of an earlier unregistered right effectively initiates a passing off claim against the applicant, the success of which will result in the denial of the registration. See Trade Marks Act 1994, s 5(4). At the CTM level, see Trade Mark Regulation, art 8(4); C-196/11 P *Formula One Licensing BV v OHIM*, ECLI:EU:C:2012:314.

⁹¹ See *Och-Ziff Management Europe* (n 83) [76-78].

⁹² See P Maeyaert and J Muyldermans, 'Likelihood of Confusion in Trade Mark Law: A Practical Guide Based on the Case Law in Community Trade Mark Oppositions from 2002 to 2012' (2013) 103 *Trade-mark Reporter* 1032, 1115 ('[o]pposition proceedings...are by their very nature (and in contrast to infringement proceedings) prospective and utterly abstract and are likely to fail to respect concrete real-life situations where the transactional decisions for everyday consumer goods are often taken in a manner of seconds').

⁹³ See Trade Mark Directive, art 10 (use requirement).

⁹⁴ The full force of this notional approach should be adapted five years after the registration of the earlier mark. At the very least, the earlier right owner should be vulnerable to a claim of partial revocation based on non-use if invoking registered rights with respect to goods beyond those on which the mark has used. See, eg Trade Marks Act 1994 (UK), s 46(5); Community Trade Mark Regulation, art 51(2). But in any event the applied-for mark might still not be used, so some degree of notionalism might persist.

registration context it has to be assumed that the trader whose application is being challenged will use the goods across the entire range of the specification of goods in the application, because that is the goods in respect of which (if successful in registration) it will secure exclusive rights, even if it in fact is using the mark on only a subset of those goods.⁹⁵

In contrast, when assessing an infringement claim, the text of the Directive and Regulation calls for a court to compare the claimant's registered *mark* as against the defendant's *sign* (as used). Thus, on the claimant's side, according to the legislation, one must still look at the mark as registered 'on paper', which defines the mark owner's rights. Again, this will often be unavoidable, as the mark may not yet have been used; it can be enforced absent use within the five-year grace period. Here a court:

[P]resupposes that the plaintiff's mark is in use or will come into use. It requires the court to assume the mark of the plaintiff is used in a normal and fair manner in relation to the goods for which it is registered and then to assess a likelihood of confusion in relation to the way the defendant uses its mark, discounting external added matter or circumstances.⁹⁶

Sometimes, however, the marks in question will have been used. Indeed, the defendant must have been using (or threatening to use) the sign or there would be no infringement claim.⁹⁷ Thus, it is clear that, in the infringement context, '*the offending use* [by the defendant] must be seen in context',⁹⁸ and that the colour of the use would thus be relevant. As Lord Justice Kitchin explained in *Specsavers*:

In assessing the likelihood of confusion arising from the use of a sign the court must consider the matter from the perspective of the average consumer of the goods or services in question and must take into account all the circumstances of that use that are likely to operate in that average consumer's mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context.⁹⁹

Specsavers usefully illustrates the extent to which an appreciation of context is now permissible under infringement analysis. In that case, the defendant Asda (a supermarket) had alluded to the claimant Specsavers (a retail chain offering opticians services) in promotional material that stated 'be a real spec saver at Asda' and 'spec savings at Asda'. The claimant alleged that this infringed several of its registrations, including the mark SPECSAVERS in both standard and figurative form. The approach adopted by Lord Justice Kitchin took into account that '[t]he average consumer would see the signs "spec saver" and "Spec savings" in the context of the [allegedly infringing] straplines and, indeed, the posters and other materials on which they were used as a whole'.¹⁰⁰ 'Context' meant as seen in the defendant Asda's store and online; as the trial court noted, Asda's own (well-recognised) name was

⁹⁵ See Case C-533/06 *O2 Holdings Ltd v Hutchison 3G UK Ltd* [2008] ECR I-4231, para 66.

⁹⁶ See *Origins Natural Resources Inc v Origin Clothing Ltd* [1995] FSR 280, 284.

⁹⁷ Trade Marks Act 1994, s 10; cf Joined Cases C-236 to 238/08 *Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-2417.

⁹⁸ *Specsavers (No 2)* (n 57) [67] (citing *O2* [64]).

⁹⁹ *ibid* [87].

¹⁰⁰ *ibid* [88].

prominently displayed along with the signs and the writing on Asda's sign appeared dark on a light background (the claimant's mark doing the opposite).¹⁰¹

However, on the claimant's side (until *Specsavers*) it was only the *registered mark* that was to be considered.¹⁰² To be sure, the British courts had for some time been willing to admit of some concern for reality. So in *Premier Brands*, it was suggested that the way in which the claimant proprietor *actually uses the mark* would be the paradigm case of 'normal and fair use' of the registered mark.¹⁰³ In *Specsavers* this concession to reality was taken even further. The claimant's registered mark did not claim colour; it had been registered in black and white. However, Specsavers actually used the logo in a specific shade of green. So which logo should form the basis for the comparison—the monochrome one as registered or the coloured one as used? While referring the matter to the CJEU, Lord Justice Kitchin offered his provisional view that 'a mark registered in black and white is [treated as] registered in respect of all colours'.¹⁰⁴ This conclusion was buttressed by other doctrinal rules on infringement analysis, which consider the distinctiveness and reputation of the earlier mark:

If, therefore, a logo registered in black and white has acquired, through use, a particular and distinctive character, in, for example, the colour green, that would seem to me to be a matter which ought to be taken into account in the global appreciation analysis.¹⁰⁵

The judgment of the CJEU is not as clear as the exposition of the Court of Appeal, but in essence endorsed Lord Justice Kitchin.

At the very least where there is a trade mark which is registered not in a particular colour or characteristic, but in black and white, the colour or combination of colours in which the trade mark is later used affects how the average consumer of the goods at issue perceives that trade mark, and it is, therefore, liable to increase the likelihood of confusion or association between the earlier trade mark and the sign alleged to infringe it.¹⁰⁶

D. Converging Approaches in Member States?

These developments, which have allowed courts in the context of infringement to consider the claimant and defendant's marks as actually used, might be seen as more connected to empirical consumer reality than would have been expected in a registration system. Indeed, analysis acknowledging greater contextual marketplace usage may come close to importing

¹⁰¹ See *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2010] EWHC 2035 (Ch), [2011] FSR 1 [137]-[138] (Mann J) (explaining basis for denying Section 10(2) claim).

¹⁰² See, eg *L'Oréal SA v Bellure NV* [2007] EWCA Civ 968, [2008] ETMR 1 [109]-[111] ('[t]he test is, and must be, founded on the mark as registered, not material which forms no part of that. There is simply no warrant in the Directive for taking more than the registered mark into account. The global appreciation test does not amount to the proposition that once a registered mark is used in marketing, anything, extraneous to the mark used in marketing, comes in too—as though it formed part of the registered mark. [By contrast, context is permissible when] we are looking at *the defendant's sign*. How *it* would be perceived in practice does form part of a global appreciation on the strict mark for sign test') (emphasis added).

¹⁰³ *Premier Brands UK Ltd v Typhoon Europe Ltd* 2000 ETMR 1071, 1083-84 (Neuberger J).

¹⁰⁴ *Specsavers (No 2)* (n 57) [96].

¹⁰⁵ *ibid.*

¹⁰⁶ See Case C-252/12 *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2013] ETMR 46, para 37.

into registered trade mark law perspectives more frequently adopted during national passing off or unfair competition proceedings.¹⁰⁷ This would be unremarkable in the use-based regime of the United States, where there has been an effective assimilation of federal unfair competition (essentially, passing off) claims with those of registered trade mark infringement. But in the EU, the Trade Mark Directive quite explicitly did not address unfair competition, for reasons with obvious historical explanations.¹⁰⁸

The convergence that could not be pursued legislatively may at least partially be occurring via the reconceptualization of the trade mark consumer, the vehicle for assessing so many core questions. The tentative and fluid nature of the debate in the UK in the last three years may exemplify the potential for movement, and for opening up further discussion of the nature of EU trade mark and unfair competition law through a debate about the nature of the consumer.

Prior to the last three years, one can find little explicit reference in British case law or literature to the ‘normative’ or ‘fictional’ nature of the average consumer, although courts have commented on the notional exercise conducted at the stage of registration (which at least suggests some hypothetical or predictive assessment). Before 1994, the absence of such language might not have been a surprise because UK law did not purport expressly to define the scope of rights explicitly by reference to the perceptions of a consumer.¹⁰⁹ But one might perhaps have expected some development of the nature of the consumer by the UK courts either in 1994 when the UK implemented the consumer confusion-based test of Article 5 of the Directive (or at least in 1997 when the CJEU interposed the ‘average consumer’ into that test).¹¹⁰

Instead, with the notable exception of the work of Jennifer Davis, although references to the ‘average consumer’ abound, there is little judicial or scholarly development of the concept in these terms until the Court of Appeal began grappling with the admissibility of survey and related evidence in 2012 in *Interflora*.¹¹¹ Indeed, those references that did exist (in two opinions by Geoffrey Hobbs QC, sitting as a Deputy Judge) appeared to disavow a normative approach to the consumer. For example, in *Whirlpool v Kenwood* at first instance, the Deputy Judge commented that:

I am aware that in some Member States the average consumer test is regarded as a means for determining the scope of protection on a ‘normative’ or ‘regulatory’ basis. The rationale is that trade mark owners are entitled to the benefit of an exclusive right with appropriate scope of protection, just as patent owners are entitled to the benefit of an exclusive right with appropriate scope of protection. The appropriate scope of protection is a matter of law, not a matter of fact: the notional average consumer in the law of trade marks

¹⁰⁷ This is not the only doctrinal site at which a convergence of trade mark law and passing off or unfair competition is occurring. See Dinwoodie, ‘Dilution as Unfair Competition’ (n 9), 91; see also Case C-661/11 *Martin y Paz Diffusion SA v Depuydt* [2014] ETMR 6 (constructing a reading of trade mark law that might ordinarily have been handled in several member states via principles of unfair competition law and bad faith).

¹⁰⁸ See generally RM Hilty and F Henning-Bodewig, *Law against Unfair Competition: Towards a New Paradigm in Europe?* (Berlin, Springer, 2007).

¹⁰⁹ See Trade Marks Act 1938, s 4(1).

¹¹⁰ See *SABEL* (n 57), paras 23-24.

¹¹¹ See Davis ‘Locating the Average Consumer’ (n 2); cf Griffiths ‘The Impact of the Global Appreciation Approach’ (n 87) 341 (noting the ‘notional’ and ‘imaginary’ nature of the average consumer).

should, like the notional technician skilled in the relevant art in the law of patents, be viewed as a synthetic person with the ‘correct’ mindset and behaviour patterns. However, I believe that this approach can be too abstract. In my view, the average consumer is meant to be a person of the type whose mindset and behaviour patterns conform to the norm among reasonably well-informed and reasonably observant and circumspect people in the market for the goods or services in question. That appears to me to bring into consideration the real world thought processes of real people. I therefore think that the appropriate scope of protection should in each case be determined with as great a sense of reality as the circumstances of the case will allow. Empirical evidence should therefore not be ignored. That is the basis on which I am proceeding in this case.¹¹²

The Directive left open to Member States the ability to choose the ways in which likelihood of confusion may be established, and the reference here to ‘empirical’ evidence might be thought simply a function of evidentiary rules.¹¹³ By the same token, however, Hobbs QC appeared to ground this approach in the notion of the ‘average consumer’, suggesting perhaps that he considered the approach in other Member States to be substantively inconsistent with the conception outlined by the CJEU. He certainly made it clear that he thought a more normative approach may well affect outcomes.¹¹⁴

In any event, after the Court of Appeal in *Interflora I and II* sent a strong signal limiting the use of survey evidence (or its witness collection variant), the UK courts have explicitly characterised the average consumer as normative. If this is indeed a shift by the UK courts towards a European approach, it arguably renders *Interflora* a greater watershed than some commentators have suggested; for many, the decision simply tightened up and endorsed existing predispositions in the UK judiciary toward particular types of evidence.¹¹⁵ And it might highlight the important connection between evidentiary rules and substantive protection.

At the very least, it suggests that more thought needs to be given to the consequences of this fuller and more explicit embrace of the normative approach by the British courts. The leading judgement in *Interflora I* itself reflects what some commentators have seen as ambiguity about what it means to adopt a normative approach, zeroing in as it did on the meaning of the term ‘average’.¹¹⁶ As the editors of the most recent supplement to *Kerly on Trade Marks* usefully suggest, the cause of some of the difficulties in grasping the nature of

¹¹² *Whirlpool Corp v Kenwood Ltd* [2008] EWHC 1930 (Ch), [2009] RPC 2 [70] (Hobbs QC, Deputy Judge). *cf Daimler AG v Sany Group Co Ltd* [2009] EWHC 1003 (Ch), [2009] ETMR 58 [26] (Hobbs QC, Deputy Judge) (noting findings in registration proceedings in Germany and France on the confusion question that ‘seem to reflect a ‘normative’ or ‘regulatory’ approach to protection within the general parameters set by the wording of the opposing specifications of goods, which might not lead to the same outcome as an ‘empirical’ assessment of the specific circumstances characterising an allegedly infringing instance of use’). However, *Whirlpool* was an infringement proceeding.

¹¹³ See Trade Mark Directive, recital 11.

¹¹⁴ *cf Daimler AG* (n 112) [26] (Hobbs QC, Deputy Judge).

¹¹⁵ *cf Kerly* (n 50), para 21-026 (noting pre-*Interflora* that the ‘net effect of these rules, necessary as they are, is that it is very difficult to design a survey which will pass muster in court’); *Zee Entertainment Enterprises* (n 54) [64] (Lewison LJ) (noting that the ‘general run of cases, both before and after *Interflora*, does tend to show that such surveys have very limited value’).

¹¹⁶ See above n 68.

the ‘average consumer’ may be linguistic.¹¹⁷ It might have been better had the term used (in English) been ‘ordinary’ or ‘reasonable’ consumer, a usage that can be found in some English decisions.¹¹⁸

This ‘watershed’ reading of *Interflora* has fairly dramatic implications and might liberate a new notion of the consumer, more normative and less empirical, in European (or British) trade mark law. But it is important to note that a normative approach does not preclude empirical evidence, including surveys. Prior to 2012, the most frequent description of the trade mark confusion test as normative would have been found in German literature. Yet German courts had over the last few decades been extremely receptive to the use of opinion poll evidence, suggesting no necessary tension between empirical evidence and a normative approach.

The *Interflora I* opinion also discussed the relationship between the ‘average consumer’ concept and parallel concepts in passing off.¹¹⁹ Passing off requires that a ‘substantial number’ of members of the relevant public are confused (or likely to be confused in a *quia timet* action).¹²⁰ That cause of action (like continental European unfair competition law) was conventionally understood as being more grounded in market realities than registered trade mark law,¹²¹ and hence more amenable to resolution based upon empirical evidence.¹²² Indeed, a passing off claim *requires* more evidence of actual marketplace conditions (eg existence of goodwill through use).

Despite that, and despite language in elements of passing off doctrine that has a quantitative ring, even passing off can be thought to contain a normative dimension.¹²³ It certainly has been understood as involving more than a statistical exercise.¹²⁴ But it *is* more grounded in actual use. Oddly, therefore, although Lord Justice Lewison affirmed that greater

¹¹⁷ Kerly 2014 Supplement (n 24), paras 2-02e-h.

¹¹⁸ *Reed Executive* (n 80) [82] (Jacob LJ).

¹¹⁹ *Interflora I* (n 36) [33]-[34] (Lewison LJ).

¹²⁰ See C Wadlow, *The Law of Passing Off: Unfair Competition by Misrepresentation*, 4th edn (London, Sweet & Maxwell, 2011).

¹²¹ See *Zee Entertainment Enterprises* (n 54) (Floyd LJ) [44] (describing passing off as a ‘real world cause of action’); J Griffiths, ‘Star Industrial Co Ltd v Yap Kwe Kor: The End of Goodwill in the Tort of Passing Off’ in S Douglas, R Hickey and E Waring (eds), *Landmark Cases in Property Law* (Oxford, Hart Publishing 2015) 277, 279 (‘the fundamental principles of the law of passing off are generally aligned closely with the reactions of real marketplace consumers’).

¹²² See Davis, ‘Revisiting the Average Consumer’ (n 2) 26; *Neutrogena Corp v Golden Ltd* [1996] RPC 473, 482 (Jacob J) (‘[i]t was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more “it depends on the evidence.”’); see also Ohly, ‘Trade mark protection and unfair competition law’ (n 7) 46 (noting similar distinction between the ‘abstract method of determining confusion in trade mark law and the concrete assessment’ of continental unfair competition law).

¹²³ In some respects, the ‘average consumer’ is normative in much the same way as the standard of not catering to the ‘moron in a hurry’ so beloved of passing off cases. See *Morning Star Cooperative Society Ltd v Express Newspapers Ltd* [1979] FSR 113 (Foster J). That standard operated to allocate responsibility ideally as between trader and consumer. So too the average consumer in trade mark law. But of course the consumer conception can be normative along other dimensions. Thus, the scope of trade mark protection also implicates ‘deep down...the philosophy of how competitive the law allows European industry to be’. *O2 Holdings Ltd v Hutchison 3G UK Ltd* [2006] EWCA Civ 1656, [2007] RPC 16 [1] (Jacob LJ). Indeed, it arguably reflects an even broader range of normative commitments sometimes obscured by the beguiling power of the consumer trope. See below Part III.

¹²⁴ *Neutrogena* (n 122), 485-6 (Jacob J) (‘[t]he court in a passing off case is not concerned with statistical precision. What it wants to know is whether or not there is a substantial degree of deception or confusion’).

latitude for surveys might exist with respect to a passing off claim, evidentiary practice in passing off cases since *Interflora I and II* suggests that the approach to surveys may be converging with those applicable in registered trade mark cases.¹²⁵ This may, counter to some of the suggestions above, simply affirm that shifting judicial attitudes towards surveys are influenced by litigation costs and not any conscious re-orientation of the nature of the consumer. But taken with the contextual turn in *Specsavers*, the distinct regimes of trade mark and passing off may be converging via the construction of the consumer and increasingly common ways of measuring his or her perception.

III. Reconstructing the Consumer(s) in EU Trade Mark Law

A. A Normative Conception of the Consumer in EU Trade Mark Law

As discussed above, the possibility for registration prior to use in EU trade mark law clearly requires that analysis of consumer perception *has* on some occasions to be something more than based on current empirically-testable marketplace perceptions because it will often need to be anticipatory and therefore hypothetical or notional. The *likelihood* of confusion test is also designed with its anticipatory deployment in mind.

However, the assessments of consumer perceptions that are required by such a system might not necessarily be normative. A notional or hypothetical analysis, because it inevitably predicts consumer perceptions with lesser regard for current real-world conditions might appear less empirically grounded. But, as discussed above, that analysis can still proceed in light of some empirical measures.

Moreover, a non-empirical consumer may simply be a formal construct—for instance, on the basis of a small universe of facts, if certain conditions of the doctrinal test are satisfied, confusion is inevitable as a logical (and legal) consequence.¹²⁶ The double-identity rule in trade mark infringement operates somewhat on this basis.¹²⁷ We do not mean to suggest that formalistic concepts do not sometimes conceal normative preferences; very often, they do.¹²⁸ Formalism can mask or translate (sometimes, but not always, for good reason) those normative choices. But there may be something else at play.

¹²⁵ See Davis, ‘Revisiting the Average Consumer’ (n 2) 26-28 (discussing *Zee Entertainment Enterprises*). In some respects, if courts believe that surveys are truly artificial and fail to replicate real world circumstances, they might (despite the conventional wisdom and the exceptions noted in *Interflora I*) find surveys even more unhelpful than in trade mark infringement cases. *cf* *Zee Entertainment Enterprises* (n 54) (Floyd LJ) [44]; *ibid* (Lewison LJ) [62]-[63]. At the very least, the need for context is even more important, although that is of course increasingly true in registered trade mark infringement analysis too. See *ibid* [62] (Lewison LJ) (‘[e]ven in the case of...trade mark infringement the acontextual comparison of mark and sign has been abandoned’); see above text to nn 98-104.

¹²⁶ See Morgan, ‘Abandoning Legal Formalism’ (n 84).

¹²⁷ Trade Mark Directive, art 5(1)(a) (use of identical marks on identical goods amounts to infringement); *cf* Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement), art 16(1) (confusion should be presumed where identical mark used on identical goods).

¹²⁸ See FS Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia Law Review* 809. Jennifer Davis persuasively traces the historical antecedents of the apparently hollow ‘average consumer’ in both the British and European contexts, exploring their normative underpinnings in the process. See Davis, ‘Locating the Average Consumer’ (n 2) (British aspects); Davis, ‘Revisiting the Average Consumer’ (n 2) (European context).

As we noted above, the roots of the average consumer concept in trade mark law, which most national courts have recognised to require more than an empirical or statistical exercise,¹²⁹ lie in the jurisprudence of the CJEU on misleading advertising, which became easy to transfer to the context of trade mark law when the CJEU first tackled case law under the Trade Mark Directive.¹³⁰ But this apparently reflexive adoption of the ‘average consumer’ from EU advertising law occurred without much (if any) consideration of whether EU trade mark law possessed a different normative basis than consumer protection or advertising law.¹³¹ Perhaps adoption of the formalism embedded in the consumer law concept reflected mere (administrative) convenience rather than an overt prescriptive agenda to limit judicial paternalism?¹³²

Alternatively, in some instances what appears to be a non-empirical consumer construct might simply be one that operates as a rough and ready approximation of empirical reality, enforcement costs suggesting that it is not worth more finely-grained assessments.¹³³ That is, consumer reaction might be deduced using heuristic devices designed to short-circuit the factually intensive and messy enquiry into how real world consumers actually perceive signs.¹³⁴ Multi-factor legal tests for assessments of consumer reactions (both as regards acquired distinctiveness and likely confusion) might be seen as falling into this category, though evidence about the actual nature of the market is often led to help courts apply the formal tests. Such devices lead to faster decision-making, and are as a result especially attractive to trade mark registries with large caseloads and indeed potentially to courts concerned with the use of judicial resources or keeping a lid on the costs of litigants (although the balance between speed and granular assessments of reality might differ in infringement proceedings). However, where such heuristic techniques have limited predictive value in the real world, such a ‘quick-and-dirty’ approach could undermine the normative

¹²⁹ Kerly 2014 Supplement (n 24) 8-9, paras 2-02n-02o.

¹³⁰ See Davis, ‘Locating the Average Consumer’ (n 2) 198. Davis notes several ways in which the social and economic climate in the UK was favourable for such a transposition, and how developments in non-legal research enable us to contemplate the move. See *ibid.* But of course the implementation of the Trade Mark Directive and the growing centrality of the CJEU were also hugely significant.

¹³¹ See Ohly, ‘Trade mark protection and unfair competition law’ (n 7) 46-50 (discussing normative bases of similar laws). Some scholars (more so in the US) see trade mark law as a subset of advertising law. See, eg R Tushnet, ‘Running The Gamut From A To B: Federal Trademark and False Advertising Law’ (2011) 159 *University of Pennsylvania Law Review* 1305 (arguing that ‘false advertising law, though vastly undertheorized compared to trademark law, has several important lessons for trademark’ and that ‘[t]rying to understand the Lanham Act solely through the lens of trademark law [without taking account of the role of false advertising law] is like trying to write a story with only half the alphabet’). But what does this suggest about the nature of EU trade mark law, because trade mark law could be viewed as more multifaceted than a mere part of advertising law. To be sure, it shares consumer protection goals. But is it a more affirmative and empowering force for consumer (or other, trader) interests than a prohibition against misleading information?

¹³² See above text to n 65 (purpose behind adoption of concept in consumer law). Indeed, the Court of Justice continues to expand the assessments into which it injects the average consumer. See Case C-26/13 *Kasler v. OTP Jelzalogbank Zrt* [2014] 2 All E.R. (Comm) 443, para 74 (interpreting the Directive on Unfair Terms in Consumer Contracts by considering the average consumer). One could argue that a preference for administrative or judicial convenience within an EU institution itself reflects some degree of prior political commitments. But we are not trying to push the ‘empirical’, ‘normative’ and ‘formalistic’ labels here to sustain a fundamental philosophical truth. Rather, we suggest only that the choice between an empirical and normative consumer is not a binary one; there is a spectrum and the consumer may be a different blend of the two in different contexts for a variety of reasons.

¹³³ See GB Dinwoodie, ‘What Linguistics Can Do For Trademark Law’ in L Bently, J Davis and JC Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge, Cambridge University Press, 2008).

¹³⁴ A Carter-Silk and J Leighton, ‘Confusion, Heuristics and the Consumer’ (Speechly Bircham, Report for the British Brands Group, 2012).

foundations of trade mark law, which claims to meaningfully engage with and protect consumer interests.

As opposed to a hollow ‘formal’ consumer or consumer-as-heuristic, the specifics of the consumer construct *could*, however, be based on an overtly normative commitment. In the broader EU consumer regulatory context, free movement cases led the CJEU to describe the average consumer as one who is ‘reasonably well-informed and reasonably observant and circumspect’.¹³⁵ The relatively high level of attention attributed to this consumer was designed to counteract paternalistic consumer protection rules adopted by national Member States, which could act as an obstacle to the free movement of goods and inhibit consumer choice. The consumer was ‘presumed to be capable to work out for him- or herself whether products or services live up to their description or quality requirements’.¹³⁶ As Stephen Weatherill observes in his contribution to this volume, it was about consumer empowerment.¹³⁷ In a similar vein, in *Interflora III* Lord Justice Kitchin characterised the average consumer in trade mark law as ‘a person who has been created to strike the right balance between various competing interests including, on the one hand, the need to protect consumers, and, on the other hand, the promotion of free trade in an openly competitive market’.¹³⁸

Since the transposition of the ‘average consumer’ from advertising law, the CJEU has fleshed out the concept of the consumer in trade mark cases by implicit reference to the goals of trade mark law, such that the nominally identical concepts may have diverged to reflect different normative groundings.¹³⁹ And in a similarly prescriptive vein, the CJEU has recently re-envisioned consumer responses when applying the standard of trade mark infringement in the context of internet advertising.¹⁴⁰ In *Google France*,¹⁴¹ the CJEU was clearly influenced by the policy of transparency embodied in the E-Commerce Directive.¹⁴² It concluded that the purchase of keyword advertisements would infringe trade mark rights by threatening their origin-indicating function:

[W]here [such an] ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking

¹³⁵ Case C-210/96 *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657, para 37.

¹³⁶ Mak, ‘Standards of Protection’ (n 1) 30.

¹³⁷ S Weatherill, ‘The Importance of Context’ in D Leczykiewicz and S Weatherill (eds), *The Image of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (forthcoming) (Oxford, Hart Publishing, 2015).

¹³⁸ *Interflora III* (n 80) [113]

¹³⁹ See above n 88 (discussing stronger protection for stronger marks via consumer confusion rubric).

¹⁴⁰ In these cases, the CJEU has characterised the average consumer as the ‘average internet user’. Some scholars have seen this as an attempt to construct a different test in the internet context, see Davis, ‘Revisiting the Average Consumer’ (n 2), whether because of a different normative framework or because the internet is in fact a different consumer environment. It is too soon to know whether the elements of the consumer that the CJEU has devised in crafting the ‘average internet user’ will give rise to more generally applicable evolutions in the construct of the consumer. *cf DataCard* (n 83) (applying internet-based changes in doctrine in the offline environment). This may to some extent depend upon whether the CJEU discerns that the internet offers a unique normative or empirical context, because the normative or empirical assimilation of offline and online may occur at a different pace.

¹⁴¹ *Google France* (n 97), paras 84, 99.

¹⁴² See *ibid* [86].

economically connected to it or, on the contrary, originate from a third party.¹⁴³

The CJEU also suggested that where an ad was vague about the origin of goods or services, this would constitute infringement.¹⁴⁴ This is far more paternalistic standard than the CJEU routinely applies outside the internet context: mere uncertainty or difficulty in ascertaining the origin of the product appears far short of the likely confusion that would normally threaten a mark's source indicating-function.¹⁴⁵ By the same token, the CJEU's decision to situate the *sale* of such advertisements outside the scope of trade mark law, and hence immunise search engines from liability for trade mark infringement, might likewise have reflected a judgment about the social and commercial value contributed by the search engines. Although that motivation is not apparent from the CJEU's judgment, the opinion of Advocate-General Maduro (although not faithfully followed by the Court in terms of the *basis* for its decision) is much more explicit.¹⁴⁶

Likewise, in *Interflora*, the CJEU readjusted the level of paternalism that it had imposed in *Google France*, in its articulation of when a consumer would be confused such that the origin function of the mark would be affected.¹⁴⁷ The CJEU's judgment in that case was clearly influenced by recognition that trade mark law has long been an important part of the EU's goal of facilitating undistorted competition and that third party use of marks might be consistent with that objective (along with the promotion of consumer choice).¹⁴⁸ And free movement of goods clearly informs both trade mark law and EU law generally.¹⁴⁹ The rising prominence of fundamental rights in EU intellectual property law further enriches the normative palette into which the CJEU can dip, as it has already shown.¹⁵⁰ Indeed, at the very least, the CJEU might even more explicitly take into account the different normative grounding of trade mark law and unfair competition or consumer protection law from which the average consumer was transplanted.¹⁵¹ Thus, we do not believe it is beyond the CJEU to approach EU trade mark law from a more explicitly normative direction. An indirect and perhaps more palatable approach to pursuing normative objectives may well be achieved

¹⁴³ *ibid* [99].

¹⁴⁴ *ibid* [90].

¹⁴⁵ See, eg Case C-48/05 *Adam Opel AG v Autec AG* [2007] ECR I-1017, para 24.

¹⁴⁶ *Google France* (n 97), Opinion of AG Maduro, paras 70-73, 101-113.

¹⁴⁷ Case C-323/09 *Interflora Inc v Marks & Spencer plc* [2011] ECR I-8625, para 50.

¹⁴⁸ See *ibid*, paras 57-59 (discussing effect on advertising function).

¹⁴⁹ See Case C-63/97 *Bayerische Motorenwerke AG v Deenik* [1999] ECR I-905, para 62 (noting that 'Article 6 seeks to reconcile the fundamental interests of trade-mark protection with those of free movement of goods...in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain').

¹⁵⁰ See Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECDR 12; *Cartier v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch), [2015] ETMR 1 [86], [133]; see generally C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham, Edward Elgar, forthcoming).

¹⁵¹ See Ohly, 'Trade mark protection and unfair competition law' (n 7) 46 (supporting the abstract method of determining confusion in trade mark law rather than the concrete method found in unfair trading law in the policy that 'trade mark gives its owner the possibility to develop a business strategy under the protected mark, [and so other] traders must respect the defensive perimeter which is drawn around the mark, even if actual confusion can be avoided under the concrete circumstances'). In the context of the CTM, this might involve a set of normative commitments beyond those found in national law. See Trade Mark Regulation, recitals 2-4, 16.

through painting a picture of the consumer.¹⁵² But it is, and always will be, to some extent a normative picture.¹⁵³

In its voyage of prescriptive re-engineering, the Court is of course influenced by the arguments made to it by litigants. And litigants likewise frequently argue for a scope of permissible competition that best advances their interests by refracting it through the consumer construct. That is, they tailor the relevant consumer to fit their interests; consumer interests have a public-regarding feel that is rhetorically useful. Indeed, these actors may argue for a consumer that is constructed differently for the purposes of distinctiveness (eg a claimant mark owner will suggest an astute consumer capable of reading origin indicating significance into signs relatively easily) and infringement (eg by the same party, a relatively inattentive consumer who may be easily confused).

Barton Beebe has noted perceptively that in the United States litigants selectively advance a consumer construct that alternates between Sovereign and Fool in such situations.¹⁵⁴ Evidence for this same phenomenon in the European context can be found in the numerous ‘stripes’ disputes. When producers seek to register design marks consisting of a particular number—whether two, three or four—of parallel stripes on sports shoes, they argue that consumers of this class of products possess sufficient nous, attention or sophistication to identify the source of the shoes on this basis, as opposed to seeing the stripes as mere embellishments or decoration.¹⁵⁵ Subsequently, as trade mark proprietors asserting infringement by competitors selling shoes bearing a slightly different number of stripes, they argue that the same class of consumers will be easily confused between three and four (or two) stripes and lack the capacity to differentiate between them.¹⁵⁶

This opportunistic behaviour is not unique in trade mark law; there are parallels, for example in European design law, where it might be advantageous for one party to argue that the ‘informed user’ (the equivalent design fiction) is more or less informed at the infringement stage than in assessing validity. Doctrinally, this strategic revision of the consumer could be checked by devices that insist on a constant perspective at the stage of

¹⁵² A normatively ‘pre-loaded’ consumer construct is not the only option for having prescriptive debates within trade mark law, but is clearly one important option for courts and policy makers. See Ohly, ‘Trade mark protection and unfair competition law’ (n 7) 48-49 (noting that trade mark policies could be incorporated into the interpretation of the Unfair Commercial Practices Directive, thus reconciling potential conflicts between those regimes, either by altering the presumptive knowledge of the reasonably well-informed consumer or by a balancing of competing interests).

¹⁵³ Of course, there may not always be consensus as to how broadly trade mark should reach out in search of relevant norms. See Kerly (n 50), para 9-100 (discussing whether confusion is to be assessed differently in cases of pharmaceutical products because of nature of the harm flowing from confusion); Max Planck Study (n 5) 106, para 2.193.

¹⁵⁴ B Beebe, ‘Search and Persuasion in Trademark Law’ (2005) 103 *Michigan Law Review* 2020. Trade mark litigants are of course not unique in this respect. See Howells, ‘The Rise of European Consumer Law’ (2006) (n 20) 71 (noting inconsistencies in the vision of consumers and traders used by the Commission to sustain its jurisdiction over consumer matters and that embodied in the resultant legislation).

¹⁵⁵ The potential distinctiveness of stripes was considered twice by the CJEU in Case C-408/01 *Adidas-Salomon v Fitnessworld* [2003] ECR I-12537; Case C-102/07 *Adidas AG v Marca Mode CV* [2008] ECR I-2439. Whether the class of sports shoes consumers was attentive enough to view five stripes as a trade mark was recently considered in Case T-85/13 *K-Swiss Inc v OHIM* [2014] OJ C245/13.

¹⁵⁶ *Adidas-Salomon AG v ALYSIDA AEBE* [2010] ETMR 23 (Athens Court of Appeal, Greece) (Adidas successful against retailer selling shoes with two and four stripes); *Adidas AG v Almacenes Kaymo SA*, 31 July 2009 (Zaragoza Commercial Court, Spain) (successful on similar facts); *Adidas v Patrick Portugal-Artigos de Desporto Ltda*, 21 June 2012 (Valencia Court of Appeal, Spain) (successful on similar facts).

both validity and infringement.¹⁵⁷ However, this is hard to achieve in trade mark law because the range of actions subsumed under the heading of infringement is so varied that the consumer relevant for distinctiveness analysis may not be the same as the relevant consumer for infringement.¹⁵⁸ Moreover, there is a sense among courts that assessment of acquired distinctiveness may involve a more empirical inquiry than the relatively normative exercise of assessing likely confusion.¹⁵⁹

Finally, any normative vision of the consumer in EU trade mark law would, by reason of the Europeanisation of trade mark law, tend towards a single, autonomous conception. To the extent that normative preferences are best effectuated by rules of law, the CJEU would be well-placed to enforce that vision. The more that the reasonably well-informed and reasonably observant and circumspect consumer is a normative fiction, the greater the scope for the CJEU to create *legal* rules that establish EU-wide standards. The more empirical that question becomes, then the greater the role of national courts and the more likely that divergent market realities in Europe will result in different outcomes with adverse effects on the creation of an integrated market.¹⁶⁰

B. An Empirical Assessment of Consumer Perception in EU Trade Mark Law

It is also clear, however, that trade mark law *is* at least to some extent concerned with market realities. The protection of actual consumers is in fact a prime concern of trade mark law. To be sure, consumer protection is not the only objective of trade mark law, but the consumer is not simply a fiction through which to determine appropriate forms and levels of competition.¹⁶¹ And while normative goals may structure the formulation of legal tests of distinctiveness and confusion and generate applicable presumptions, the application of those tests to the facts of a specific dispute creates meaningful opportunities for empirical assessment. Courts (not just in Europe) are inevitably attracted to the notion that they are legitimately making factual assessments rather than formulating normative policies about the appropriate nature of competition or consumer choice.

¹⁵⁷ cf D Stone, *European Union Design Law: A Practitioner's Guide* (Oxford, Oxford University Press, 2012) 11.09 (noting this full parallel in design law); FK Beier, 'Basic Features of Anglo-American, French and German Trademark Law' (1975) 6 *International Review of Industrial Property and Copyright Law* 285, 303 (discussing German theory of *Abstandslehre*).

¹⁵⁸ See L Bently and B Sherman, *Intellectual Property Law*, 4th edn (Oxford, Oxford University Press, 2014) 991-92 (noting confusion variants). In determining distinctiveness the relevant consumer is determined by reference to the goods in respect of which the applicant seeks to register its mark. See Kerly (n 50) para 8-016. At the infringement stage, however, the goods on which the defendant is using its sign may be different, causing courts to adapt the relevant consumer. See Bently and Sherman, above, 989 (noting General Court case law suggesting that the relevant public is composed of users likely to use both the claimant's and defendant's goods); cf *Jack Wills* (n 66) [59]-[68] (Arnold J) (discussing average consumer when parties targeting different markets, as opposed to selling different goods). The role of the average consumer in the dilution cause of action may diverge even further because that action extends to uses on dissimilar goods and one variant focuses on defendant's benefit. cf *ibid* [81]-[83] (Arnold J) (considering effects of unauthorised uses on defendant's consumers).

¹⁵⁹ See *Enterprise Holdings* (n 42).

¹⁶⁰ See Dinwoodie, 'The Europeanisation of Trade Mark Law' (n 8) 94-95 (comparing *Adam Opel* and *Arsenal*); see above n 88 (discussing stronger protection for stronger marks via definition of confusion factors).

¹⁶¹ cf MP McKenna, 'The Normative Foundations of Trade Mark Law' (2007) 82 *Notre Dame Law Review* 1839 (challenging the conventional wisdom that trademark law traditionally sought to protect consumers and arguing that consumer deception was historically relevant only to the extent it was the means by which a competitor diverted a producer's trade).

However, judges may also be persuaded that it is their responsibility to make decisions that determine the outcome of legal tests rather than sign off on conclusions mechanically flowing from supposedly neutral measures of empirical reality, such as a responsibly designed consumer confusion survey. Certainly, UK decisions (on passing off and trade mark infringement) are replete with statements that the likely confusion of customers is a matter for judges to decide,¹⁶² even if the judgment called for is more instinctive than scientific.¹⁶³ Although courts have little compunction in concluding that the reaction of particular members of the public who testify before them are quite different from the average consumer,¹⁶⁴ the purportedly scientific character of a survey may be instinctively harder for some judges to dismiss and thus reconcile with the exercise of judgment.¹⁶⁵ But once it is accepted that no single item of empirical evidence is dispositive, as opposed to merely potentially helpful and considered within a broader (normatively structured) framework, the use of empirical evidence will be less threatening to the judicial role. And that is how empirical evidence should be conceived: factual evidence (whether direct or circumstantial) that assists a court in making a legal determination of validity or infringement.

In this regard, the use of empirical evidence in trade mark cases is not unlike that adduced in patent cases (eg to help determine skill in the art and thus to construct a person of ordinary skill in the art who helps to assess inventive step), where courts would not question that the ultimate legal question remains one for the judge. Recognising this purely intermediate role for empirical evidence is important; courts appear more sceptical of evidence that appears to opine on the ultimate legal question than on matters that provide background context. And this is an understandable fear in trade mark law where the legal fiction is very close to one of the primary objects of legal protection, namely, the consumer. Patent protection does not so obviously exist to protect the interests of the person of ordinary skill in the art. This misapprehension could be alleviated by courts stressing what is apparent in CJEU jurisprudence, namely, that opinion polls on distinctiveness or confusion (which come closest to the ultimate legal question) are simply one factor to be considered among many.¹⁶⁶

Attitudes towards surveys have historically varied quite widely among Member States.¹⁶⁷ The admissibility of survey evidence (whether a full-blown survey or via witness

¹⁶² See, eg *Neutrogena* (n 122) 482 (Jacob J) (noting in assessing passing off that '[t]he judge must consider the evidence adduced and use his own common sense and his own opinion as to the likelihood of deception. It is an overall "jury" assessment involving a combination of all these factors. Ultimately the question is one for the court, not for the witnesses'); see also *General Electric Co v The General Electric Co Ltd* [1973] RPC 297, 321-22; *Spalding AG v AW Gamage Ltd* (1915) 32 RPC 273, 286 (Parker LJ).

¹⁶³ See *Wagamama Ltd v City Centre Restaurants Plc* [1995] FSR 713, 732 (Laddie J) (the question is more a matter of 'feel than science').

¹⁶⁴ See, eg *Specsavers* (n 102) [149] (Mann J).

¹⁶⁵ See G Vos and T Iserief, 'The Rise of Market Surveys in Trade Mark Cases' in *BMM Magazine* 2012/3, 2-3, translated from Dutch at http://www.klosmorelvosenschaap.nl/_images/uploads/Vos%20&%20Iserief%20-%20The%20rise%20of%20market%20surveys%20in%20trade%20mark%20cases.pdf ('[a] greater role for the market survey automatically implies a smaller role for the discretionary authority of the court. The court would hand, as it were, part of its judgment over to empiricism, and experience has shown that, in general, they are not keen to do so. They are the ones appointed to give their own judgment in, in this case, trade mark law disputes. If the role of market surveys were to increase, the feeling might arise that part of the court's characteristic legal authority was being handed over to (market) researchers, which some people would find inappropriate').

¹⁶⁶ See above n 53 and accompanying text.

¹⁶⁷ See above n 48.

collection exercise) has been extensively reviewed by the UK Court of Appeal in recent years and it is fair to say that such evidence has not been welcomed with open arms (at least as regards the question of confusion).¹⁶⁸

There are two principal reasons why such evidence is treated with caution. First, UK courts have been sceptical about whether surveys are reliable in their methodological rigour, impartial implementation, and accuracy of the conclusions drawn.¹⁶⁹ In short, surveys might be thought of as second-best ‘constructed’ evidence, both because the artificial environment in which they are asked differs from actual purchasing experience and because of the ‘hired gun’ dimension to duelling party-adduced surveys. Thus, surveys in the UK have for thirty years prior to *Interflora* had to comply with the arduous requirements of the so-called ‘Whitford Guidelines’ if they are to be admitted as evidence.¹⁷⁰ These include selecting a relevant cross-selection of the public to be surveyed; the scale of the survey being sufficient to produce statistically significant results; full disclosure of the number of surveys and the manner in which they were conducted; avoiding leading questions or ones inviting speculative responses; and faithfully recording and disclosing all responses.

Second, surveys can be expensive to design, conduct and critique, so courts or registries tightly regulate the admissibility of such evidence in order to keep costs down. Concern about costs of litigation generally has become more prominent in recent years, and this was referenced by the Court of Appeal in *Interflora*. It clearly is driving a lot of this debate. Courts have performed a ‘gatekeeping’ function not just by tightening formal rules on admissibility, but also through case management techniques that require court supervision to conduct potentially admissible surveys.¹⁷¹

On its own terms, each of these concerns could be addressed. If unsatisfied with the artificiality of surveys, courts could contemplate alternative forms of expert study that do speak to the actual particularities of the market (if there has been sufficient use of the mark by the defendant).¹⁷² The fear of bias in using hired guns could be ameliorated by the use of a court-ordered survey.¹⁷³ Alternatively, if the principal concern behind a reluctance to admit survey evidence is the costs of such evidence, then reform would focus on other techniques that could be imposed through case management or perhaps (in the UK) with some reform of the ‘Whitford Guidelines’.

¹⁶⁸ *Interflora I* (n 36); *Interflora Inc & Anor v Marks & Spencer plc (Interflora II)* [2013] EWCA Civ 319. Similar sentiments have been expressed by courts in other countries. See, eg *Masterpiece Inc v Alavida Lifestyles Inc* 2011 SCC 27 (Supreme Court of Canada); *Australian Postal Corporation v Digital Post Australia* [2013] FCAFC 153 (Federal Court of Australia); see also *Kraft Foods* (n 58) 735 F.3d at 741 (Posner J) (listing numerous problems that academic literature has identified about surveys, but acknowledging that ‘[o]f course, judges and jurors have their own biases and blind spots’).

¹⁶⁹ For an elaboration of these methodology and implementation concerns and ways in which sufficient objectivity might be established, see A Niedermann, ‘Surveys as evidence in proceedings before OHIM’ (2006) 37 *International Review of Intellectual Property and Competition Law* 260; K Swaine et al, ‘The Value and Treatment of Survey Evidence in Different Jurisdictions’ (2010) 100 *Trade Mark Reporter* 1373; S Diamond and D Franklyn, ‘Trade Mark Surveys: An Undulating Path’ (2014) 92 *Texas Law Review* 2029.

¹⁷⁰ See *Imperial Group plc v Philip Morris Ltd* [1984] RPC 293 (Whitford J).

¹⁷¹ See *Enterprise Holdings* (n 42) [21]-[34] (describing practice adopted in the UK of requiring litigants to seek the advance permission of the court to conduct potentially permissible surveys).

¹⁷² See, eg *Kraft Foods* (n 58) 735 F.3d at 742 (Posner J) (musing about the possibility of a statistical study analysing sales in areas where defendant was—and was not—using and comparing results, but suggesting that would not have confidence in the reliability of such a study either).

¹⁷³ See Vos and Iserief, ‘The Rise of Market Surveys’ (n 165), 5 (discussing Dutch practice).

Ironically, tackling the costs objection is hampered by the concern of reliability. Guidelines (such as the ‘Whitford Guidelines’) that seek to establish the reliability and representativeness of surveys by imposing rigorous standards paradoxically, increase the costs of surveys. Less rigorous surveys *might* be cheaper.¹⁷⁴ Indeed, witness collection pilots (though savaged by the Court of Appeal in recent opinions to the extent that they are surely beyond rehabilitation) might have been seen as driven in part by such concerns.¹⁷⁵

Given the scepticism shown by UK courts towards full-blown surveys, this of course seems wholly counter-intuitive. But it would also address what we earlier ventured as a possible reason for judicial discomfort, namely, the abdication of judgment and usurpation of the judicial role. Surveys of the cheaper, less rigorous variety would very clearly be admitted on the assumption that they be afforded lesser weight and were simply to assist the exercise of judgment. The reaction of UK judges to the admissibility of surveys in recent years suggests that they, at least, would be comfortable dismissing the dispositive weight of such surveys and exercising independent judgment. Paradoxically, it is that scepticism that should allow courts to reconcile this form of evidence with their judicial role.¹⁷⁶

But the appetite and room for these types of reform is surely limited after *Interflora*. As Lord Justice Lewison summarised the state of affairs in *Interflora II*:

[T]he general message [is] that evidence from consumers in this kind of case (i.e. trade mark infringement involving ordinary consumer goods or services) should only be admitted if it is of *real* value; and even then only if the value justifies the cost; and that judges should be robust gatekeepers in that respect.¹⁷⁷

Although the Court of Appeal has not completely foreclosed the admissibility of surveys,¹⁷⁸ especially as regards unusual goods and to test distinctiveness,¹⁷⁹ no surveys have been

¹⁷⁴ *cf* *Enterprise Holdings* (n 42) [35] (noting that interlocutory ‘gatekeeping’ proceedings on the admissibility of surveys may in certain circumstances increase costs over what would have been incurred by dealing with survey evidence at trial).

¹⁷⁵ *cf* *Neutrogena* (n 122), 485-6 (Jacob J) (expressing a preference for live witnesses over market surveys in assessing passing off).

¹⁷⁶ On gaps between input and judgment, litigants may be on the horns of a dilemma: are surveys too dispositive or insufficiently helpful? See *Zee Entertainment Enterprises* (n 54) [65] (Lewison LJ) (noting in passing off case that ‘Mr. Malynicz does not submit that the answers go to the question of deception. The survey goes to the question of whether the public or the relevant public has a propensity to make a connection between the mark and the sign. But, as Floyd LJ has said, that is not the real issue in cases of passing off, where the real issue is deception, so the fact that the survey only goes to a peripheral or subsidiary issue is itself a reason for degrading its value and not allowing it into evidence’); *cf* *Neutrogena* (n 122) 482 (Jacob J) (‘It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more “it depends on the evidence”’, although expressing a preference for live witnesses over market surveys).

¹⁷⁷ *Interflora II* (n 168) [5].

¹⁷⁸ See *Interflora I* (n 36) [138] (‘[I] would not accept the proposition that evidence from respondents to a questionnaire can never be called in the absence of a statistically valid and reliable survey. But (apart from those I have mentioned) the cases in which that kind of evidence might be of real use are difficult to imagine. I would not therefore hold that such evidence is inadmissible as a matter of law’); *ibid* [150] (‘[i]n a case of trade mark infringement in which the issue is one of deception in relation to the provision of ordinary consumer goods or services, these criteria are likely to be satisfied only in a special or unusual case’).

successfully admitted in the UK courts to date on the question of consumer confusion since the *Interflora II* court emphasised its ‘real value’ test.

As Lord Justice Lewison noted, and several courts have since emphasised, this test is really a cost-benefit equation: is the game worth the candle?¹⁸⁰ Is the expense of conducting a survey, having it analysed by experts to draw conclusions and having these challenged in the course of litigation worth the additional insight that it provides, especially in a likelihood of confusion context? And the value side of the ledger is affected not only by the ruling on admissibility of surveys and the use of witness collection exercises, but also by the fuller embrace of the normative consumer by the UK courts.¹⁸¹ If the consumer is a fictional subject of the law which may be inhabited by the judge in the given dispute, and where the judge can be assisted by other categories of evidence, and must consider policy values of trade mark law that might discount precise consumer understanding, in reaching a conclusion, how much do surveys add?¹⁸² Here other values, such as the cost and efficacy of the legal process, offset the relatively modest advantages of survey evidence, which once again raises the prospect of normative choices to be made in designing the consumer construct under EU trade mark law.

In sum, the normative (at the level of the test and its encoded presumptions) can and does co-exist with empirical evidence relating to consumer perceptions as well as behaviour in real world contexts. But that mix may vary across legal contexts. Acquired distinctiveness is seen as implicating a far more empirical inquiry, resulting in a more liberal attitude to surveys than in the confusion context. Moreover, empirical evidence can be used to rebut presumptions. For example, one could imagine that empirical evidence could support the argument that a European consumer would react differently than a British consumer in determining the appropriate scope of an injunction in a case involving a CTM.¹⁸³ Or empirical evidence can add detail to attenuated aspects of the test. As an illustration, courts assume that *generally* goods are not presented side by side; but in fact, some categories of goods might be, thus altering the confusion inquiry. Finally, there can also be variations as to when and where such evidence is considered relevant, the calculus potentially being different at the trade mark office or in courts adjudicating cases of infringement.

¹⁷⁹ See *Interflora I* (n 36) [137] (‘[t]hat is not to say that there can never be evidence called in a case of trade mark infringement. The court may need to be informed of shopping habits; of the market in which certain goods or services are supplied; the means by which goods or services are marketed and so on. In addition I must make it clear, however, that different considerations may come into play where: (i) Evidence is called consisting of the spontaneous reactions of members of the relevant public to the allegedly infringing sign or advertisement; (ii) Evidence from consumers is called in order to amplify the results of a reliable survey; (iii) The goods or services in question are not goods or services supplied to ordinary consumers and are unlikely to be within the judge’s experience; (iv) The issue is whether a registered mark has acquired distinctiveness; or (v) where the cause of action is in passing off, which requires a different legal question to be answered’). Despite exception (v) in *Interflora I*, the message from that judgment appears to have informed attitudes to surveys in passing off cases too. See, eg *Zee Entertainment Enterprises* (n 54).

¹⁸⁰ See *Interflora I* (n 36) [150]; see, eg *Zee Entertainment Enterprises* (n 54) [28]-[30].

¹⁸¹ However, reliability of surveys might also matter less if the assessment is more avowedly normative.

¹⁸² Therefore the relevant consumer perspective is adopted by the trial judge as a ‘notional juror’, using their own common sense and experience of the world. See *Cosmetic Warriors Ltd v Amazon.co.uk Ltd* [2013] EWHC 2470 (Ch), [2014] FSR 15 [26]-[31].

¹⁸³ *DHL Express* (n 29); *Interflora Inc v Marks & Spencer plc* [2013] EWHC 1484 (Ch), [2014] FSR 2 [31]-[38].

C. Institutional and Structural European Questions

As noted above, the consumer is a fictional figure through whose eyes doctrinal questions are answered in both the registration and infringement contexts. The CJEU hears appeals from registration determinations at OHIM as well as preliminary references from national courts (and so-called CTM courts) on issues of both registration and infringement.¹⁸⁴ The Court readily adopts doctrinal and methodological statements about consumer reaction from one context and applies them in the other, though it has been careful to note the different (more limited) supply of information given to a notional consumer in the registration context.

In Part II above, we noted that where there *had* been use of marks in a question, the Court appears to be growing more comfortable with the notion that actual context should be allowed to inform how the notional consumer views both the claimant and defendant's marks. But because of the continued importance of enforcing registration in unused marks, the default rule will often be for courts to proceed without evidence of current empirical realities.

Since neither the Directive nor the Regulation addresses the characteristics of the consumer directly, the image has been painted by the CJEU. However, pursuing the EU goal of a unitary market, the Regulation contributes uniquely to the construction of the average European consumer (the fiction at play in cases involving the CTM) in at least one way. A trade mark registration will only be granted if the purported trade mark avoids being descriptive. The 'consumer' through whose eyes questions of trade mark law are assessed differs in cases involving national marks (litigated under the Directive) and CTMs (litigated under the Regulation). In the latter case, the Regulation is concerned with the average European consumer. Reflecting that fact, if the term for which a CTM is sought is descriptive or generic in any part of the Community, Article 7(2) requires that registration be denied.

The practical upshot of this rule is that one of the characteristics of the consumer through whose eyes distinctiveness determinations are made is that he or she speaks every language of the Community. An application to register the Portuguese term for biscuits as a mark for biscuits would be denied registration notwithstanding that consumers throughout the rest of the (non-Portuguese speaking) Community would not regard the term as descriptive and likely see it as distinctive. Such a consumer is clearly not empirically grounded; certainly the 'average consumer' does not speak all 24 official languages of the EU. There is a normative construction of the consumer, reflecting the core goals of the European project.¹⁸⁵

Some countries make similar (but not identical) assumptions in assessing their national marks either because they recognise (empirically) that some of their citizens might speak the foreign language and thus view the mark differently, or because (normatively) free trade concerns counsel in favour of not protecting marks that would be generic in other countries and thus likely on the packaging of any goods imported from that country. But

¹⁸⁴ To administer the CTM, the Regulation had to establish EU institutions, leading to the creation not only of the OHIM to administer the system of registration, but also of CTM courts to enforce the rights conferred. The CJEU is not the only court to hear cases under both the Directive and the Regulation. CTM courts are national courts designated by the Member States to hear CTM infringement actions. See Trade Mark Regulation, art 95.

¹⁸⁵ In this regard, trade mark law is to some extent adopting a proactive approach to the consumer, seeking to construct a legal fiction and shape markets in Europe, rather than reactively mirror reality. See GB Dinwoodie, 'Trademarks and Territory: Detaching Trademark Law From the Nation-State' (2004) 41 *Houston Law Review* 885.

Member States of the EU are not required to follow this rule (sometimes called the doctrine of foreign equivalents). For example, in *Matratzen Concord AG v Hukla Germany*, an applicant sought to register the mark MATRATZEN for mattresses with the Spanish Trademark Office.¹⁸⁶ This term would have been regarded as generic for mattresses and unprotectable in Germany. But the Spanish office reasoned that Spanish consumers would not appreciate this, and would regard the word as the mark for a single brand of mattresses. The CJEU was not willing to over-rule this approach, notwithstanding the barriers that the ownership of the Spanish mark by a single producer might have had on the import of mattresses from Germany to Spain. The empirical reality was not trumped by normative commitments. Empirically, the Spanish consumer is not the European consumer. But should this reality prevail normatively? Recent Commission proposals for reform of the Trade Mark Directive and Regulation would have required Member States to adopt as national law the rule found in Article 7(2) of the Regulation, namely that a lack of distinctiveness in any country of the EU will doom a national mark as well as a CTM.¹⁸⁷ But national offices, lacking the linguistic infrastructure that exists in Alicante, objected and the proposal is lacking from the most recent (Common Position) text of the proposed directive.¹⁸⁸

A similar dilemma arises in the context of infringement. The same average European consumer determines whether two marks are confusingly similar for purposes of infringement of a CTM. But such judicial assessments are made by CTM courts.¹⁸⁹ These are *national* courts (and national judges) masquerading as federal courts.¹⁹⁰ Indeed, typically these are simply the same courts that hear cases under national trade mark law.¹⁹¹ Does this institutional structure affect the construction of the consumer? When an application is made before the OHIM, there will likely be consideration of the mark in all languages of the EU.¹⁹² As a result of the institutional framework chosen for the creation of CTM courts, however, (national) judges pragmatically tend to decide cases involving the CTM through the eyes of a local consumer (or judge, notionally being a consumer).¹⁹³

If infringement of a CTM is found, and the CTM court has what is called ‘international jurisdiction’, the CTM court should ordinarily grant an injunction that is EU-wide in scope.¹⁹⁴ That is the normative basis of the unitary right system. However, in *DHL Express France SAS v Chronopost SA*, the CJEU recognised an exception to this rule where infringement has occurred in only a particular group of Member States because the existence of confusion is dependent on a specific linguistic usage in those territories.¹⁹⁵ To be sure, the burden to show variation among other consumers of the EU is imposed on the party seeking

¹⁸⁶ Case C-421/04 *Matratzen Concord AG v Hukla Germany* [2006] ECR I-2303.

¹⁸⁷ See Proposed Directive (n 5), art 4(2).

¹⁸⁸ See Council, Proposal for a Directive of the European Parliament and of the Council to Approximate the Laws of the Member States relating to Trade Marks - Presidency Compromise Proposal (2013/0089 (COD), 19 November 2013) 16 (deleting art 4(2)). For the latest text, see Council, Proposal for a Directive of the European Parliament and of the Council to Approximate the Laws of the Member States relating to Trade Marks - Presidency Compromise Proposal (2013/0089 (COD), 18 July 2014) 25 (deleting art 4(2)).

¹⁸⁹ A CTM court with international jurisdiction can hear an invalidity counterclaim. See Trade Mark Regulation, arts 96(d), 98(1).

¹⁹⁰ See Trade Mark Regulation, art 95.

¹⁹¹ See, eg The Community Trade Mark Regulations 2006, SI 2006/1027, reg 12.

¹⁹² See OHIM Guidelines, Part B, Examination, Section 4, Absolute Grounds for Refusal (n 56) 37.

¹⁹³ As a contrast, consider the design of the unitary patent court system, and the composition of panels. See Council Agreement on a Unified Patent Court [2013] OJ (C175/01).

¹⁹⁴ *DHL Express* (n 29), para 44.

¹⁹⁵ *ibid*, para 48.

to deny the national-Community level assimilation.¹⁹⁶ However, here the Court has allowed empirical reality potentially to modify the normative vision of a single European consumer that underlies the unitary right.

In both these cases—languages relevant to the distinctiveness of a CTM and scope of relief for infringement of a CTM—the EU has elevated a normative conception of the European consumer reflecting the ideals of the European project, although the latter doctrine leaves open the possibility of empirical modification. The approach that has been adopted in the infringement context seems to us to be a pragmatic reconciliation of normative market integration goals and other objectives of trade mark law that are more tied to the realities of how real consumers react to marks.

But could other approaches be envisaged, and how would they affect the image of the consumer in EU trade mark law? Clearly, the most single minded pursuit of market integration (from which the Commission has pulled back in its current reform of the Directive) would construct at the national and CTM level a fictional European consumer who would speak all 24 official languages and react uniformly to marks throughout Europe (both when we assess distinctiveness and determine confusion). Despite decades of European integration, there would with respect to many goods and services be a gap between this vision and marketplace realities.¹⁹⁷ And, because of the consumer's schizophrenic existence as both the legal fiction driving the system and the actual real world object of trade mark protection, the gap between reality and normative ideal cannot become too wide lest the policy goal of market integration undermine the consumer protection objectives of trade mark law.

Of course, to some extent we already tolerate such gaps at the national level; this is implicit in recognition that the average consumer is not a policy-blind reflection of reality. But the average national consumer channelled by national judges is (at least with respect to goods with which a judge is familiar) not too far removed from reality. Could mechanisms be developed to help national judges sitting as CTM judges more closely approximate a European consumer? Indeed, paradoxically, could empirical evidence assist in the construction of this notional character (in ways that increasingly we deem unnecessary in the national context)? If the relevant assessment has (for normative reasons) to be of the European consumer, could not a court require opinion polls to be constructed that test the reactions of consumers throughout the entire EU?

Such an approach is unlikely to occur without aggressive legislative prompting. As noted above, there has historically been a divergence of opinion about the use of such evidence among different national courts. And in a CTM court, procedural matters are left to the national law of the country in which the CTM courts sits. More fundamentally, of course, the costs of imposing such a requirement may outweigh the gains (as the default assimilation of national and European consumers, subject to proof otherwise, adopted by UK courts might suggest).

¹⁹⁶ *Interflora* (n 183) [31]-[38].

¹⁹⁷ See Howells, 'The Rise of European Consumer Law' (n 20) 72-73 (noting that 'signs of a homogenous European consumer protection culture are still fledgling' in terms of what different consumers rely on).

Conclusion

Trade mark law recognises and protects proprietary interests in signs. However both formal recognition (when does a sign qualify as a trade mark) and protection via the infringement provisions (has a mark's signalling ability been harmed) turn on consumer perception. Provoked by the other contributions in this volume, this chapter seeks to make two contributions to EU trade mark law scholarship. First, it has identified a variable consumer construct. Structural features stemming from the co-existence of national and unitary trade mark rights, as well as different doctrinal reasons for turning to the consumer (assessing distinctiveness or the likelihood of confusion; during registration or when applying infringement tests) ensure that such variations are hard-wired into the trade mark regime. Second, this variation is often expressed in the divergent degrees to which empirical evidence is incorporated within a notional average consumer test. Inherent distinctiveness analysis is a light touch best-guess or prediction as to whether an average consumer will perceive a sign as a trade mark qualifying for protection. Yet, despite viewing the matter from the same vantage point, analysis of acquired distinctiveness typically accommodates far more empirical evidence relating to how the mark has been used and its visibility in the marketplace. Empirical heft is also required to support claims that a mark should no longer be protected because it is generic in the eyes of relevant consumers, or where a mark is alleged to be so reputed that it deserves a greater scope of protection. For likelihood of confusion, recent debates over the admissibility and utility of survey evidence have foregrounded the extent to which the average consumer is a fictional construct. If we are ultimately asking whether a normatively infused 'reasonable' consumer would be confused, survey evidence can only provide a partial answer. Is it worth the time and expense?

At the same time, in drifting too far from empirically grounded consumer responses, trade mark registries and courts could stray into contested territory. Will the average consumer vantage point become a set of heuristic techniques used to process large volumes of opposition decisions or distinctiveness claims? Can it collapse into an abstract, formalistic infringement test which relies on a visual comparison of the signs and their goods and services, as applied for on paper? Would it be deployed such that assumptions about consumer behaviour further trade mark proprietors' agendas in pursuit of bright line property rules? At present, each of these characterisations is recognisably familiar at different doctrinal sites within EU trade mark law. Unreflexive assumptions that we are working with the same 'one size' notional consumer construct could lead to dangerous cross-fertilization (or cross-contamination) across EU trade mark law. Expanding our horizons further, what are the sources of normativity – both within EU trade mark law and across EU law more generally – which inform this objective construct? To the extent that consumer interests may conflict with other normative agendas, how should such normative dissonance be managed? To take one illustration, what if consumers are becoming habituated to seeing pure or single colours as trade marks, regardless of the anti-competitive effects and colour depletion this could generate? Thus the two contributions we seek to make in this chapter lead to a third embryonic contribution – setting out a research agenda for developing a more nuanced, diagnostically accurate, normatively robust and reflexive approach to understanding the average consumer in EU trade mark law.