

# Where does the vulnerable consumer fit in? A comparative analysis.

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## I. INTRODUCTION

*“If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language, that goes to his heart.”*

– The late president Nelson Rolihlahla Mandela (1918 – 2013)

Although consumer protection is not a new concept in South African law, the Consumer Protection Act 68 of 2008 (CPA) now provides for a much more comprehensive and encompassing mechanism to protect consumers. This is primarily done in three ways:

- a) Protecting consumers not only in the provision of goods and services, the conclusion of contracts but also in the promotion and marketing thereof;
- b) Providing from the outset of the CPA (starting with the preamble to the Act) special protection to a particular type of consumer which is the vulnerable consumer. In terms of section 3 of the CPA the vulnerable consumer includes low-income, illiterate, young and elderly consumers. It also includes consumers from low-density populated areas; and
- c) For the first time in the history of South African law, the consumer is provided with eight core fundamental consumer rights.

This article focuses on the consumer’s fundamental right to disclosure and information. Section 22 of the Consumer Protection Act provides that a consumer has a right to information in plain and understandable language. It also provides that the yardstick by which to assess whether information is in plain language; that is whether, “*an ordinary consumer of the class of persons for whom the information is intended, with average literacy skills and minimal experience as a consumer could be expected to understand the information.*”<sup>1</sup>

Who should be regarded as an “ordinary consumer” in a South African context? Providing a realistic answer is complicated by the fact that South Africa has eleven official languages and quite a large group of the population falls under the concept of a “vulnerable consumer” qualified by section 3 of the CPA. What therefore is the role of the vulnerable consumer in assessing plain language in consumer agreements?

Section 22 and the plain language requirement governed therein are mentioned throughout the Act. In the case of South Africa, the requirement for notices, documentation and visual representations to be in plain language goes much further than unfair terms in consumer contracts or even unfair trading. The plain language requirement forms part of, for example the consumer’s cooling-off right (section 16), exemption notices and clauses (section 49), written consumer agreements (section 50) and trade description guidelines. Any further comparative discussion is also interpreted from this viewpoint. Note should also be taken of the fact that, due to the fairly recent nature of the CPA, no South African case law interpreting the provisions of section 22 has been handed down.

In an attempt to find appropriate answers to the questions posed above the position in the United Kingdom is assessed. This jurisdiction was chosen due to its historic links rooted in the common law of South Africa as a source of law as well as the similar wording between the CPA and the relevant consumer legislation in the UK (The Consumer Protection Act 1987, Unsolicited Goods and Services Act 1971 and the Consumer Protection from Unfair Trading Regulations of 2008 for example). It is acknowledged that the Consumer Rights Bill 2013to2014 is serving in the UK Parliament for final consideration and comments. The Bill attempts to combine and align some of the scattered consumer legislation within the UK but because it was not in force at the time of conducting this research, the current legal position is discussed.

It should be noted that, in the case of plain language, the EU Unfair Commercial Practices Directive deserves discussion as an introduction to the position in the UK due to the fact that the Consumer Protection from Unfair Trading Regulations of 2008 (CPUT Regulations) are an almost *verbatim* implementation of the above EU Directive.

What would be the relevance of this contribution to the legal reader in Texas and the United States? Apart from the fact that International Consumer Law provides an important broader viewpoint of international trends and attitudes towards consumer protection, it is perhaps also important to determine whether plain language plays (or should play) any role in consumer contracts. It could also be relevant to establish if “vulnerable consumer groups” exist in the United States Consumer Protection Framework and whether such groups need additional protection.

## II. SOUTH AFRICA: PLAIN AND UNDERSTANDABLE LANGUAGE

### A. Section 22 of the CPA: The consumer right to information in plain and understandable language

If one were to give a “one-line” summary regarding the application of the CPA, it would be that the CPA is applicable where a supplier supplies goods and or services to a consumer in the ordinary course of the suppliers business for consideration. Each of these concepts has their own particular definition in terms of section 1 of the CPA. In the supply of such goods and services the consumer is provided with (as mentioned above) eight core fundamental rights one of which is the right to disclosure and information which includes section 22: the right to plain and understandable language.

In terms of section 22, the producer of a notice, document or visual representation that is required to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of the CPA or any other legislation, if any, for that notice, document or visual representation;<sup>2</sup> or in plain language, if no form has been prescribed for that notice, document or visual representation.<sup>3</sup>

Section 22(2) provides that a notice, document or visual representation is in plain language if it is reasonable to conclude that an *ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort.*

In determining whether a notice, document or visual representation is in plain language the following will also be considered in terms of section 22(2):

- a) The context, comprehensiveness and consistency of the notice, document or visual representation;
- b) The organization, form and style of the notice, document or visual representation;
- c) The vocabulary, usage and sentence structure of the notice, document or visual representation; and
- d) The use of any illustrations, examples, headings or other aids to reading and understanding.

The National Consumer Commission (NCC) may publish guidelines for methods of assessing whether a notice, document or visual representation is in plain language.<sup>4</sup>

### B. Plain language and the provisions of section 22 CPA: Interpretation by legal writers

Gordon and Burt argue correctly that the definition of plain language in terms of section 22 not only speaks about grammar and wording but also about content, structure, design and style of the document.<sup>5</sup> Not only must consumers understand what the document says, but also how the document applies to them and its effect.<sup>6</sup>

Stoop states that plain language is a valuable tool that can be applied in order to proactively promote procedural fairness in the law of contract and to protect consumers.<sup>7</sup> A consumer can be placed in a better position in order to protect his own interests.<sup>8</sup> Plain language aims to address technical vocabulary, archaic words, overuse of passives, complex and long sentence and poor organization.<sup>9</sup> After all, an informed consumer is central to the concept of consumer protection.<sup>10</sup>

Gouws defines plain language as direct and straightforward, designed to deliver its message to its intended readers clearly, ef-

fectively and without fuss or undue effort.<sup>11</sup> He regards it as avoiding things like obscurity, inflated vocabulary, convoluted sentence construction and using only as many words as are necessary.<sup>12</sup> It is understood by the audience the first time they read or hear it.<sup>13</sup>

Kirby<sup>14</sup> is of the opinion that the scope and ambit of section 22 will in all likelihood be expanded upon and interpreted by the people who are tasked with enforcing the provisions of the CPA, including, but not limited to, the NCC.

A consumer must be able to understand a consumer document without undue effort in terms of section 22(2). Gordon and Burt state that if a consumer needs to consult a dictionary (or a lawyer) to understand the terms of a consumer agreement, the consumer's understanding may well be considered to be with undue effort and not in plain language.<sup>15</sup> Melville also suggests that “undue effort” would include difficulties regarding the translation of documents and should be addressed by way of guidelines published in terms of the CPA.<sup>16</sup> With regard to “undue effort,” Gouws states that the effort must be undue, excessive or unwarranted before it can be held that it is unreasonable to conclude that the ordinary consumer would understand the agreement.<sup>17</sup> Whether the effort was “undue” remains a question of fact. It is submitted that the requirement of “effort” must be seen against the backdrop of the purpose of plain language, namely, that the consumer must be able to understand the content, significance and import of the agreement by merely reading the agreement.<sup>18</sup>

Kirby argues that the words “notice” and “document” do not have separate definitions in section 1 of the CPA.<sup>19</sup> The result is that section 22(1) creates the first criterion in respect of plain and understandable language, namely, that it applies to legally prescribed notices or visual representations (in other words the representation or document that is required to accompany goods or services when the consumer acquires or buys such goods or services).<sup>20</sup>

How and when the consumer reads the document also should be taken into account. The document must give as much as possible information regarding the consumer agreement and elements such as terminology should be consistent throughout.<sup>21</sup> Monty and Hurwitz explain that the content should at all times be consistent with the context in which the notice, document or visual representation is intended and should include all aspects necessary and intended for that consumer.<sup>22</sup>

With regard to the requirement of form and style, the most important information should, for example, be at the top of the document and not hidden in the small print. Plain words and short sentences should be used and where possible (and relevant) illustrations should also be included to make the document more understandable.<sup>23</sup> Melville discusses building blocks to plain language which include structure, writing, and design.<sup>24</sup> Gouws comprehensively discusses plain language drafting techniques dividing it into techniques regarding vocabulary, grammar and style; structure and lastly improving readability.<sup>25</sup> Newman distinguishes between typographical and linguistic readability.<sup>26</sup> Under *typographic readability* the writer remarks that quite often a contract is physically illegible because of font size or even the colors utilized and makes suggestions as to the font size, colors, layout and headings to conform to plain language.<sup>27</sup> According to Newman *linguistic readability* deals with “legal matters” and the use of “legal language.”<sup>28</sup> For the average consumer a “legal” grammatical formulation may be incomprehensible and is often the greatest deterrent to consumers reading contracts.<sup>29</sup> The writer discusses the use of personal nouns, reduced sentence length, simplification of legal terms, passive verb usage and the avoidance of cross-references to assist in linguistic readability and plain language.<sup>30</sup>

I agree with Kirby that the application of the criteria in section 22(2) is complex because the terms used are not defined in law and it would, therefore, be difficult to advise precisely when

a particular notice, document or visual representation will have met these criteria.<sup>31</sup> There is indeed a fine line between an overload of information and sufficient information to protect a consumer rather than confuse him. It is clear that the facts of each particular case should be taken into account.

Guidelines or standards for the assessment of plain language have not been published in terms of the CPA. Stoop argues correctly that because of the lack of objective assessment measures or guidelines, it is not clear whether the provisions of plain language have been implemented successfully in terms of the CPA.<sup>32</sup> Such a piece of legislation should not only provide for plain language in consumer contracts but also guidelines for illustrations, examples, headings and other aids as mentioned in section 22(2).<sup>33</sup> Because the plain language provisions in the CPA begin with the reader, suppliers should conduct user testing to ensure that their documents comply with plain language requirements and documents should be written with the consumer in mind.<sup>34</sup>

### C. Ordinary consumer with average literacy skills and minimal experience

If a document is to be sent to consumers, it must be written in a way that consumers (not only lawyers or judges) can understand.<sup>35</sup>

With regard to literacy in South Africa, Gouws refers to the percentages released by Statistics South Africa in 2007 and states that the average level of education in South Africa equates to Grade 7.<sup>36</sup> According to the South African Institute of Race Relations, the average literacy rate since 2007 has not increased to a satisfactory level.<sup>37</sup> The average literacy level in 2007 was 88.2% and increased slightly to 89% in 2012.<sup>38</sup> Kirby correctly remarks that the threshold is low for the consumer but high for the supplier to meet in relation to the language used in the terms and conditions concerned.<sup>39</sup>

Gordon and Burt refer to UN statistics which determine that 82% of South Africans are functionally literate but also that so-called “functional literacy” is not enough to understand most business and legal documents.<sup>40</sup>

Kirby is of the opinion that the ordinary consumer with average literacy skills must be viewed from the point of view of the officious bystander who is able to conclude reasonably, (that is, with reference to particular objective factors pertaining to the particular consumer concerned) that the consumer understood what he was buying and the terms and conditions in respect of which the transaction occurred.<sup>41</sup> According to the writer the criterion is one of reasonableness.<sup>42</sup> The result is that any person adjudicating a consumer complaint will therefore need to apply a test of objective reasonableness on whether or not the language in question is plain and understandable based on the particular characteristics of the consumer concerned.<sup>43</sup>

Section 22(2) also seems to distinguish between ordinary consumers with the inclusion of the passage “of the class of persons for whom the agreement is intended”. According to Gouws, this distinction seems based purely upon the type of agreement the consumer intends to conclude.<sup>44</sup> The writer argues that if this is correct, the inclusion of the latter distinction was unnecessary and prone to lead to confusion because it presupposes different classes of ordinary consumers, the extent of which is limited only by the number of different types of agreements which a supplier and a consumer may conclude.<sup>45</sup>

Gouws criticizes the fact that the distinction further presupposes ascribing an average literacy to the ordinary consumer belonging to a particular class of consumers, which in all likelihood will vary from class to class. It would be more difficult to determine the average literacy of a particular class of consumers as opposed to determining the average literacy of a consumer in gen-

eral by relying on for example data from Statistics South Africa. What complicates the determination of an average consumer for a class or group of persons is the fact that a consumer is not restricted to entering into one particular type of agreement. The result would be that a particular type of agreement which complies with the plain language requirement based on the average literacy of the consumers belonging to a particular class will suddenly fail to satisfy the section 22(2) requirement if a consumer from another class with a lower average literacy rate enters into an agreement intended for the former class.<sup>46</sup> What is plain for one consumer is not necessarily plain for another consumer, and a distinction between classes of consumers based on literacy would not support this. A distinction between different classes of consumers is also contrary to what is envisaged in the preamble to the CPA, namely, eradicating the indifferences of consumers based on illiteracy and other forms of social and financial inequalities.

On the other hand, it might be argued that in the absence of any class distinction a situation may arise where a consumer with literacy skills that exceeds the average level of literacy of an ordinary consumer may escape contractual liability based on non-compliance with the plain language requirement. Gouws argues that this might be the case, especially because an agreement might be declared void for non-compliance with the plain language requirement in terms of section 52 of the CPA, and it remains to be seen how the courts and different forums will address this issue.<sup>47</sup>

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### D. The vulnerable consumer

Upon analysis of the opinion of legal writers regarding section 22 above, it becomes clear that the determination of an “ordinary consumer” is not as simple as it seems. This becomes more apparent when one considers that, aside from the ordinary consumer of a group of consumers, there are also particular groups who need additional protection in terms of the CPA: Vulnerable consumers. Though section 22 does not mention the vulnerable consumer *per se*, the wording of section 3 of the Act compels an interpretation of section 22 that takes the purpose and policy of the CPA into account.

Section 3(1)(b) clearly states that the purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa by reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers:

- a) Who are low-income persons or persons comprising low-income communities;
- b) Who live in remote, isolated or low-density population areas or communities;
- c) Who are minors, seniors or other similar vulnerable consumers; or
- d) Whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in language in which the representation is produced, published or presented.

It therefore becomes necessary to establish where the concept of a vulnerable consumer fits in when considering whether or not documentation is in plain language in terms of section 22 and what the ordinary consumer of a particular group of consumers is. Perhaps an investigation into these concepts in the EU and the UK can provide some answers in the South African context.

### III. EUROPE: EU UNFAIR COMMERCIAL PRACTICES DIRECTIVE (UCPD)

Ramsay<sup>48</sup> remarks that the UCPD is regarded by many commentators as one of the most significant EU consumer directives. The Directive attempts to protect consumers in an internal market but also strives to provide future direction for consumer protection throughout the European Union.<sup>49</sup>

The UCPD applies to unfair business to consumer commercial practices before, during and after the transaction in relation to a product.<sup>50</sup> “Commercial practice” means any act, or omission, course of conduct, representation or communication including advertising and marketing by a trader<sup>51</sup> directly connected to the sale or supply of goods and services.<sup>52</sup>

Article 5 deals with the prohibition of unfair commercial practices and lays down the “average consumer test.” Article 5 is also referred to as the “grand general clause.”<sup>53</sup> In general the UCPD is divided into the following:

- a) General unfairness clause (article 5);
- b) Misleading commercial practices (section 1);
- c) Aggressive commercial practices (section 2); and a
- d) List of specific prohibited practices (annexure 1).

#### A. The average consumer test

Though “average consumer” is not defined in the Directive, it is referred to as part of the test for an unfair commercial practice in article 5. A commercial practice will be unfair if:

- a) It is contrary to the requirements of professional diligence, and
- b) It materially distorts or is likely to materially distort the economic behavior with regard to the product of the *average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*

Recital 18 to the Directive further provides that it is appropriate to protect all consumers from unfair commercial practices. In the case of advertising, the EU Court of Justice found it necessary to examine the effect on a notional, typical consumer. Recital 18 further provides that inline with the principle of *proportionality*, and to permit the effective application of the protection contained in it, the UCPD takes as a benchmark the average consumer, *who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.* The Directive also contains provisions aimed at preventing the exploitation of consumers whose *characteristics* make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.<sup>54</sup>

The EU Commission published a working document in 2009 providing guidance on the implementation of the UCPD.<sup>55</sup> In it, the commission explains that the “average consumer test” contained in article 5 of the Directive is not a statistical test.<sup>56</sup> National courts and authorities will have to exercise their own faculty of judgment, having regard to the case law of the Court

of Justice, to determine the typical reaction of the average consumer in a given case. The Directive adopted this notion to strike the right balance between the need to protect consumers and the promotion of free trade in an openly competitive market.<sup>57</sup> This not only suggests that, for instance, a national measure prohibiting claims that might deceive only a very credulous, naïve or cursory consumer would be disproportionate to the objectives pursued and create an unjustified barrier to trade but also suggests a high level of consumer protection.<sup>58</sup>

As suggested by Recital 18 and to achieve proportionality, various specific factors that complement the average consumer test should be taken into account.<sup>59</sup> Factors such as cultural, linguistic and social factors which warrant a different assessment of the unfair character of a commercial practice should be considered.<sup>60</sup> Other relevant factors could also include the circumstances in which products are sold, the information given to consumers, the clarity of such information, the presentation and content of advertising material, and the risk of error in relation to the group of consumers concerned.<sup>61</sup>

The remarks by the commission regarding the adaptation of the average consumer test when the interests of specific groups of consumers are at stake (article 5(2)(b) of the Directive) should be noted. The commission explains that:<sup>62</sup>

“when the commercial practice is addressed at a specific group of consumers, be they children or rocket scientists, national authorities and courts must assess its impact from the perspective of the *average member of the relevant group.*”

#### B. The UCPD and vulnerable consumers

Article 5(3) of the UCPD states that commercial practices that are likely to materially distort the economic behavior only of a *clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee*, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally (commonly known as “puffing”).

Recital 19 to the UCPD further provides that where age, physical or mental infirmity or credulity make consumers particularly *susceptible* to a commercial practice or to the underlying product and the economic behavior only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

The Commission therefore confirms that the Directive is based on the idea that it is appropriate to protect all types of consumers including consumers whose characteristic make them particularly vulnerable to unfair commercial practices.<sup>63</sup>

#### C. Criteria for assessing vulnerable consumers

It is clear from article 5(3) of the Directive that the criteria to assess vulnerable consumers are an assessment of their:

- a) Mental or physical infirmity,
- b) Age; or
- c) Credulity.

The Commission notes that the reasons (criteria) mentioned by article 5 as the basis to establish the vulnerability of a specific category of consumers is listed indicatively and cover a wide range of situations.<sup>64</sup>

*Mental or physical infirmity* includes sensory impairment, limited mobility and other disabilities.<sup>65</sup> Examples are given such as consumers who need to use wheelchairs might be a vul-

nerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue, or those with a hearing impairment may be a particularly vulnerable group in relation to advertising claims about 'hearing aid compatibility' in a telephone advertisement.

The Commission discusses three categories of consumers who may also qualify as vulnerable consumers in certain instances because of the *age* criterion.<sup>66</sup> Broadly speaking, it would be the perspective of an older or younger consumer. Elderly consumers may be more intimidated by for example pressure selling or aggressive door-to-door selling. The elderly might also be particularly vulnerable to practices connected to certain products, such as burglar alarms. Children and teenagers are also vulnerable consumers due to their age. The commission state that a trader could reasonably foresee that certain advertisements may have an impact on a vulnerable category of consumers such as children. For example, the compatibility of a videogame with a specific device may be sufficiently clear to an adult consumer but, due to the way the information is provided, it may still confuse children. Teenagers represent another category of consumers who are often targeted by rogue traders. An example of this is promoting products which are particularly appealing to teenagers in a way which exploits their

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lack of attention or reflection due to their immaturity. For example, an advertisement for mobile phone services conveying the message that by subscribing to a particular loyalty plan you can easily make and maintain friends is likely to be taken more literally by teenagers.<sup>67</sup>

*Credulity* covers groups of consumers who may more readily believe specific claims. Although the Commission regards the term "credulity" as neutral, the effect is to protect members of a group who are for any reason open to be influenced by certain claims.<sup>68</sup> An example might be members of a group who, because of particular circumstances, might believe certain claims more readily than others.

The vulnerable consumer test applies if the practice affects the economic behavior of a vulnerable group of consumers "in a way which the trader could reasonably be expected to foresee." According to the Commission this criterion adds an element of proportionality in assessing the effects of a commercial practice on vulnerable consumers and the professional diligence which reasonably can be expected from a trader.<sup>69</sup> It aims at holding traders responsible only if the negative impact of a commercial practice on a category of vulnerable consumers is foreseeable. The aim of the provision is to capture cases of dishonest market practices (e.g. outright frauds or scams) which reach the majority of consumers, but in reality are devised to exploit the weaknesses of certain specific consumer groups.<sup>70</sup>

Micklitz (and others) explain that the reference in recital 18 to vulnerable groups of consumers has a normative component as it purports to evaluate the particular measure used by the trader.<sup>71</sup> The yardstick of control will also vary.<sup>72</sup> The writers argue that it must be differentiated whether a trader could reasonably be expected to foresee that the commercial practice can materially distort the economic behavior not of all consumers taken as a whole, but only of a clearly identifiable group of consumers who are particularly vulnerable.<sup>73</sup>

## **IV. THE UNITED KINGDOM**

### **A. Plain and understandable language**

Marus remarks that plain language has been widely supported throughout the United Kingdom.<sup>74</sup> The National Consumer Council (which was formed in the mid-seventies) promotes plain language in all consumer-related interactions.<sup>75</sup>

Regulation 7(1) and (2) of the Unfair Terms in Consumer Contract Regulations 1999 (UCTA Regulations) require a trader or business to ensure that any written term of a contract is expressed in plain and intelligible language and stipulate that if there is any doubt about the meaning of a written term, the interpretation which is most favorable to the consumer should prevail. Stoop is of the opinion that these provisions are not proactive and do not provide objective guidelines on how plain language should be assessed.<sup>76</sup>

Ervine states that regulation 7 which compels terms to be in "plain and intelligible language" makes it unclear what standard it attempts to impose.<sup>77</sup> The writer argues that it would seem the standard is language that the average person finds intelligible.<sup>78</sup> The consumer should be given the opportunity to examine all the terms and this envisages that if an average person reads the contract, he will find it plain and intelligible.<sup>79</sup> This is also the approach of the Office of Fair Trading (OFT) which states that the standard of *plainness* and *intelligibility* of contract terms must normally be within the understanding of ordinary consumers without legal advice.<sup>80</sup>

Micklitz (and others) explain that two standards are created, namely, plainness and intelligibility which need to be assessed differently.<sup>81</sup> *Plainness* refers to the legal effect of a term including its consequences.<sup>82</sup> The consumer needs to know what to expect and ambiguous formulations must not put the trader in a position that improves his legal position at the consumer's expense.

*Intelligibility* according to Micklitz *et al.* refer to legibility, in that it purports to eliminate "small-print" from the contract which consumers do not readily understand.<sup>83</sup> The result is that the drafter is required to design standard business conditions plainly from both an editing and optical point of view. The writers make the important remark that intelligibility also entails a qualitative requirement in that information needs to be provided by the trader. Terms must not mislead the consumer about the scope of his (the consumer's) rights and obligations.<sup>84</sup>

### **B. Consumer Protection from Unfair Trading Regulations (CPUT Regulations) of 2008**

The CPUT Regulations is and almost verbatim implementation of the EU UCPD and in particular article 5 of the Directive. The CPUT Regulations 2008 define an "average consumer"<sup>85</sup> as one to whom the commercial practice is addressed or whom the commercial practice reaches. If the unfair commercial practice is directed at a particular group of consumers, it will be the average member of that group that is relevant.<sup>86</sup>

Ervine gives the following examples to illustrate this point.<sup>87</sup> Firstly, the example of children in case of television advertisements during children's programs (in which case the standard would be that of the average child)<sup>88</sup> and secondly, the example of a group of readers of a soccer magazine in which case the test would be that of the average soccer fan.<sup>89</sup>

Ramsay<sup>90</sup> poses the question whether one of the core objectives of the Regulations should be the protection of the vulnerable consumer in particular and asks how should this be done? The writer argues that under broader equitable conceptions of substantive fairness one of the objectives might also be protecting the vulnerable and the poor, maintaining integrity in marketing and furthering values of risk-sharing and loss-distribution.<sup>91</sup>

In its 2013 Report,<sup>92</sup> the EU Commission discusses the protection of vulnerable consumers and notes the opinion of the UK in this regard.<sup>93</sup> The Report states that although the UK is not calling for a revision of the vulnerable consumer test (in terms of article 5 of the Directive) in its current form, it is remarked that, if the Directive were to be reviewed, then it may be worth adding provisions to specifically protect also the elderly from certain aggressive practices. With regard to the average consumer test and the criteria for assessing the vulnerable consumer (infirmity, age and credulity), Ervine correctly criticizes the above list of characteristics as being very limited.<sup>94</sup> The writer argues that factors such as ethnic origin, education and economic circumstances should also have been included.<sup>95</sup> A vulnerable group of consumers could cover various people.<sup>96</sup> Ervine further refers to the elderly who are more vulnerable to claims about home security, for example or young people who would be more vulnerable on account of their inexperience.<sup>97</sup> The elderly as vulnerable consumers were also confirmed in the case of *Crimea Price v Cheshire East Borough Council*.<sup>98</sup>

Collins states that the concept of an “average consumer” provoked considerable controversy in the UK.<sup>99</sup> The writer argues that since rogue traders may prey upon vulnerable groups, the question arises whether the concept should represent an average person who would not be influenced by suspicious and misleading practices or should the law protect the gullible? (When one takes groups such as the young and the elderly in consideration as well as the concept of “credulity”, it seems that the Directive as well as the CPUT Regulations may very well attempt to protect the “gullible.” Taking into account of course that specific circumstances apply which include that the consumer should in the first instance be identified as a *vulnerable* consumer.)

On the other hand, Collins states that one welcome aspect of the average consumer test and the rules contained therein may be to place a curb on some of the emotive advertising techniques aimed at children and young people, who do not yet have the experience to know that if it sounds too good to be true, it is.<sup>100</sup> The concept of the “average consumer” seems sufficiently precise to achieve a high level of uniformity because the legislators have sensibly built on and articulated further the notions, rather than starting afresh.<sup>101</sup>

After the implementation of the CPUT Regulations of 2008 it became more and more apparent that particular groups of vulnerable consumers needed additional and specific legislative protection against unfair commercial practices. The two most prominent groups that were identified were young people and the elderly. The Consumer Protection from Unfair Trading (Amendment) Regulations was published in August of 2013. In a nutshell the amendments to the CPUT Regulations attempt to provide new powers to protect vulnerable (and elderly) consumers against rogue traders. This is done by for example:

- a) Giving consumers 90 days to cancel a contract and receive a full refund if they have been misled or bullied into agreeing it;<sup>102</sup>
- b) Giving consumers new rights to recover payments made to traders who mislead or bullied them into paying money which was not owed;<sup>103</sup>
- c) Giving consumers the right to claim compensation for any alarm or distress caused by these practices.<sup>104</sup>

Even prior to the implementation of the CPUT Regulations of 2008, the courts in the UK gave guidelines as to what a typical consumer might be. In the case of *Director General of Fair Trading v First National Bank*<sup>105</sup> it was held that where the court is considering a collective challenge to the fairness of the terms in a consumer contract, it is necessary to consider the position of typical parties and the effects of typical relationships between them.<sup>106</sup> The court remarked that there is not always a direct dispute be-

tween the consumer and the other contracting party and therefore the relevance of particular circumstances affecting a contractual relationship must also be taken into account.<sup>107</sup> One of these circumstances should be taking into account the effects of contemplated or typical relationships between the contracting parties.<sup>108</sup>

In the case of *The Office of Fair Trading v. Ashbourne Management Services Limited and others*<sup>109</sup> the OFT alleged that the defendants have engaged in practices which contravene the Consumer Credit Act 1974, the Unfair Terms in Consumer Contracts Regulations 1999 as well as the CPUT Regulations of 2008. The alleged misleading and aggressive commercial practices involved the business of recruiting members for gym and health and fitness clubs (collectively “gym clubs”), providing standard form agreements for their use and collecting payments from members under those agreements.<sup>110</sup>

The court remarked that the concept of a typical or average consumer is generally assumed to be a person who is reasonably well informed and reasonably observant and circumspect, and who is assumed to have read the relevant documents and to seek to understand what is being read.<sup>111</sup> Be that is it may the court added that the standard is a variable one and must take color from the context.<sup>112</sup> The court gave the example that consumers who are financially sophisticated may be expected to bring to bear a greater understanding of the meaning and implications of the terms of a contract than consumers who are vulnerable as a result of their naivety or credulity. More importantly, the court stated that, *such a typical consumer is relevant not only to the assessment of fairness but also the consideration of whether a particular term is expressed in clear intelligible language*.<sup>113</sup>

In *OFT v Ashbourne*, the parties identified three issues regarding the application of the CPUT Regulations of 2008: first, whether the term imposing a minimum membership period falls within the scope of regulation 6(2)(a); second, whether the term is in plain intelligible language; and third, whether the term is fair.<sup>114</sup> For purposes of this discussion attention will be given to the issue of plain intelligible language.<sup>115</sup> In this case the question whether a particular term is expressed in plain intelligible language was considered from the perspective of an average consumer being a member of the public interested in using a gym club which was not a high end facility and who may have been attracted by the relatively low monthly subscriptions.<sup>116</sup>

There was, according to the court, a difference in the terminology used on the front of many of the agreements and that used in the body of the terms and conditions on the reverse. In this regard, it is plainly desirable that there is consistency in the terminology used in any agreement. However, despite the inconsistency the court still found the language used plain and intelligible and assumed that the average consumer could have read each agreement reasonably carefully.<sup>117</sup>

With regards to the “average consumer”, the court found that the defendants’ business model was designed and calculated to *take advantage of the naivety and inexperience of the average consumer* using gym clubs at the lower end of the market.<sup>118</sup> As the many complaints received by the OFT showed, the defendants’ standard form agreements contained a trap into which the average consumer was likely to fall.<sup>119</sup> Ultimately, the court found that various aspects of the trader agreements were unfair and that they engaged in unfair commercial practices contrary to the CPUT Regulations of 2008.<sup>120</sup>

In *OFT v Creative Industries*<sup>121</sup> the court referred to both the CPUT Regulations of 2008 as well as the UCPD and held that the requirement to assume that the consumer is reasonably well informed, observant and circumspect reflects the common sense proposition that the UCPD exists to protect from

being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer. It is submitted that the court made this remark and did not deal with the vulnerable consumer in particular due to the fact that no particular social or economic (or other) class of consumer was targeted.<sup>122</sup>

## V. UNITED STATES: PLAIN LANGUAGE AND THE VULNERABLE CONSUMER

### A. A model plain language law

It is interesting to note that as far back as 1981, the need for a model plain language law that required consumer contracts to be written so that an average consumer could understand them was recognized.<sup>123</sup> Bernard Black, in his journal article entitled *A Model Plain Language Law*, describes the problems with standard consumer contracts and the fact that nearly all consumer contracts are based on mass-produced, nonnegotiable forms.<sup>124</sup> Black correctly argues that consumers do not read the contracts they sign, and would not understand them if they did. Furthermore consumers often have no real alternative to signing such contracts.

*Incomprehensible contracts* are one of the main reasons consumers do not read contracts. Consumer contracts are incomprehensible according to Black due to *format* (fine print, long lines and inadequate spacing), *language* (including to overuse of legal terms) and *honesty* (the contract is in a particular form to deceive consumers and confuse them).<sup>125</sup>

The fact that consumers are unable to negotiate terms in standard consumer contracts takes away the incentive for consumers to try to read and understand the contracts they sign. Black goes further to argue that even if the product is not a necessity, consumers may sign a contract without a careful reading because they expect that nothing will go wrong or that the seller will not enforce the contract to the letter.<sup>126</sup>

Although, according to Black, there may be costs involved in rewriting consumer contracts, the tangible benefits to both consumers and businesses outweigh such costs.<sup>127</sup>

The benefits to consumers include consumers getting form contracts they are able to read and understand. As a percentage of the purchase price of consumer goods sold in terms of consumer contracts may be small in terms of individual contracts, the aggregate value of plain language to all consumers, spread over all transactions, become much more significant. On the other hand consumers who read and understand one-sided contracts may refuse to sign it and thereby creating pressure for fairer more complete contracts in the marketplace.<sup>128</sup> If, for example prices reflect formerly hidden costs, consumers can make a more informed choice and as a result more competition between businesses.

Black also discusses the benefits for businesses to provide consumer contracts in plain language.<sup>129</sup> Plain language increases business efficiency and the enforceability of contracts, and encourages consumer trust in business. An important point made by Black is that plain language forms take employees of businesses less time to understand and therefore also fewer mistakes and fewer complaints. The writer explains that procedural fairness brought about by plain language in consumer contracts may benefit businesses through greater consumer trust.<sup>130</sup>

The plain language model law proposed by Black covers all types of consumer transactions, includes the sale or lease of real or personal property; services; mortgages and credit. (This conforms to the South African position discussed earlier). The writer there-



fore proposes a general standard and all documents and forms which may form part of the contract should also conform to plain language.<sup>131</sup>

Black makes the very important statement that it would be impossible to define plain writing precisely as that would result in a vague standard and it will then be left to the courts to develop workable guidelines for compliance.<sup>132</sup> There needs to be a balance between precision and vagueness. Black proposes that this be done by using a double structure being a general standard for “simple format” and a general standard for “plain language.” “Simple format” attempts to provide standards organizing with clarity the contract (word size, preventing excessively long lines etc.)

As part of the general standard for “plain language”, consumer contracts must be drafted in a way that the average person is likely to understand in context and also refers to reasonableness.<sup>133</sup> When it comes to enforcement, a dispute should be resolved by litigation rather than administration and consumers should also have a private right of action which includes remedies such as actual damages, penalties and injunctions.<sup>134</sup>

### B. The Pennsylvania Plain Language Law

On 23 June 1993, the Plain Language Consumer Contract Act (PLCCA) was signed into law in Pennsylvania. This law requires many lenders, retailers and landlords to redraft their loan, sale, lease and other agreements. The objective of the PLCCA is to protect consumers from making contracts that they do not understand, as well as to aid consumers in better understanding their rights and duties under such contracts.

The Act, however, does not cover all transactions. Various transactions are excluded from coverage by the PLCCA. One of these principal exemptions exists in the real estate arena, covering conveyance documents and contracts, deeds and mortgages, certificates of title and title insurance contracts. Other important exemptions include contracts with any federal or state regulated financial institutions or any of their affiliates, as well as contracts subject to examinations by the Pennsylvania Public Utility Commission or the Federal Energy Regulatory Commission. Additional exceptions include: commercial leases; marital agreements; contracts involving amounts of more than \$50,000; contracts to purchase securities; and insurance policies and contracts.

The PLCCA provides guidelines pertaining to design & style (what a consumer contract should look like) as well as a readability test.

A violation of PLCCA is also by definition violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL)

and this subjects the drafting entity to monetary sanctions. Any creditor, seller or landlord who violates the Act will face penalties and damages, including the following: any actual damages resulting from a violation of the PLCCA; court costs; reasonable attorney's fees; statutory damages of up to \$100; or any other relief ordered by the court.

It is important to recognize that a violation of the PLCCA does not invalidate what might otherwise be a valid contract -- it merely subjects the entity drafting the contract to monetary sanctions for its violation. Moreover, there can be no violation if all parties have finished what was required under the contract, and it is a valid defense if the creditor, seller or lessor made a "good faith and reasonable effort" to comply with the PLCCA (§ 2208). Where a consumer waives his or her rights under the PLCCA, such a waiver is void according to § 2210.

Unfortunately the PLCCA seems to be completely underused in practice. The biggest reason for this is most likely the many exclusions in terms of the PLCCA itself and the danger of a too vague standard is set which is ultimately not used at all. There hasn't been much litigation involving the PLCCA although there were a few cases involving releases found in small print on the back of admission tickets.<sup>135</sup>

### C. Unfair and Deceptive Acts and Trade Practices

Every state has a consumer protection law that prohibits deceptive practices, and many prohibit unfair or unconscionable practices as well. These statutes, commonly known as Unfair and Deceptive Acts and Practices (or UDAP statutes), provide fundamental protection for consumers.

Carolyn L. Carter argues that these statutes constitute the main lines of defence in protecting consumers from predatory, deceptive, and unscrupulous business practices.<sup>136</sup> Unfortunately the initial purpose for such legislation has been widely and frequently breached and according to the writer, in almost all states significant gaps or weaknesses undermine the promise of UDAP protection for consumers.<sup>137</sup>

UDAP laws prohibit deceptive practices in consumer transactions and, in many states, also prohibit unfair or unconscionable practices. Yet despite their critical role in ensuring marketplace justice and fairness, the effectiveness of UDAP laws varies widely from state to state. The holes are (according to Carter) glaring. Legislation or court decisions in dozens of states have narrowed the scope of UDAP laws (for example Michigan and Rhode Island) or granted sweeping exemptions to entire industries (Louisiana, New Hampshire and Virginia). Other states have placed substantial legal obstacles in the path of officials charged with UDAP enforcement, or imposed ceilings as low as \$1,000 on civil penalties (Colorado, Indiana, Nevada, North Dakota and Wyoming). Several states have stacked the financial deck against consumers who go to court to enforce the law themselves (Florida and Oregon).<sup>138</sup>

From the comparative discussion of Europe and the UK directly above, it is clear that plain language and the test for the ordinary (average) consumer is extremely important when it comes to the assessment of a business's fair (or unfair) honest (or deceptive) acts and trade practices.

A case for the inclusion of plain language in these types of statutes has been made by writers in the States in the past (see for example Black's arguments above).

An attempt has also been made to link plain language legislation to deceptive and unfair trade practice statutes (as is the case in Pennsylvania and the PLCCA). Unfortunately the effect thereof seems to be very minimal providing insufficient protection for consumers.

Perhaps the explanation by Black why even plain language

has its limits may provide some light on the subject.<sup>139</sup> He explains that even with a proper plain language system in place, the reality is that consumers will not understand consumer contracts completely no matter how clearly they are written. Many plain language contracts will still go unread and although plain language encourages fairer contracts, the consumer will not necessarily be able to negotiate the terms thereof.

Despite the limit to plain language, "consumers have a right to understand the contracts they sign. They are entitled to contracts in simple language and readable format, contracts that state the rights and duties of both parties clearly. If plain language fits common notions of justice and can be achieved at reasonable cost, that is reason enough to justify it."<sup>140</sup>

Based on the above arguments it would perhaps be advisable for State Legislators to rethink plain language policy and take it into account when assessing deceptive and unfair trade practices.

### D. Possible examples of vulnerable consumers in the United States Consumer Protection Framework

Is it possible to determine the average consumer in a consumer group for a particular type of consumer contract in the United States? Are there particular groups of consumers who are more vulnerable to deceptive trade practices and need additional protection?

The U.S. Department of Education's National Institute of Literacy published a research document on 28 April 2013 in which it is estimated that 32 million adults can't read whereas 21% of U.S. adults are only able to read below a 5th grade level.<sup>141</sup> Surely many of these adults conclude consumer agreements during their lifetimes? Surely these adults (consumers) are more vulnerable to deceptive practices and dishonest dealings due to their language deficiencies? When the international position is assessed consumers in America who are elderly can also be classified as vulnerable consumers.

Another group of consumers in the United States who may also be vulnerable are consumers who are not proficient in English, as it is not their first language. In this regard Steven W. Bender makes out a case for consumer protection for Latinos to overcome language fraud and the difficulties surrounding English-only in the marketplace.<sup>142</sup> The writer states that existing consumer protection regulation too often assumes that consumers are proficient in English or, at least accompanied by an interpreter but in actual fact this gap has made some Latinos and other language minorities the victims of choice for unscrupulous merchants who prey on their inability to understand the terms of the bargain.<sup>143</sup>

To safeguard consumers most vulnerable to unfair and deceptive trade practices, Bender contemplates a comprehensive strategy of reform that involves all relevant role-players (legislatures, courts and merchants themselves). Reform regarding statutory consumer protection is proposed to place more responsibility on businesses when they deal with language minority consumers. This could be done for example by including language fraud specifically under UDAP fraud.<sup>144</sup>

It is apparent that even in the United States particular groups of consumers are more vulnerable and need additional consumer protection due to for example their age or language proficiency. There are however many other scenarios where the vulnerability of a consumer (and the exploitation of consumers due to this fact) will play a role. Legislation should be reformed to conform to this reality.



## VI. CONCLUSION AND RECOMMENDATIONS TAKING INTO ACCOUNT COMPARATIVE ANALYSIS

### A. Plain and understandable language

Melville states:

“Plain language plays an important role in the Consumer Protection Act. After all, if one party in a relationship cannot understand what he or she is agreeing to, that person is disempowered. For a truly balanced relationship, both parties need to have equal access to understanding their relationship and how their relationship is to be governed.”<sup>145</sup>

Although it may seem ironic that the term “plain language” can be interpreted in many ways, the point is that the term includes all aspects regarding a notice, document or visual representation.<sup>146</sup> It is important to remember that section 22 does much more than merely requiring the use of plain and understandable language; it elevates the plain language requirement to a fundamental consumer right.<sup>147</sup>

This becomes relevant when one takes into account the comparative analysis with the EU, and the UK. In the latter two instances the whole concept of plain and intelligible language, the average (“ordinary”) consumer as well as the vulnerable consumer are assessed with regard to unfair commercial practices and unfair trading. In the South African context the consumer has a particular fundamental right to fair and honest dealing (Part F of the CPA) which include unconscionable conduct (s 40) and false, misleading or deceptive representations (s 41). However, the consumer’s right to disclosure and information and his right to information in plain and understandable language is a right that goes much further than the assessment of unfair dealing and unconscionable conduct: It is elevated to a fundamental right applicable to all aspects of the supply of goods and services where any notice, document or visual representation is involved. In this way the South African position gives broader protection to consumers and a stricter duty on suppliers.

Unfortunately, the provisions of section 22 as it is currently worded, are not sufficient. I agree with Stoop that the plain language provisions in the CPA, are not pro-active and do not provide objective guidelines on how the use of plain language should be assessed.<sup>148</sup> This is especially so in the absence of guidelines or standards which have not been published in terms of the abovementioned legislation. Therefore, the courts will have to decide whether a document complies with plain language requirements.<sup>149</sup> The broad definition of plain language in terms of section 22 is subject to discretion and interpretation and can in fact not be applied proactively.<sup>150</sup> Stoop rightly argues that because of the lack of objective assessment measures or guidelines, it is not clear whether the provisions of plain language have been implemented successfully in terms of the CPA.<sup>151</sup>

Plain language requirements are part of an effort to balance power between the parties to a contract and while bargaining powers between parties may once have been equal, it is certainly no longer so.<sup>152</sup> Gordon and Burt suggest that suppliers set up their own evaluation methods for assessing whether or not a document is in plain language and warns that this should be done before suppliers embark on any large-scale rewriting project.<sup>153</sup> The writers suggest research and user testing throughout the rewrite process, a phased approach, working steadily towards best practice and terminology tools to ensure consistency.<sup>154</sup>

The criteria in terms of section 22(2) of the CPA are designed to be as flexible as possible in order to take into account every possible relationship between a consumer and a supplier in respect of goods and services.<sup>155</sup> A great deal of discretion is therefore left to persons tasked with enforcing the provisions of

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the CPA to determine what is or is not, in any particular circumstances, plain and understandable language.<sup>156</sup> It is hopeful that section 22 will compel suppliers to redraft their contracts to meet the plain language requirements and that consumers may look forward to more user-friendly agreements and representations.

The provisions of section 112 of the CPA are a reminder of the seriousness of non-compliance with the plain language requirement and breaching of the consumer’s fundamental right to plain language.<sup>157</sup> It provides that the National Consumer Tribunal may impose an administrative fine in respect of prohibited or required conduct to the amount of either ten per cent of the supplier’s annual turnover during the preceding year but not more than R1 million.<sup>158</sup> The fine payable must be paid into the National Revenue Fund.<sup>159</sup>

In the EU and the UK the requirements for plain language are referred to as “plain and intelligible language” rather than “plain and understandable language” as is the case in the CPA in South Africa. It is submitted, however, that the interpretation remains the same.

The views of Micklitz (*and others*) are supported in their explanation that two standards are created, namely, plainness and intelligibility which need to be assessed differently.<sup>160</sup>

In the UK, the consumer should be given the opportunity to examine all the terms of a consumer agreement and as this envisages an ordinary person reading the contract, the kind of language used by the trader must therefore be such that he will find it plain and intelligible.<sup>161</sup> This seems to be similar to the test suggested by South African writers.<sup>162</sup>

Ultimately it seems that the plain language requirement can only be properly assessed if a consumer agreement is in written form. The courts will have the final word on the matter. It would be unfair to apply an objective guide to all consumer agreements across the board as every transaction will be based on its own merits and circumstances.

Perhaps the Department of Trade and Industry (DTI) could publish general guidelines which could be adjusted to fit into a specific industry code (the motor industry for example). Where the industry guidelines do not conform to the general guidelines suggested by the DTI, the courts will have the final word on the matter.

### B. The ordinary (average) consumer: Where does the vulnerable consumer fit in?

Kirby describes the averagely literate and minimally experienced consumer as a “new animal” in South African law.<sup>163</sup> The experience of this consumer will dictate whether or not a particular supplier is able to achieve the obligations imposed on him by section 22(2) of the CPA. Kirby also argues that this consumer will further determine the degree to which particular language (which is to form the basis of the transaction) is plain and understandable

and whether or not it is sufficient to protect both the interests of the consumer and the supplier.<sup>164</sup>

Where does the vulnerable consumer fit in? Should the ordinary consumer be assessed taking into account the vulnerable consumer for each type of consumer transaction or agreement; or should each type of vulnerable consumer as set out in section 3(1)(b) of the CPA be regarded as a separate group of consumers

**It must be ensured that vulnerable consumers are protected from the risks deriving from the effects of the economic crisis, the ageing of the population, and the increased complexity of digital markets.**

which means that the *ordinary vulnerable consumer* of each vulnerable group of consumers should be assessed?

Business and legal writers must now write for the person with minimal experience; in

other words, a first-time user of goods and services.<sup>165</sup> Clearly the protection of such consumers also underscores the necessity for plain language.<sup>166</sup>

According to Kirby the level of intelligence and education of a particular consumer may very well inform what is plain and what is understandable in any particular circumstances.<sup>167</sup> Section 22(2) further assumes that all consumers have average literacy skills and minimal experience as consumers of the relevant goods and services.<sup>168</sup>

The EU and UK can provide guidance in the assessment of both the ordinary consumer as well as the vulnerable consumer. In the EU (in terms of the UCPD) and the UK (CPUT Regulations of 2008) the term “average consumer” rather than “ordinary consumer” is used. This distinction becomes important to determine the average consumer in a particular group of consumers. It is recommended that the term “ordinary consumer” in the CPA be substituted with the term “average consumer” to bring South Africa more in line with international provisions.

The “average consumer test” is not without controversy in the EU or the UK but is a good foundation upon which the ordinary “average” consumer in South Africa (section 22 CPA) could be determined. With regard to the vulnerable consumer, the position in South African is simplified by giving particular examples of vulnerable consumers who need additional protection as part of the application of the CPA (section 3(1)(b)). Similarly to the EU and UK position young people and the elderly are also included but goes further to make specific mention of low-income and illiterate consumers as well. Ervine correctly argues that factors such as ethnic origin, education and economic circumstances should be included in the test for the average consumer and in my opinion is a paramount inclusion in case of South African consumers.<sup>169</sup>

It is submitted that, in the case of South Africa (in terms of the CPA), the vulnerable consumer should be included in any assessment as to the “ordinary consumer of the class or group of persons for which the particular goods or services are supplied to” rather than be dealt with separately. In this regard the interpretation of the criteria to assess vulnerable consumers in the UK could be helpful.

It could be argued that comparing the ordinary consumer in South Africa to the ordinary (average) consumer in the UK (or even to the position in the United States) is to compare apples with oranges. Surely it would be unfair to compare consumers in a developing country such as South Africa to a first world country such as for instance the UK? But even in the United States the protection of vulnerable consumer groups is something that needs to be addressed.

The fact of the matter is that the world is becoming a global community and countries are moving “closer” together in terms of communication, technology and, more importantly, trade. People from third world or developing countries often immigrate or obtain working permits in search of a better life in first world countries. This shift in the global paradigm can no longer be ignored as it clear from the recognition of vulnerable consumers and the need to protect them.

Ultimately, it must be ensured that vulnerable consumers are protected from the risks deriving from the effects of the economic crisis, the ageing of the population, and the increased complexity of digital markets, together with the difficulty some consumers may encounter in mastering the digital environment.

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<sup>1</sup> S 22(2) CPA. The Sotuh African Consumer protection Act may be found at, [http://www.saflii.org/za/legis/num\\_act/cpa2008246.pdf](http://www.saflii.org/za/legis/num_act/cpa2008246.pdf).

<sup>2</sup> S 22(1)(a) CPA.

<sup>3</sup> S 22(1)(b) CPA.

<sup>4</sup> S 22(3) CPA.

<sup>5</sup> Gordon F & Burt C “Plain Language” 2010 (April) *Without Prejudice* 59-60 at 60 (hereinafter referred to as Gordon & Burt). See also Stoop PN “Plain Language and Assessment of Plain Language” in *Private Law: Rights, Duties and Conflicts* (2010) International Association of IT Lawyers 636-648 at 639 (hereinafter referred to as Stoop (2010)).

<sup>6</sup> Gordon & Burt at 60.

<sup>7</sup> Stoop (2010) at 636.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See also Gouws M “A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act” 2010 *South African Mercantile Law Journal* 79-94 at 81 (hereinafter referred to as Gouws).

<sup>10</sup> Preamble to the CPA.

<sup>11</sup> Gouws at 81.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Kirby N “Clearly clear? Plain and understandable language in terms of the Consumer Protection Act?” August 2011 *Legal Brief: Werksmans Attorneys* <http://bit.ly/Vt1uCW>, (accessed on 19/05/2014) at 22. (Hereinafter referred to as Kirby 2011).

<sup>15</sup> *Id.* See also Monty S & Hurwitz D “Avoiding the sesquipedalian trap” 2012 (February) *Without Prejudice* at 58 (hereinafter referred to as Monty & Hurwitz).

<sup>16</sup> Melville NJ *The Consumer Protection Act Made Easy* (2010) at 165 (hereinafter referred to as Melville).

<sup>17</sup> Gouws at 88.

<sup>18</sup> Gouws at 88-89.

<sup>19</sup> Kirby 2011 at 22.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Monty & Hurwitz at 58. See also Melville at 163-164.

<sup>23</sup> Gordon & Burt at 60.

<sup>24</sup> Melville at 166-170.

<sup>25</sup> Gouws at 91-93.

<sup>26</sup> Newman S “The influence of plain language and structure on the readability of contracts” 2010 *Obiter* 735-745 at 745 (hereinafter referred to as Newman).

<sup>27</sup> Newman at 738-741.

<sup>28</sup> Newman at 741.

<sup>29</sup> *Id.*

<sup>30</sup> Newman at 741-745.

31 Kirby 2011 at 23.  
32 Stoop (2010) at 641.  
33 *Id.*  
34 *Id.* See also Melville at 162.  
35 Gordon & Burt at 60.  
36 Gouws at 87.  
37 Mail & Gaurdian, article by staff reporter “SA adults lag behind in global literacy stakes” -<http://bit.ly/XeZSOw> (accessed on 17/05/2014).  
38 *Id.*  
39 Kirby 2011 at 23.  
40 Gordon & Burt at 60. See also Melville at 161.  
41 Kirby 2011 at 23.  
42 *Id.*  
43 *Id.*  
44 Gouws at 88.  
45 *Id.*  
46 *Id.*  
47 *Id.*  
48 Ramsay I, *Consumer Law and Policy* (2012) 3<sup>rd</sup> ed at 156. Hereinafter referred to as Ramsay (2012).  
49 Ramsay (2012) at 156-157  
50 Reg 2 UCPD.  
51 For purposes of this discussion “supplier” in terms of the CPA (South Africa) and “trader” in terms of the EU and UK position will be regarded as the party who supplies goods and services to the consumer in the ordinary course of their (the “supplier” or “traders”) business.  
52 Reg 2 UCPD.  
53 Ramsay (2012) at 164.  
54 Recital 18 UCPD.  
55 “Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices” SEC (2009) 1666. Hereinafter referred to as Guidance UCPD (2009)  
56 Guidance UCPD (2009) at 25.  
57 *Id.*  
58 Guidance UCPD (2009) at 26.  
59 *Id.*  
60 *Id.*  
61 Guidance UCPD (2009) at 27. See also Case C-313/94 *Flli Graf-fione SNC v Ditta Fransa* [1996] ECR I-06039, para 26.  
62 Guidance UCPD (2009) at 28.  
63 Guidance UCPD (2009) at 29.  
64 Guidance UCPD (2009) at 30.  
65 *Id.*  
66 *Id.*  
67 *Id.* This is a particular problem in the South African context.  
68 Guidance UCPD (2009) at 30.  
69 Guidance UCPD (2009) at 31.  
70 *Id.*  
71 Micklitz HW (*and others*) (Gen eds) *Understanding EU Consumer Law* (2009) at 88 (hereinafter referred to as Micklitz (*and others*) (2009)).  
72 *Id.*  
73 *Id.*  
74 Marus L “Gobbledygook has got to go” 2010 (November) *Enterprise Risk* at 24 (hereinafter referred to as Marus).  
75 *Id.*  
76 Stoop (2010) at 638.  
77 Ervine WCH *Green’s Consumer Law in Scotland* (2008) 4<sup>th</sup> ed at 216 (hereinafter referred to as Ervine 216).  
78 *Id.*  
79 *Id.*  
80 Ervine at 216.  
81 Micklitz (*and others*) (2009) at 136.  
82 *Id.*  
83 *Id.*  
84 *Id.*

85 Reg 2 CPUT Regulations 2008.  
86 Ervine at 231.  
87 *Id.*  
88 *Id.*  
89 *Id.*  
90 At 152.  
91 *Id.*  
92 “Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee” COM (2013) 139 Final at 13.  
93 *Id.*  
94 Ervine at 232.  
95 *Id.*  
96 *Id.*  
97 *Id.*  
98 [2012] EWHC 2927 (Admin) par 8.  
99 Collins, H “Harmonisation by Example: European Laws against Unfair Commercial Practices” *Modern Law Review* (2010) (Vol 73) 89–118 at 99. Hereinafter referred to as Collins *MLR* (2010).  
100 Collins *MLR* (2010) at 100.  
101 *Id.*  
102 Reg 27E CPUT (Amendment) Regulations 2013.  
103 Reg 27H CPUT (Amendment) Regulations 2013.  
104 Reg 27J CPUT (Amendment) Regulations 2013.  
105 [2001] UKHL 52.  
106 Par 20.  
107 Par 33.  
108 Par 33.  
109 [2011] EWHC 1237 (Ch).  
110 Par 1.  
111 Par 128.  
112 Par 128.  
113 Par 128.  
114 Par 140.  
115 Par 158.  
116 Par 161.  
117 Par 173.  
118 Par 173.  
119 Par 173.  
120 Par 240.  
121 [2011] EWHC 106 (Ch) par 62.  
122 Par 128.  
123 Bernard Black *A Model Plain Language Law* 33 Stan. L. Rev. 255-300, (1981).  
124 At 255.  
125 Black at 256.  
126 At 258.  
127 At 259.  
128 At 261.  
129 263-264.  
130 At 264.  
131 272.  
132 273.  
133 282.  
134 286-292.  
135 See for example *Beck-Hummel v. Ski Shawnee, Inc.*, 902 A. 2d 1266 - Pa: Superior Court 2006.  
136 Carolyn L. Carter *A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* National Consumer Law Centre Inc. (February 2009) <http://www.consumerlawcentre.org> accessed on 17/06/2014.  
137 Report  
138 See Report Summary.  
139 See Black at 265-267.  
140 Black at 259.  
141 <http://www.statisticbrain.com/> accessed on 17/06/2014.

<sup>142</sup> Steven W. Bender *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace* 45 Am. U. L. Rev. 1027-1109.

<sup>143</sup> Bender at 1029,1030. See also FN 201 where the writer refers to other minority groups to include: American Indians, Asian Americans and Alaskan Natives.

<sup>144</sup> See 1069.

<sup>145</sup> Melville at 157.

<sup>146</sup> Melville at 158.

<sup>147</sup> Gouws at 85.

<sup>148</sup> Stoop (2010) at 638.

<sup>149</sup> Stoop (2010) at 640.

<sup>150</sup> *Id.*

<sup>151</sup> Stoop (2010) at 641.

<sup>152</sup> *Id.*

<sup>153</sup> Gordon & Burt at 60.

<sup>154</sup> *Id.*

<sup>155</sup> Kirby 2011 at 22-23.

<sup>156</sup> *Id.*

<sup>157</sup> Marus at 24. See also Marus L. "Has the gobbledeygook gone yet?" 2011 (March) *Enterprise Risk* at 32.

<sup>158</sup> An estimated 69,920.00 EUROS.

<sup>159</sup> S 122(5).

<sup>160</sup> Micklitz (*and others*) (2009) at 136.

<sup>161</sup> *Id.*

<sup>162</sup> See Melville at 158; Stoop (2010) at 638; Gouws at 85; Gordon & Burt at 59; Kirby 2011 at 22-23.

<sup>163</sup> Kirby 2011 at 22-23.

<sup>164</sup> *Id.* The purpose of the CPA in terms of s 3 should also be taken into account: Ultimately aiming to protect the vulnerable consumer.

<sup>165</sup> Gordon & Burt at 60.

<sup>166</sup> Gouws 8at 2.

<sup>167</sup> Kirby 2011 at 22-23.

<sup>168</sup> *Id.*

<sup>169</sup> Ervine at 232.