

Hugh Collins

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The Unfair Commercial Practices Directive

HUGH COLLINS*

Abstract: In an examination of the main provisions of Directive 2005/29, the solutions adopted for a number of the key design issues are assessed. First, has the Directive overcome the problem of the inherent vagueness and unpredictability of a general clause that forbids unfair commercial practices? Second, is it the case that the Directive has no implications for contract law and competition law? Third, will the provisions requiring maximal harmonisation lead to a decline in consumer protection in some Member States? Fourth, will the new comprehensive duties to provide material information prove workable and affordable by business? The article also assesses the degree of protection afforded to vulnerable groups, and the extent to which the Directive will contribute towards building coherence in European contract law.

Résumé: L'examen des principales dispositions de la directive 2005/29 permet d'évaluer les solutions adoptées pour un certain nombre de questions clés. En premier lieu, la directive a-t-elle résolu le problème du flou et de l'imprévisibilité inhérents à une clause générale qui prohibe les pratiques commerciales déloyales? En second lieu, est-il exact que la directive n'a pas de conséquences sur le droit des contrats et le droit de la concurrence? En troisième lieu, les dispositions exigeant une harmonisation maximale vont-elles conduire à un déclin de la protection des consommateurs dans certains Etats membres? En quatrième lieu, est-ce que les nouvelles et vastes obligations d'information seront-elles praticables et abordables dans le milieu des affaires? L'article évalue également le degré de protection accordé aux groupes vulnérables, et la mesure dans laquelle la directive pourra contribuer à construire une cohérence en droit européen des contrats.

Kurzfassung: In dieser Untersuchung zu den wichtigsten Vorschriften der Richtlinie 2005/29 werden die Lösungen zu einer Reihe konzeptioneller Kernanliegen bewertet. Hat die Richtlinie erstens das Problem der Unbestimmtheit und Unvorhersehbarkeit einer Generalklausel zum Verbot unfairer Handelspraktiken überwunden? Stimmt es zweitens, dass die Richtlinie keine Auswirkungen auf Vertrags- und Wettbewerbsrecht hat? Werden drittens die Bestimmungen, die eine Vollharmonisierung erfordern, zu einem Rückgang des Verbraucherschutzniveaus in einigen Mitgliedsstaaten führen? Werden sich viertens die neuen umfassenden Pflichten zu substantieller Information für die Praxis als praktikabel und finanzierbar erweisen? Der Beitrag befasst sich schließlich mit dem Maß an Schutz für schwächere Gruppen und der Frage, bis zu welchem Niveau die Richtlinie zur Kohärenz im europäischen Vertragsrecht beitragen wird.

The Directive on Unfair Commercial Practices was approved on 11 May 2005.¹ The Commission initiated the legislative process in 2001 with a *Green*

* Professor of English Law, London School of Economics.

¹ Dir 2005/29 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/250/EEC, Directives 97/7/EC, 98/7/EC

Paper on Consumer Protection.² The Commission explained that its aim was to create a legislative instrument that could provide a uniform and comprehensive standard for governing unfair commercial practices. The instrument would have as its twin objectives both to enhance the confidence of consumers in making cross-border transactions, and to eliminate differences in national laws that may discourage businesses from exploring the full potential offered by the single market. Following the co-decision procedure laid down in Article 251 of the EC Treaty, which requires the agreement of both Council and the European Parliament, the legislative process secured many significant amendments to and clarifications of the Commission's original proposal. Yet, in its essentials, the Directive has achieved the bold ambition of the *Green Paper*, namely to enact a mandatory general principle of good faith to govern the practices of traders engaged in selling products and services to consumers across all market sectors. This essay examines the central provisions of the new Directive, which Member States are required to implement by 2007.³

I. The General Principle of Good Faith

Article 5(1) of the Directive asserts that: 'Unfair commercial practices shall be prohibited.' Unlike previous Directives, this pronouncement is not limited to particular market sectors or to specific modes of communication used by business. The principal limitation on its scope is simply that it only applies to business to consumer commercial practices. This central provision therefore establishes a general clause, which is likely to provoke uncertainty about the content of the law unless the Directive contains adequate devices to pin down its meaning.

Article 5(2) defines the meaning of 'unfair' by describing two criteria by which to assess a commercial practice:

and 2002/65/EC and Regulation No 2006/2004, *OJEC L 149/22* (11.6.2005). Except where otherwise indicated, references in notes to Articles and Annexes are to this Directive.

2 COM(2001) 531 (2 October 2001); see also the Commission's *Follow-up Communication to the Green Paper on EU Consumer Protection*, 11 June 2002, COM(2002) 289. The Commission has in fact been making proposals for legislation regarding fair trading since at least 1978: see H.-W. Micklitz, 'A General Framework Directive on Fair Trading', in H. Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (The Hague: Kluwer Law International, 2004) 43, 44–45.

3 Dir 2005/29 Art 19 – to be precise 12 June 2007.

- (a) it is contrary to the requirements of professional diligence, and
- (b) it materially distorts or is likely to materially distort the economic behaviour 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.

The Directive explicates many of the terms used in that standard of unfairness.

The requirement of ‘professional diligence’ in Article 5(2)(a):

Means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.⁴

There is no further clarification of the principle of good faith. The standard of professional diligence tries to steer a path between, on the one hand, merely endorsing current marketing practices, which may already be unsatisfactory, and, on the other, imposing a subjective standard in the sense that whenever a consumer feels duped or pushed around by a trader, the conduct would be regarded as unfair. The crucial element in constructing this middle path is the notion of the reasonable expectation of the consumer, which permits the court to establish an objective test by use of the standard of reasonableness. At the same time, however, this test does not fall into the trap of merely reflecting existing market practices, for the trader’s conduct must conform to professional standards rather than the standards of an ordinary person, and those standards must themselves conform to principles of good faith and honesty.

The second limb in Article 5(2)(b) is more closely defined. A ‘material distortion’ means:

Using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.⁵

And the concept of a transactional decision is described broadly to include whether, how and on what terms to purchase, pay for, retain, or dispose of a product, including the exercise of any contractual rights.⁶ The concept of a ‘product’ refers to any goods or service including immovable property, rights and obligations.⁷

4 Art 2(h).

5 Art 2(e).

6 Art 2(k).

7 Art 2(c).

The concept of a commercial practice itself is defined as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’.⁸ This broad definition is likely to include any acts and omissions of a business that are calculated to enhance the prospects of selling goods and services to a consumer. The requirement of a direct connection seems to exclude traders who are only peripherally involved in the unfair commercial practice, such as the printer who produces a misleading document. Perhaps the most significant limitation on the relevant types of commercial practice is that the conduct must be one that is likely to ‘distort’ the economic behaviour of consumers, either by impairing their ability to make an informed choice or by impairing their freedom to choose. For example, a decision by a business to put poor quality products onto the market is not an unfair commercial practice for the purposes of this Directive, but any false indications by the business that the goods are of high quality or aggressive techniques employed to prevent consumers from obtaining appropriate redress after sales are likely to fall within the scope of the Directive. In a sense all advertising, whether truthful or not, is designed to alter the economic behaviour of consumers, but it will not fall within the scope of the Directive’s prohibition, either because it will not be regarded as a ‘distortion’ that ‘impairs’ choice, or because the advertising conduct is not contrary to the requirements of ‘professional diligence’.

At the heart of the Directive lies the good faith standard. When the Commission originally proposed a general standard, many reservations were expressed about the possible vagueness and uncertainty that such a standard might create. The Commission argued in favour of a general standard on the ground that businesses were always inventing new techniques for selling to consumers, some of which might be unfair, and that the legislative process aimed at sector-specific measures would always prove too slow to prevent the use of novel unfair commercial practices unless it contained some general provision that the courts and administrative agencies could apply. Instead of the legislature constantly playing ‘catch-up’, the Commission urged that the law should be devised so that it could ‘catch-all’. Business interests and some governments objected that the resulting vagueness of the law would create considerable uncertainty about whether or not new marketing techniques were prohibited. Furthermore, a general standard could be interpreted differently in national jurisdictions, so that the alleged benefit of comprehensive and uniform European legislation, namely that there would be a reduction of barriers

8 Art 2(d).

to trade, would be lost in the process. Instead of achieving uniformity, a Directive that relied on a general clause might simply end up by provoking new differences between national laws.⁹ From comparative studies of consumer protection regimes, it could also be observed that although some countries including the United States, Australia, and Denmark had general standards to govern unfair commercial practices that apparently caused no great difficulties for business, it was also true to say that these countries also possessed government agencies that could provide more detailed, binding guidance on the meaning of the general clause in particular context in order to overcome problems of vagueness.¹⁰

The need to address this concern about the vagueness of the general standard explains much of the subsequent detail of the Directive. We can identify three strands in the endeavour to render the general standard more predictable. First, the Directive contains unusually detailed definitions of its terms, including the concept of unfairness as described above. Second, the Directive identifies two principal kinds of unfair commercial practice, namely misleading information and aggressive commercial practices, and defines these concepts in some detail. These two types of commercial practice, as defined, are declared to be automatically unfair.¹¹ These two types of unfair commercial practice do not, however, prevent the general standard from applying to other types of commercial practice if they fall within the definition. Third, the Directive contains in Annex 1 a list of those commercial practices which 'shall in all circumstances be regarded as unfair'.¹² This 'black list' contains thirty-one examples of prohibited commercial practices. It includes such techniques as 'bait and switch', false statements about the limited availability of the goods at a particular price, and creating the false impression that the consumer has won a prize when in fact the consumer will have to incur expenditure such as purchase of a product to obtain the prize.¹³ This list is likely to provide a valuable guide to courts and administrative authorities in their application of the Directive and national implementing legislation, and will certainly assist the process of harmonisation of laws at a European level. Nevertheless, these

9 G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying law Ends Up in New Divergences', (1998) 61 *Modern Law Review* 11.

10 For comparative studies obtained by the European Commission see research reports at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm; see also, Department of Trade and Industry, *Comparative Report on Consumer Policy Regimes* (London, October 2003), available at: www.dti.gov.uk/ccp/publications.htm.

11 Art 5(4).

12 Art 5(5).

13 Annex 1, paras 6, 7, and 31 respectively.

examples of blatant unfairness will not directly assist decisions in borderline cases of unfairness except through reasoning by analogy. In practice, it seems likely that most contested commercial practices will fall under the heading of two main forms of automatic unfairness: misleading practices and aggressive practices.

In brief, a misleading practice is described as one that contains false information or ‘in any way, including overall presentation, deceives or likely to deceive the average consumer, even if the information is factually correct’, and that information relates to the nature and characteristics of the product, the price, the nature and attributes of the trader, the legal rights of the consumer, and the extent of the trader’s commitments, the motives for the commercial practice and the nature of the sales process, and claims regarding sponsorship of the trader or the product.¹⁴ This rather comprehensive list extends from misleading price indications, such as claims that prices of goods have been ‘slashed’ (whereas in fact the price is more or less the same as before), to commercial practices through which the trader pretends that no sale is envisaged at all, as where the trader purports to be carrying out a ‘survey’ or asking people to participate in a ‘free trial’. A misleading practice can also be committed by a misleading omission of material information,¹⁵ which raises the topic of duties to supply information that will be considered below.

The Directive also specifies in some detail the characteristics of aggressive commercial practices that will be regarded as automatically unfair.

A commercial practice shall be regarded as aggressive if, in its factual context, taking into account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

As well as catching trading practices that use threatening language or threats to take action that cannot be legally taken, this provision is designed to extend to more subtle techniques of coercion. For example, some traders, having succeeded in obtaining entry to a potential customer’s home, without making any explicit threats simply fail to leave the premises until something has been signed, and the consumer, particularly if frail and elderly, may reach the point of being willing to sign anything to get rid of the salesman. Another example of harassment contained in the black list of automatically unfair commercial practices is the making of persistent and unwanted solicitations

¹⁴ Art 6(1).

¹⁵ Art 7(1).

by telephone or other remote media. Indeed the black list encourages a broad meaning for aggressive practices by some of its examples. In particular, it mentions two perennial problems for consumers. The first is for an insurance business to require a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or systematically to fail to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights. Notice in this example that the aggressive practice is constituted by an omission, namely the refusal to answer correspondence. A second problem suffered by every parent is the inclusion in advertisements of a direct exhortation to children to persuade their parents to buy advertised products for them. The scope of this prohibition depends crucially on the difference between a direct and an indirect exhortation, since all advertising aimed at children contains an indirect exhortation, even if it is disguised as a suggestion to the children to ask Santa Claus for a particular present.

These three techniques for rendering the concept of unfairness more precise and predictable will reduce, though certainly not eliminate entirely, the concerns of business about the vagueness and unpredictability of a general standard. The Directive does not employ a fourth technique that was suggested,¹⁶ namely to enable Codes of Conduct established by trade associations in cooperation with national and transnational authorities to provide more determinate guidance on permitted and prohibited commercial practices. This suggestion included the idea that compliance with a relevant trade code would provide a safe haven for a business in the sense that it could not be regarded as having committed an unfair commercial practice. Although this technique for creating certainty is not endorsed by the Directive, the legislation does permit national authorities to encourage trade associations to establish Codes of Conduct, and for those trade associations to police the conduct of their members. Even so, the national authorities must retain the power to take legal or effective administrative action against unfair commercial practices regardless of whether alternative remedies may be available under a code of conduct.¹⁷ The Directive provides further support for codes of conduct by including in the black list of unfair commercial practices both a claim to be a signatory to a code of conduct when the trader is not, and a false claim that a code has been endorsed by a public authority.¹⁸ In addition, the Directive

16 For various suggestions of this kind, see: H. Collins, 'EC Regulation of Commercial Practices', in Collins, n 2 above, 1, 30; Micklitz, n 2 above, 43, 76; and G. Howells, 'Co-regulation's Role in the Development of European Fair Trading Laws', in Collins, n 2 above, 119.

17 Art 10.

18 Annex 1, paras 1 and 3.

provides that where a trader indicates in a commercial practice that he is bound by a code, and the trader does not comply with firm, verifiable commitments contained in the code, that conduct shall be regarded as an unfair commercial practice.¹⁹ Thus, whilst conformity to a code does not provide a safe harbour for a trader, non-conformity to a precise obligation under a code to which the trader has associated his business will automatically result in a finding of an unfair commercial practice. The failure to provide any kind of safe harbour for traders within a code does raise the possibility that traders will decline to subscribe to codes, since their breach may result in an automatic finding of unfairness, whereas membership only affords the uncertain benefit of promoting consumer confidence.²⁰

II. The Implications for European Contract Law

Through its broad scope and general standard the Directive plainly introduces a significant control over marketing practices throughout Europe. The obligation on Member States is to ensure that adequate and effective means are created to combat unfair commercial practices.²¹ These means must include measures that enable appropriate national authorities and organisations to bring legal or administrative procedures that will result in orders for the cessation of unfair commercial practices.²² Furthermore, national law must include the power for courts or administrative authorities to impose penalties for the unfair commercial practices, and these penalties 'must be effective, proportionate and dissuasive'.²³ With these enforcement requirements, the Directive plainly intends Member States to create a regulatory apparatus that uses injunctions and fines in order to prevent and deter the use of unfair commercial practices. The question then arises, especially for readers of this journal, of what are the implications of this Directive for the evolution of contract law in Europe.

19 Art 6(2)(b).

20 Department of Trade and Industry, The European Commission's Consultation on the Follow-up Communication to the Green Paper on EU Consumer Protection: Response of the UK Government (London: DTI, October 2002) para 28.

21 Art 11(2).

22 Art 11(2). In addition, by Art 16, the need to provide effective enforcement measures includes both its inclusion in the procedures for collective actions for injunctive relief (Dir 98/27) and the duty to promote cooperation between national authorities responsible for the enforcement of consumer protection law (Regulation No 2006/2004).

23 Art 13.

On one level, there are no direct consequences for contract law. The Directive tries to insist that it has no implications for national or European contract law:

This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.²⁴

In other words, the Directive does not require national laws to adopt a principle that, if the formation of a contract is tainted by an unfair commercial practice, the contract itself should be invalid or voidable. Nor does the Directive require national laws to provide compensatory remedies to the victims of unfair commercial practices. On a formal level, therefore, the national rules governing fraud and coercion are unaffected by the Directive. Yet we can anticipate that the Directive and its implementing national legislation are likely to have two effects on the evolution of contract law in Europe.

First, the presence of implementing legislation in the national legal system seems likely to influence the development of private law. Where a marketing practice has been identified as unfair under rules implementing the legislation, with the business therefore committing an administrative or criminal offence, it seems likely that a court would be reluctant to refuse to permit the consumer also to escape from the relevant transaction. The national rules of private law governing the formation of binding contracts usually have sufficient flexibility to be extended to cover these kinds of prohibited commercial practices. In the past, however, courts may have been cautious about extending the invalidity of contracts to some of the borderline instances of unfairness. For example, some representations of traders may be highly misleading, even though not strictly speaking untruthful, and national legal systems may have been reluctant to invalidate a transaction without evidence of a false statement. The presence of a broad standard in consumer law may provide an impetus for national courts to extend the concepts of private law, such as ‘*culpa in contrahendo*’, ‘*dol par réticence*’, and ‘*misrepresentation*’, to include a wider range of misleading statements.

In a similar way, the concept of an unfair commercial practice may influence the development of compensatory remedies for those who are harmed by such pre-contractual behaviour. Although these compensatory remedies may be classified by national legal systems as either contractual, delictual, or some kind of hybrid, it seems clear that the Directive is not intended to affect their development in national law. It is possible, however, that the courts and doctrinal writers will be encouraged to extend their scope where necessary, so

24 Art 3(2).

that a compensatory remedy will become normally available for loss caused by an unfair commercial practice. In some national legal systems, private law may evolve so far as to regard an unfair commercial practice as a type of statutory tort or wrong, which should always give rise to a compensatory remedy on proof of damage.

Secondly, the Directive seems likely to have a major impact on the development of European contract law. The Directive now forms part of the *acquis communautaire*, from which will be developed the ‘common frame of reference’ and other possible measures such as an ‘optional instrument’.²⁵ Although the Directive is confined to transactions between a business and a consumer, that restriction may not be regarded as significant in the development of general principles of contract law in Europe, since businesses themselves, particularly small business, often require equivalent protection against unfair commercial practices. The Directive therefore provides strong impetus for the development of a general principle of good faith in the context of pre-contractual negotiations. Indeed, by referring to ‘the’ principle of good faith, the Directive seems to presuppose that a principle of good faith is already part of the *acquis communautaire*.²⁶

The Directive also endorses other concepts that may become important themes in the evolving European contract law. For example, it contains a definition of ‘undue influence’, a term drawn from common law, but which now has a European community meaning for the concept:

Exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.

This concept differs from the rather ill-defined common law concept of undue influence, which has tended to focus on situations where one party ex-

25 European Commission, *A More Coherent European Contract Law: Action Plan*, 12 February 2003, COM(2003) 68 final, OJEC 2003 C 63/1. For discussion of these proposals see: M. Meli / M. R. Maugeri (eds), *L’Armonizzazione Del Diritto Privato Europeo: Il Piano D’Azione 2003* (Milano: Guiffre, 2004); V. Roppo (ed), *A European Civil Code?: Perspective and Problems* (Milano: Guiffre, 2005); Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: A Manifesto’, (2004) 10 *European Law Journal* 653; House of Lords, ‘European Union Committee 12th Report of Session 2004–05’, *European Contract Law – the Way Forward?* (London, 5/4/05) HL Paper 95.

26 In the original proposed amendment, however, the requirement of good faith was identified with the provision in the unfair terms in consumer contracts Directive 93/13: Opinion of the Committee on the Environment, Public Health and Consumer Policy of the European parliament, 24 November 2003, 2003/0134(COD).

exploits a relation of trust and confidence to its advantage. But the European concept of undue influence could lay the foundation for more general provisions concerning the use of coercion in private law. The definition, as stated, however, does not seem entirely satisfactory for that purpose. It seems to insist that this subtle form of coercion should affect the weaker party's ability to make an informed decision. That will often be the problem, but in some cases of undue influence, as in my earlier example of an elderly person who cannot get rid of a salesman without signing a document, the pressure has the effect of reducing the freedom to choose to make a decision to enter a transaction at all, even if the consumer has all the correct information. Perhaps such cases will be categorised under the concept of harassment, which is not further defined in this Directive.

III. Relevance to Competition Law

The new Directive is often presented as a measure of consumer protection law, though its formal legal basis was solely the internal market Treaty provision in Article 95 ECT.²⁷ But it also has indirect implications for competition law. Indeed, in some countries such as Germany, this topic of unfair commercial practices is regarded as an integral aspect of competition rules, with the benefits to consumers as a desirable side-effect. The reason for the overlap between consumer protection and competition law is that unfair marketing techniques employed by a business to increase its share of the market by duping consumers are likely to have an adverse effect on competitors. For example, a shop in the high street that falsely claims that it has reduced its prices as a result of a sale is likely to attract more customers, to the possible detriment of other shops in the high street. Similarly, a business that makes its product appear like a well-known brand may benefit from the good reputation of the brand and divert customers away from the seller of the branded product. Prohibition of such practices as unfair not only protects the consumer against deception, but also protects the business that suffers from unfair competition.

27 The preamble also refers to EC Art 153, however, which suggests that consumer protection can be regarded as an objective of the Directive for the purpose of interpretation in the case of uncertainty about the needs of the internal market. For the limits of the legal basis in Art 153, see: H.-W. Micklitz / S. Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht', (1993) *Journal of Consumer Policy* 285; J. Stuyck, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?', (2000) 37 *Common Market Law Review* 367.

Owing to its origins as a consumer protection measure, however, the Directive does not regulate these kinds of unfair competitive practices directly. It is necessary for the national authorities to establish that consumers would be likely to be deceived by the practice into taking a transactional decision that they would not otherwise have taken. It is not sufficient under this Directive merely to demonstrate that the trader has deliberately sought to create a misleading impression in order to induce customers to enter the shop. Nevertheless, provided that the enforcement authorities can establish that a consumer's transactional decision was likely to have been affected, it is an unfair commercial practice for the trader to market or promote products, including the use of comparative advertising, in a way which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor.²⁸ Similarly, fair competition between traders will be enhanced by the prohibition of other kinds of misleading statements, such as false or misleading claims about the existence of a specific price advantage,²⁹ or about the attributes of the trader.³⁰

This separation in European law between competition law and consumer protection law may prove untenable in the long run. In the preamble to the new Directive, Council and Parliament perhaps acknowledge as much. In a rather unusual forward-looking statement, the preamble observes:

It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.³¹

The purpose of this statement is no doubt to placate opposition from some Member States such as Germany that already have an integrated approach to competition and consumer protection, but it does suggest that it will not be long before the Commission makes proposals to prevent unfair commercial practices more broadly, including those relating to business to business transactions.

28 Art 6(2)(a); Annex 1, para 13 in the black list also includes 'Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.'

29 Art 6(1)(d).

30 Art 6(1)(f).

31 Para (8).

IV. Maximal Harmonisation

One of the principal justifications for the need for the Directive on unfair commercial practices was the need to increase harmonisation of laws in order to promote cross-border trade. The Commission argued that traders were deterred from marketing their goods and services across borders for fear of infringing local national laws. In other words, their marketing techniques, though permitted in their country of origin, might be forbidden in the country where the traders were trying to sell directly to consumers. This legal risk, it was alleged, deterred cross-border marketing. Assuming that this problem does exist, there are a number of ways in which it might be addressed.

One strategy is to adopt the ‘country of origin’ principle, which has been used for product standards and some directives concerned with trading standards.³² Under this principle, also known as ‘mutual recognition’, provided that a trader could demonstrate that the market practice was lawful in its country of origin, then that market practice could be employed without interference in other national jurisdictions. Support for this approach could be found from business organisations and some national governments.³³ In effect, this country of origin principle would have provided businesses with a safe harbour against enforcement of local laws when trading abroad, provided that they could secure approval of their marketing practices in their country of origin. For example, if one country in Europe tolerated schemes in which consumers were induced to incur expenditure by the misleading promise of prizes, every other country would have to tolerate such scams provided that the business running that operation had its main site of business in the permissive country. This approach would certainly have overcome the alleged obstacle to cross-border trade presented by diversity in national consumer protection laws. But in so doing, it would have effectively levelled down consumer protection against unfair commercial practices to the point accepted by the most permissive economies.

In truth, this country of origin principle, though effective in reducing barriers to trade and convenient for achieving political agreement in Council, has never been very attractive as a standard for harmonisation of market rules in Europe. As well as perhaps encouraging a ‘race to the bottom’ in consumer protection measures, a well-informed consumer living in a country with high

32 Eg Dir 89/522, as amended by Dir 97/36 (television without frontiers); Dir 2000/31 (e-commerce), though these directives also establish some minimum standards.

33 Countries supporting the country of origin principle were UK, Netherlands, Luxembourg and Estonia: Competitiveness Council, political agreement, Brussels, 25 May 2004, 9667/04, Annex 2, para 2.

levels of protection would find no reason to alter behaviour and enter transactions with foreign companies for fear that the country of origin rules might provide inferior protection. The final version of the Directive rejects the country of origin principle, and instead imposes full harmonisation.

Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

The objective of this provision is to prevent national legislatures from regulating commercial practices towards consumers in ways at variance with the good faith standard adopted in the Directive. What the provision means is not that Member States should not regulate this field of unfair commercial practices, which is what it says literally, but rather that national laws should not enact rules that differ from the principles of the Directive. In particular, Member States are not permitted to create more stringent measures of consumer protection. In other words, the Directive is an instance of maximal or full harmonisation, rather than the normal minimum level of harmonisation provided by most earlier consumer protection laws.

The proposal for full harmonisation or, in view of the level of detail contained in the Directive, almost a uniform law, provoked opposition on two grounds. Supporters of the consumer interest were concerned that the effect of the Directive might be to require national governments actually to reduce the level of consumer protection. In particular, in those fields already harmonised by directives setting minimum standards, the new Directive might require Member States to adjust their legislation downwards in order to make it less restrictive with respect to marketing practices.³⁴ This problem has already emerged in connection with product liability,³⁵ where France's decision not to implement a minimum threshold for the amount of damage was held to be incompatible with the directive.³⁶ A second ground for opposition to full harmonisation was that the new Directive would have the effect of freezing consumer protection laws in Europe, so that experimentation by national governments to find new ways to protect the consumer would be inhibited by the need to conform to the European standard.³⁷

In response to the former objection, the Directive contains a circumspect derogation. Until 2013 Member States may continue to apply national provisions

34 For this reason Denmark and Sweden did not support the Directive: Competitiveness Council, political agreement, Brussels, 25 May 2004, 9667/04, Annex 2, para 4.

35 Dir 85/374, Art 9.

36 Case C-52/00 *Commission v France* [2002] ECR I-3827 (ECJ).

37 G. Howells / T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age?', (2003) 9 *European Law Journal* 370.

in this field of unfair commercial practices that are more restrictive or protective of consumers provided that two further conditions are met. First, the restrictive national legislation must be a law that implements an earlier directive containing a minimum harmonisation clause. Second, the retained measure must be one that is essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective.³⁸ It seems to be envisaged that the Commission will be able to contest claims by Member States that their restrictive rules satisfy these two conditions. If the Commission is in the mood to insist strongly on uniform laws, it will be very hard for national governments to defend the retention of their restrictive laws under this test. The Commission will no doubt form the view that its unfair commercial practices directive provides adequate protection for consumers, and that any more restrictive regulation is a disproportionate and unnecessary interference with the operation of the single market. It is important to note, however, that as the new Directive explicitly avoids any harmonisation of private contract law, national rules that provide compensatory remedies for consumers or the ability to avoid contracts will not be affected by this drive for uniformity.

The new Directive also contains some more precise exceptions to its scope and coverage through which more restrictive national laws can be preserved. The Directive is stated to be without prejudice to those national rules governing regulated professions that serve the purpose of upholding high standards of integrity on the part of the professional.³⁹ The Directive does not apply to national rules governing the certification and indication of the standard of fineness of articles of precious metals, such as the hallmark system for gold and silver used in the UK. Furthermore, the Directive is stated to apply only a minimum standard with respect to transactions in financial services and immovable property, so that national laws may impose requirements that are more restrictive or prescriptive in these fields of commerce.⁴⁰ These areas are excluded from the scope of full harmonisation on the ground that the typical complexity of transactions in these fields combined with the seriousness of the risks to consumers may warrant more elaborate and detailed protections for consumers. The new Directive also makes it clear that it does not apply to national restrictions introduced for the purpose of protecting the health and safety of consumers. Thus, to mention one area of controversy, rules governing tobacco advertising are not affected in so far as they are justified on the ground of protecting the health and safety of consumers.

38 Art 3(5).

39 Art 3(8); Art 2(l).

40 Art 3(9).

These derogations and exceptions from the scope of the Directive do not really answer the criticisms of the uniform law that it may lead to a reduction in protective standards in some countries with highly developed consumer protection laws, and that it may discourage experimentation in new kinds of protective measures for consumers against unfair commercial practices. The latter criticism may turn out to be misplaced, however, given the breadth of the general standard of good faith and the considerable flexibility granted to Member States on modes of implementation and enforcement. Experimentation may continue either by exploring the possible meanings of good faith or by devising new methods of securing compliance by traders with the general standard. In particular, the reference to the reasonable expectations of consumers in the general test of unfairness may enable courts and doctrinal writers to suggest new standards or criteria with which traders should be expected to comply.

Finally, it should be noted that the effect of maximal harmonisation is to place considerable pressure on the legal system to draw a sharp distinction between the field of application of the Directive, where no deviations are permitted, and closely related but uncovered fields, where national law is either unaffected or merely has to comply with minimum standards contained in other European directives. In this context the concept of an unfair commercial practice, considered above, will become a crucial determinant of the scope of pre-emption by European law. Some commercial practices, though perhaps regarded as unsavoury or undesirable, will not fall within the scope of the directive because they may not distort consumers' transactional decisions. For example, regulations concerning taste and decency fall outside the scope of the Directive. Other regulations governing commercial communications, such as reports of companies to their investors and general promotions of a brand image are also likely to fall outside the pre-empted field. In determining the field of application of the Directive, it is important to remember, however, that it is not confined to cases concerning a trader's conduct that leads to a transaction; it encompasses unfair trading practices that occur outside any contractual relationship between a consumer and a trader. The Directive also applies to certain aspects of the performance of contracts, as where misleading statements are made with respect to a complaint mechanism offered by the trader, or where the trader blocks an attempt by a consumer to use a complaint mechanism.

V. Information Duties

In theory, it is possible to make a sharp distinction between the regulation of false or misleading statements and duties to provide or disclose information. The former regulation controls the accuracy of information circulating in the marketplace; the latter enhances the amount of information available in the marketplace. The former regulation is generally regarded as necessary and desirable: the circulation of false information obstructs competition in markets and harms individual consumers who are the victims of fraud. But the latter kind of regulation, which requires producers and traders to provide information to their customers, is more controversial: in part because it imposes costs on business; in part because some of that information may be regarded by the business as confidential and commercially valuable; and in part because it is unclear often whether the provision of additional information really helps competition in markets or assists consumers to satisfy their preferences better owing to problems of information overload and the difficulty of understanding technical information. But the sharp distinction often drawn between control over misleading statements and duties to provide information tends to break down when we consider the proper scope of control over unfair commercial practices.

The difficulty of drawing this distinction arises because traders may find it to their commercial advantage to be 'economical with the truth'. Nothing that is actually said or written down by the seller is inaccurate, but the overall impression given to the consumer is misleading, because some information that reveals a weakness of the product or an additional cost is omitted. In order to address this problem, Article 7(1) of the new directive introduces the concept of a 'misleading omission' as an automatically unfair commercial practice.

A commercial practice shall be regarded as misleading if, in its factual context, taking into account of all its features and circumstances and the limitation of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

This provision might apply for instance to the purchase of a house where the estate agent omits to mention the government's plan to build a large road at the bottom of the garden. But that material omission is not necessarily an unfair commercial practice once the circumstances and the medium of communication is taken into account. That latter qualification seems to suggest that, if the communication of the estate agent is given orally or perhaps in a document that describes itself as a brief summary of the qualities of the property for sale, the omission will not be regarded as material in all the circumstances.

One response to the new Directive may therefore be an unwillingness on the part of some traders to provide detailed written information for fear of making a material omission, or in the alternative, to provide information but also to state clearly that the document does not purport to be comprehensive and does not provide information on certain material issues that would affect a transactional decision. A difficult area in this respect is price labelling in shops: the question is how much detail can be expected from a shop in its price labelling of goods on the shelves when it offers a discount or some other kind of promotion.

An issue that is not clearly resolved by the Directive is whether it is necessary to demonstrate that the trader itself knew of the omitted material information and appreciated its importance to the transactional decision of the consumer. Suppose in my example that the estate agent did not know of the government's plan, perhaps as a result of carelessness or incompetence. Would the failure to disclose the information amount to an unfair commercial practice in such circumstances? In other words, are honest or negligent omissions of material information equally regarded as misleading commercial practices? Although the Directive does not answer this question directly, it can perhaps be inferred from the concept of 'professional diligence',⁴¹ which forms part of the general test of unfairness, that at least careless omissions should be included in this category of misleading omissions. A similar question about the necessary state of mind of the seller also arises in a related provision of Article 7(2) that describes as an unfair commercial practice the case where a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner the relevant material information.

In appreciating the scope of Article 7(1), it is also important to recall that a transactional decision is defined in the Directive to include not only a consumer's decision whether or not to enter a contract, but also on what terms to enter a transaction and whether or not to exercise a contractual right in relation to a product. Thus, for example, a seller who fails to point out to a dissatisfied consumer that under the terms of the contract the consumer is entitled to compensation or to have the good replaced free of charge might be committing an unfair commercial practice under Article 7(1). Equally, a trader who in fact provides that information but in small print that is hard for the average consumer to understand may also be committing an unfair commercial practice.

Another difficult question for this provision regarding omissions is to determine what information is 'material' and therefore should have been disclosed

41 N 4 above.

or made available. Part of the answer must lie in the concept of a transactional decision: the information is likely to be classified as material if it would have affected the transactional decision of the average consumer. In addition, the Directive provides a list of certain types of information that will be regarded as material in the case of an invitation to purchase.⁴² The trader must supply that information unless it is apparent from the context.⁴³ This duty to provide information in the context of an invitation to purchase includes the main characteristics of the product or service, the geographical address and the identity of the business, the price inclusive of taxes and transport charges, the arrangements for payment, delivery and complaint handling if they differ from the normal standards of professional diligence, and the existence of any right to cancellation or withdrawal. Furthermore, any other information requirements established by Community law in relation to commercial communications in general will also be regarded as material information that, if omitted, would be regarded as an unfair commercial practice.⁴⁴ In effect, this provision turns all the prior information duties towards consumers enacted by Community law into material information for the purpose of establishing an unfair commercial practice. For example, the duties imposed on tour operators to provide information concerning package holidays, such as the itinerary, mode of transport, type and class of accommodation, meal plan, and arrangements for payment, will all be regarded now as material information, failure to disclose which is contrary to the implementing provisions of the Package Travel Directive,⁴⁵ will also be contrary to the new Directive as an unfair commercial practice by comprising a misleading omission.

In reviewing these comprehensive provisions regarding misleading omissions and duties to supply information, it is worth making three further observations. First, although confined to consumer transactions, this general duty to supply material information goes further than most, if not all, private law systems in Europe in setting a high requirement of disclosure.⁴⁶ It seems likely to encourage the courts and doctrinal writers to assert broader duties of disclosure in private law in order to permit consumers to escape from

42 An 'invitation to purchase' is defined as 'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enable the consumer to make a purchase': Art 2(i).

43 Art 7(4).

44 Art 7(5). The Directive includes in Annex II a non-exhaustive list of the existing Directives that impose information requirements in the context of advertising and marketing.

45 Dir 90/314, Art 3.

46 See the analysis in R. Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005).

transactions into which they have entered as a result of an unfair commercial practice. In steering this development, the new Directive introduces a novel distinction between commercial practices that form part of an invitation to purchase, and commercial practices that are merely aimed at influencing a transactional decision. That distinction enables the legislation to insist upon precise disclosure requirements that apply at the time of sale. The concept of an invitation to purchase may provide the foundation for the evolution of more intensive and precise duties of disclosure and good faith in pre-contractual negotiations.

Second, with respect to the uniform standard or maximal harmonisation established by the new Directive, it should be observed that where national laws have implemented earlier Directives that permit more stringent standards, as in the case of the Package Travel Directive, those additional national duties to provide information to the consumer will not be regarded as material omissions for the purpose of establishing an unfair commercial practice. The retention in national law of those additional duties to supply information will only be permitted, however, under the test of proportionality described above.⁴⁷

Finally, it should be noted that there is an overlap between the concept of misleading omissions contained in the new Directive and the duties of information proposed in the draft Sales Promotion Regulation.⁴⁸ A sales promotion is a commercial communication designed to promote the goods, services, or image of a business by means of offering discounts, free gifts (buy one, get one free), a premium such as a voucher towards another product, or by offering a promotional contest or game. When making such sales promotions, the proposed regulation describes in detail the information that must be supplied by the promoter. In the case of the promotion by means of discounted prices, for instance, the proposed regulation requires a trader to supply the exact value of the discount, the reference price, and any limitations applicable to the discount. The proposed Regulation is also intended to establish a uniform law in order to reduce barriers to cross-border trade. There is no indication, however, either in the new Directive or in the proposed Regulation of how

⁴⁷ See text at n 38 above.

⁴⁸ *Amended Proposal for a Regulation concerning Sales Promotions in the Single Market* COM(2002) 585 final, Brussels 25.10.2002; Following disagreements in Council, the Dutch presidency proposed various compromises that were not accepted: Sales Promotion Regulation 17 September 2004 (12498/04), and Note of Competitiveness Council Meeting of 24 September 2004. Outstanding issues concern the need for full harmonisation, the extent of information duties, and whether or not to use a Regulation as opposed to a Directive.

these two legislative instruments will work together in areas of overlap. For example, will the failure to provide the exact value of any discount amount to an unfair commercial practice? Under the proposed regulation, the duty to supply that information is an absolute one, whereas under the Directive there is always the qualification that the omission of material information may be excusable where that is justified by reasons of limitations of space and time imposed by the communication medium used, or where that information should have been apparent in the context.

VI. Credulous Consumers

The British government frequently issues the warning: 'If it seems too good to be true, it is'. Nevertheless, promises that seem too good to be true circulate in vast numbers, which suggests that at least a few consumers are seduced by the various scams. Children, young people, the elderly and infirm may be the most common victims of these kinds of rackets. When most consumers receive a letter saying that they have won a vast prize in a competition that they have not entered, they put it in the bin. But some will call the telephone hotline at great expense, or send off the necessary payment to obtain their prize. In short, whereas many misleading offers and statements will not change the economic behaviour of the average consumer, they may affect a credulous consumer.

The new Directive uses the average consumer as its principal test for whether or not the commercial practice is unfair. Hence a hyperbolic statement about a product that an average consumer would not treat seriously will not be caught by the Directive's prohibitions. But that focus on the average consumer, which follows the jurisprudence of the European Court of Justice, is qualified in three ways. First, the average consumer is defined as the average member of the group when a commercial practice is directed to a particular group of consumers.⁴⁹ Thus when a commercial practice is directed towards the elderly and infirm, the level of sophistication and credulity expected from the consumer would be that of the average member of that group of consumers, not an average of the population as a whole. Second, where a commercial practice is of a type that is likely to materially distort the economic behaviour of an identifiable group, such as children, because they are particularly vulnerable to the practice or the product, again the fairness of the commercial practice should be assessed from the perspective of the average member of that group.⁵⁰ Finally,

⁴⁹ Art 5(2)(b).

⁵⁰ Art 5(3).

however, the Directive reasserts that there are some exaggerated statements in advertising that are not meant to be taken literally, and that no consumer, no matter how credulous or naïve, should rely upon.⁵¹

VII. The Coherence of the *Acquis Communautaire*

The new Directive was always regarded as a type of framework Directive in the sense that it would provide general standards to govern the wide range of activities involving in advertising and marketing. It was hoped that the sheer breadth of the Directive would assist in bringing coherence to the *acquis communautaire*. Since the EC had already introduced a considerable amount of legislation in this field, however, the question arose of how to bring the whole body of law into systematic harmony. The general principle contained in the Directive is that more specific legislation on particular issues will exclude the general standards of the framework.

In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.⁵²

The effect of this provision is to leave in place prior Directives either when they impose higher standards of consumer protection or lower standards.

In addition, the new Directive makes a few attempts to harmonise the law by amending prior legislation. For instance, the Directive on misleading advertising is amended to exclude advertising directed towards consumers, so that its purpose is now solely to protect other traders, and in particular to prevent misleading, denigrating, comparative advertising.⁵³ With respect to inertia selling, this is now a prohibited unfair commercial practice under the new Directive,⁵⁴ but the rules in the earlier directives on distance selling,⁵⁵ which prevent the consumer from incurring any private law obligations, such as an obligation to pay for unsolicited goods, are re-enacted.⁵⁶ It seems unlikely that these few measures will have dealt with all the potential overlaps between the new framework Directive and the existing *acquis communautaire*.

51 Art 5(3).

52 Art 3(4).

53 Art 14, which amends Dir 84/450. The definition of 'misleading' in the amended Directive on advertising does include, however, the definition provided in the new Directive.

54 Annex I, para 29.

55 Dir 97/7 (distance selling), Art 9; Dir 2002/65 (distance marketing of financial services), Art 9.

56 Art 15.

Yet the most important issue with respect to the coherence of the *acquis communautaire* concerns the question whether it is useful in the long run to draw the sharp distinction contained in this Directive between business to consumer transactions and business to business interactions. This distinction may have more to do with the division of responsibilities within the Commission than with the development of a coherent body of European law to govern marketing. It is noteworthy in this context that the proposed Regulation on Sales Promotions is not confined by reference to the need to protect consumers. Arguments for regulating unfair commercial practices based upon market failure and the need to promote a competitive market throughout Europe apply equally to business to business transactions. There is no reason to suppose that a professional cannot be duped by misleading statements or coerced by aggressive practices in some instances. Furthermore, even if a case can be made for regarding the protection of consumers as a priority in Europe, as we have previously noted, any measure in this field of commercial practices has an indirect impact on other traders by protecting them from unfair competition from other businesses. Member States such as Germany and Austria, where national laws adopt an approach that integrates the protection of both entrepreneurs and consumers, objected to this exclusive focus on consumers, and insisted that they would continue to adopt an integrated approach in national law whilst conforming to the Directive.⁵⁷ That move may create pressure to create a more coherent body of European law with regard to unfair competitive practices that does not introduce the artificial exclusive emphasis on consumer protection.

VIII. Conclusion

At a time when prospects for further measures of European integration look rather poor following the defeat of the proposed Constitution, the new Directive on unfair commercial practices amounts to a remarkable political achievement. Despite vigorous opposition from some Member States on the grounds that the law provided either too much or too little protection for consumers, and also that in any case it was an unnecessary duplication of national laws, the Commission has succeeded in pushing through this flagship legislation within its agenda of enhancing consumer confidence in the internal market. Perhaps a key ingredient in this success has been both a willingness to produce a more detailed legislative text than is common with Euro-

57 Competitiveness Council, political agreement, Brussels, 25 May 2004, 9667/04, Annex 2, para 3.

pean directives combined with a relatively clearly defined policy objective that informs all the measures.

Indeed, a general impression left after reading the new Directive is that it was written by economists, using a theory of market failure, without much attention to prior law. It is replete with concepts that seem to be derived from textbooks on economics such as ‘material distortion of the economic behaviour of consumers’, a ‘transactional decision’, and ‘invitation to purchase’. The Directive seems to be relatively uninterested in issues that frequently concern lawyers, such as the question whether the trader has to be proved to be at fault in some sense, or how to construct the necessary enforcement mechanisms. For instance, the Directive offers only meagre guidance on one important practical issue concerning the burden of proof. When the legal issue is whether or not the trader’s claims are factually accurate, the Directive suggests that, where appropriate, national law may require the trader to provide evidence of a statement’s accuracy.⁵⁸ The Directive therefore does not endorse a general requirement that the burden of proof should be placed on the trader to demonstrate the truthfulness of claims, as one might expect in a Directive aimed at consumer protection, but instead rather leaves the issue up in the air by indicating that such a requirement may be imposed when ‘appropriate’ in the circumstances of a particular case. National implementing legislation therefore enjoys a wide range of choice regarding how it constructs the burden of proof save that it must leave open the possibility of placing the burden on the trader in at least some instances of misleading statements. Nor has the Directive really thought through the potential interaction between legislative standards and codes of conduct, a matter of considerable interest for consumer groups and lawyers. The development of transnational codes for specific sectors could provide the most reliable method for protecting consumers, but the Commission does not appear to have pursued that option vigorously, no doubt because it would be even harder to obtain than the new legislation.

Given this focus of the Directive on the economic problem to be addressed rather than issues of legal process and doctrine, when national governments have to implement this Directive through national legislation, they will have to confront not only the usual task of translating European measures into terms and concepts that will function satisfactorily within their national legal systems, but also they will have to find ways of translating the economic concepts into workable legal concepts. In so doing, we may observe the increasing use of economic terminology throughout European private law systems: a colonisation by economic discourse of legal discourse.

58 Art 12.

Yet this translation problem will certainly not prove to be the hardest aspect of the task of national implementation legislation. The lazy route of simply copying out the provisions of the Directive and enacting them as domestic law will not work in this instance. The use of maximal harmonisation requires national legislators to amend or eliminate inconsistent national laws that occupy the same field as the Directive. Unless the national rules fall within one of the derogations described above, any existing legislation that controls unfair commercial practices will have to be revised so that it does not impose additional duties on traders. Implementation of the Directive will require national authorities to review the entire corpus of their consumer protection laws in order to eliminate possible conflicts.⁵⁹ Although the general duty to refrain from unfair commercial practices may not differ in substance from particularistic, sector specific, national legislation, maximum harmonisation will require the elimination of any more onerous or stringent requirements imposed on traders.

59 For a study of the possible impact of the directive see: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/impact_assessment_en.pdf.