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Harmonisation by Example: European Laws against Unfair Commercial Practices

The European Union is often presented as disunited and confused about its goals. While this perspective may be an apt description of the politics surrounding reforms to the governing treaties, it overlooks some of the important achievements of the European Community in laying the foundations for a competitive single market. In particular, increasingly comprehensive consumer protection measures are gradually transforming the legal framework that regulates everyday transactions in all the Member States. The boldest initiative enacted so far is the Unfair Commercial Practices Directive 2005.¹ This legislation creates uniform rules to govern all marketing practices which are designed to induce consumers to purchase goods and services. The regulation controls misleading advertising, false claims about products and services, deceptive pricing, high pressure sales techniques, and similar sharp practices. The Directive demonstrates an evolving confidence and clear strategic approach shared by the Commission, the Council of Ministers, and the European Parliament.² Even more ambitious in some respects is the next European legislation in the pipeline: the proposed Consumer Rights Directive.³ Although this latest proposal may be presented as a consolidation of more narrowly focused existing European directives concerning amongst other matters consumer guarantees and unfair terms,⁴ the sum is greater than the parts, because the draft directive envisages a comprehensive law governing consumer contracts for the purchase of goods and services. But will this new comprehensive European legislation succeed in its goal of harmonising the law of consumer protection across Europe in order to promote consumer confidence in the single market?

One persistent reason to doubt that European measures will succeed in their goal of uniform laws is the obstacle presented by wide divergences in national traditions in law and regulation.⁵ To implement consumer directives, each Member State has to fit

¹ Dir. 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/22, 11.6.2005. Unless otherwise stated, all references to Articles below refer to this Directive.

² See Commission, *EU Policy Strategy 2007-2013: Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them*, Brussels, 13.3.2007, COM(2007) 99 final.

³ Com (2008) 614/3, 8/10/2008.

⁴ Dir. 93/13 on unfair terms in consumer contracts [1993] OJ L95/29; Dir. 1999/44 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

⁵ The possibility and desirability of uniform private laws in Europe, given the existing diversity, has been much debated in recent years, beginning with the controversy about convergence: e.g. B.S. Markesinis (ed), *Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford: Oxford University Press, 1994); P. Legrand, 'European Legal Systems are Not Converging' (1996) 45 ICLQ 52; P. Legrand, 'Against a European Civil Code' (1997) 60 M L R 44; T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007); O. Lando, 'Can Europe Build Unity of Civil Law while Respecting Diversity?' (2006)

them into their existing regulatory and private law schemes. Officials and judges interpret the new laws in the light of national traditions and the context into which the European measures are inserted. It is not difficult to foresee that despite the harmonising efforts of the Directive, differences between national laws and practice will persist, and indeed that new divergences will arise.⁶ Acknowledging that such problems exist, the European Commission has proposed that what is required, in addition to a clarification and consolidation of the existing legislation, is the development of a ‘Common Frame of Reference’, which would provide common principles, concepts, and guidance for courts when interpreting legislation that implements Directives that affect private law.⁷

One reason why consumer protection directives have in the past only achieved patchy harmonisation has been their limited ambition of only setting minimum standards. Member States have been permitted to retain their existing laws in so far as they provide superior protection for consumers.⁸ This flexibility tolerates considerable divergence between national laws. For instance, the control of unfair terms in consumer contracts does not apply according to the Directive to transparent terms concerning the ‘main subject matter of the contract nor to the adequacy of the price or remuneration’.⁹ The minimum standard of the Directive permits national legislation to omit this restriction on the scope of the law, with the possible implication in some jurisdictions that an unfair price might be regarded as an unfair term, even if the term is transparent.¹⁰ Another reason for the persistence of differences between national laws in the context of consumer law is the narrow, sector specific focus of many Directives, or their only partial regulation of a particular field. Previous Directives have been confined, for instance, to particular marketing techniques such as doorstep sales,¹¹ or to narrow market sectors such as package holidays.¹² Similarly, the consumer guarantees Directive, though addressing some of the principal concerns of consumers when they are disappointed with products which they have purchased, was certainly not comprehensive in its coverage of legal issues. For instance, though it stresses the need for a right to repair of the goods, it

Europa e diritto privato 1; T. Wilhelmsson, ‘The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law’, in J. Smits (ed), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Gronigen: Europa Law Publishing, 2005) 121; H. Collins, *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2008) 124.

⁶ G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ (1998) 61 *Modern Law Review* 11.

⁷ Communication from the Commission to the European Parliament and the Council, *A More Coherent European Contract Law: An Action Plan*, Brussels, 12.2.2003, COM(2003) 68 final; Communication from the Commission to the European Parliament and the Council, *European Contract Law and the Revision of the acquis: The Way Forward*, Brussels, 11.10.2004, COM(2004) 651 final.

⁸ E.g. Art.8(2) Dir. 1999/44, above n 4, ‘Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.’

⁹ Art. 4(1) Dir. 93/13, above n. 4.

¹⁰ E.B. Capdevila and A. Giménez, ‘Unfair Terms in Contracts with Consumers in Spanish Law: Interpretation of the General Standard of Fairness and Effects of the List of Unfair Terms [2006/2007] 8 (2/3) *Contemporary Issues in Law* 200, 207; K.N. Christodoulou, ‘Standard Contract Terms in Greece’ [2006/2007] 8 (2/3) *Contemporary Issues in Law* 134, 137.

¹¹ Dir. 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

¹² Dir. 90/314 on package travel [1990] OJ L158/59.

contains no explicit reference to a remedy in compensatory damages for non-conforming goods.¹³

In these two respects, the Directive on Unfair Commercial Practices differs significantly from the earlier consumer law Directives. First, the legislation provides comprehensive rules to prohibit unfair trading practices throughout Europe. Such unfair practices may include misleading statements and advertising, aggressive selling techniques, prevarication and obstruction in the face of complaints, and, potentially, all the other tricks and devices used by dishonest traders to manipulate consumers' purchasing decisions. As well this broad coverage of all unfair commercial practices, the Directive differs from legislation during the past 20 years,¹⁴ secondly, because it requires full harmonisation or uniformity of national laws in accordance with its principles and rules, not merely conformity to minimum standards. In combination, these features reveal that the Directive seeks to pre-empt national law in the whole field of business practices aimed at inducing consumers to purchase goods and services. The proposed Consumer Rights Directive shares this character of providing comprehensive rules of full harmonisation.

Will this effort to pre-empt national laws succeed in achieving uniform laws throughout Europe? Even if all the Member States properly implement the Directive, perhaps in many cases simply by copying out its provisions verbatim, will this measure achieve uniformity in practice, or will the differences in language, traditions, philosophies, and practice continue to provoke divergences in interpretations and applications of the law?

The Directive on Unfair Commercial Practices strives hard to provide precise guidance to national authorities and courts about the scope of its provisions. It employs all the implements in the legal tool-box to communicate precise requirements to national legislators and courts. As well as using general principles and standards to determine its scope of application, it uses more precise rules and standards that apply to particular types of marketing techniques. Furthermore, this Directive employs unusually detailed definitions of many of its key concepts. These definitions are striking for their avoidance of traditional legal concepts drawn from national traditions. They create new concepts to which a special European meaning should be attributed, thereby reducing the risk that they might be interpreted as synonymous with concepts in national legal systems. In addition, the Directive creates a lengthy 'black-list' of prohibited commercial practices, which comprises simple, one sentence long, descriptions of unlawful marketing practices. Uniform practice throughout Europe is therefore sought not only by the application of common principles, standards and rules, the phrases in which often have precise technical meanings, but also by the application of examples.

The following discussion considers the likely degree of success of this bold initiative from Europe to harmonise the law of the internal market with respect to the marketing practices of businesses aimed at consumers. We consider in detail the impact on United Kingdom (UK) law of the implementation of the Directive by the Consumer Protection from Unfair Trading Regulations 2008, which entered into force on 26th May

¹³ M.C. Bianca and S. Grundmann (eds), *EU Sales Directive Commentary* (Antwerp: Intersentia, 2002) 175.

¹⁴ The most significant prior instance of full harmonisation is the much older directive on product liability, Dir. 85/374.

2008.¹⁵ This particular example demonstrates the radical character of the Directive in its quest to find a way to harmonise the laws of European Member States. For instance, to satisfy the requirement of full harmonisation, these U.K. Regulations necessarily enacted a major spring cleaning of the existing national consumer law. Schedule 4 to the Regulations refers to 40 items of primary legislation and 36 statutory instruments which had to be repealed or revised. Repealed legislation includes some cornerstones of domestic consumer protection law: the Trade Descriptions Act 1968 sections 1(1), 5-10, 13-15, the Consumer Protection Act 1987 sections 20-26 (misleading price indications), and the Control of Misleading Advertising Regulations 1988.¹⁶ The list of repeals also includes some quaint items, such as the Fraudulent Mediums Act 1951, a measure to catch persons who, with intent to deceive, pretend to be in touch with dead relatives by spiritualistic methods. The UK Government reported that the repeals include all the most important laws governing the regulation of commercial practices, judged by reference to the fact that they accounted for over 95% of the prosecutions in the field.¹⁷ The content of the UK Regulations tracks closely the structure and words of the underlying Directive. The principal differences arise from the need to specify repeals of existing domestic legislation and to provide the details of the methods of enforcement.

Through an examination of the national implementing legislation, we will try to assess how successful this European initiative will prove in achieving full harmonisation across the Member States. This note examines the principal provisions of the Regulations and some of the controversial questions that they address. In particular, we consider the significance for UK law of two major innovations: the creation of two new broad offences of ‘misleading omissions’ and ‘aggressive marketing practices’. We shall also consider the potential impact of the Directive on the private law of obligations, which may prove to be the Achilles heel for the project of harmonising the law of unfair marketing practices.

1 The European Debate

Such a major piece of European legislation was not enacted, of course, without debates between the Member States.¹⁸ When the European Commission first proposed a Directive,¹⁹ the UK government voiced some of the loudest objections.²⁰ It was

¹⁵ SI 2008/1277. Unless otherwise stated, all references to Regulations below refer to these Regulations.

¹⁶ S.I. 1988/915.

¹⁷ DTI, *Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive* (December 2006) URN 06/2121: ‘Following further consideration, and taking into account the responses received to the consultation, the Government will repeal provisions in 22 of the 29 laws affected. 13 of these laws will be repealed outright; 9 in part. This represents repeals in 75% of the laws considered. These 22 arguably include the most important laws considered, as they account for over 95% of prosecutions taken under all 29 between 2000-2005 (as notified to the OFT).’

¹⁸ For discussion, see: H. Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer and Competition Law Implications* (The Hague/London: Kluwer Law International, 2004). S. Weatherill and U. Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques*, (Oxford: Hart Publishing, 2007).

¹⁹ Commission, *Green Paper on European Union Consumer Protection*, 2 October 2001, COM(2001) 531.

suggested the proposed law containing a general clause, such as a duty to bargain in good faith or to trade fairly, was both dangerous and unnecessary. It was dangerous because it was so vague. Businesses would not know what was - and what was not - lawful commercial behaviour. The legal risks in trading under such a vague standard would, it was alleged, deter commerce and thereby harm the growth of the internal market. At the same time, it was asserted that the proposed Directive was unnecessary, at least in the UK. Domestic consumer law already contained extensive prohibitions against unfair commercial practices, such as misleading statements and advertising. If there were any gaps in this legislation, a point strongly asserted by consumer interest groups and other professionals,²¹ these could be better filled by tailored provisions that addressed particular problems rather than by some sweeping general clause.²²

But the pressure for harmonisation at European level was compelling. In particular, the German government was in the process of reforming its domestic law and it wanted to generalise these new rules across Europe. It could point to the risk, shared by other Member States with high levels of consumer protection laws, that these national measures might be undermined or avoided by the use of unfair commercial practices emanating from traders across the border. It would be hard, for instance, for national authorities to challenge misleading marketing statements to domestic consumers, such as a claim that using a carbolic smoke ball prevents influenza, if those statements were produced by a trader in a different jurisdiction where such statements were lawful. To promote consumer confidence to shop abroad, particularly through the emerging Internet markets, a substantial majority of Member States agreed that it was necessary to have strong, uniform laws that would weed out rogue traders wherever they might be located.²³

In many countries the rules on marketing do not distinguish between consumer protection measures and unfair conduct by a business that harms competitors. Indeed, an unfair commercial practice such as misleading advertising, if effective, should both harm consumers and damage the profits of competitors. In line with its domestic legislation, the German government pressed for rules to govern unfair commercial practices, whether or not those practices were aimed at harming consumers or competitors.²⁴ Application to competition between businesses was possible, because the Treaty basis for the Directive had to be the internal market provision of Article 95EC in order to achieve full

²⁰ Department of Trade and Industry, *Green Paper on EU Consumer Protection: UK Government Response* (London, Department of Trade and Industry, 2002); see H. Collins, 'EC Regulation of Unfair Commercial Practices', in Collins, above n 18, 1.

²¹ National Consumer Council, *The Case for a General Duty – Evidence to support the NCC's campaign for a General Duty not to Trade Unfairly* (London: NCC, 2002); Department of Trade and Industry, *Report of DTI Workshop on the Evidence for a "general duty to trade fairly"*. (London: DTI, July 2003)

²² See, for instance, the rejection of an amendment to the Enterprise Bill that provided for a prohibition against unfair commercial practices: House of Commons, Standing Committee B, 23 April 2002, column 248.

²³ Commission, *Follow-up Communication to the Green Paper on EU Consumer Protection*, 11 June 2002, COM(2002) 289 reported support from 12 Member States for a 'framework directive'.

²⁴ The German unfair competition act of 2004 retained the approach that consolidates unfair competition harmful to competitors as well as consumers: J. Stuyck, 'The Unfair Commercial Practices Directive and its Consequences for the Regulation of Sales Promotion and the Law of Unfair Competition' in Weatherill and Bernitz above n 18, 159, 169.

harmonisation.²⁵ Owing probably to its political origins within the Commission in the sphere of consumer protection, however, the Directive was confined to consumer protection rather than extending to unfair competition between businesses. As a practical matter, the coverage of the Directive may prove almost as broad: if a trader markets or promotes products for sale to consumers in a way which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor, this practice will be regarded as unfair.²⁶ In the UK, some of the prior national legislation such as the Trade Description Act 1968 applied to deceptions practiced against other businesses as well, so it was necessary to re-enact those laws in a separate statutory instrument.²⁷

Perhaps the deepest disagreement between the Member States during the passage of the Directive concerned the use of full harmonisation.²⁸ Supporters of consumer protection measures were concerned that some Member States might be forced to reduce their levels of protection. For this reason, Denmark and Sweden ultimately opposed the Directive.²⁹ A second ground for opposition to full harmonisation was a fear that the legislation would lock the whole of Europe into a particular model of regulation of marketing practices, which would be both hard to shift and would prohibit further experimentation by Member States.³⁰ This concern forms part of a more general suspicion of the rigidity of codified laws, particularly when their transnational operation effectively prevents rapid reform.³¹ The Directive does permit some time-limited preservation of national consumer laws, provided that they provide better protection for consumers and were measures designed to implement previous EC Directives. But even such retentions may be challenged by the Commission as disproportionate measures.³² The Directive is also stated to apply only a minimum standard for transactions in financial services and immoveable property, thereby permitting Member States to retain

²⁵ The Recitals in the preamble to the Directive refer to the consumer protection dimension of the internal market in Art.153, but Art. 153 (5) limits consumer initiatives to minimum harmonisation and there is also doubt about the question whether on its own Art.153 provides a sufficient legal basis for such qualified majority measures: H-W. Micklitz and 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.

²⁶ Dir Art 6(2)(a); Annex 1, para. 13. Reg. 5(3), Sched. 1, para. 13.

²⁷ The Business Protection from Misleading Marketing Regulations 2008 SI 2008/1276; Dir.2006/114 concerning misleading and comparative advertising OJ L 376, 27.12.2006, p.21.

²⁸ H. Collins, 'The Unfair Commercial Practices Directive' (2005) 1 *European Review of Contract Law* 417, 429-432.

²⁹ Competitiveness Council, political agreement, Brussels, 25 May 2004, 9667/04, Annex 2, para. 4. Similar fears have been expressed about the proposed Consumer Rights Directive, above n 3, which, by becoming full harmonisation, may remove some rights of consumers in the UK, such as the right of rejection of non-conforming goods.

³⁰ G. Howells and T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age?' (2003) 9 *European Law Journal* 370; G. Howells, 'European Consumer Law- the minimal and maximal harmonisation debate and pro independent consumer law competence,' in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 73.

³¹ T. Wilhelmsson, 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) 10 *European Review of Private Law* 77.

³² Art. 3(5); Collins, above n 28, 431.

their existing, sometimes more protective, laws in those fields.³³ Apart from conceding these exceptions, the Commission pressed hard for full harmonisation against the alternatives such as minimum harmonisation, perhaps combined with the ‘country of origin’ principle. In so doing, it clearly prioritised the competitiveness of the internal market over concerns either for conserving even higher levels of consumer protection in some countries or for reserving scope for national innovation.

In a reference for a preliminary ruling, the European Court of Justice reinforced the mandatory and pre-emptive quality of the Directive.³⁴ It declared that a Belgium law that prohibited the marketing practice of ‘combined offers’ (where the acquisition of one product is tied to the acquisition of other products) was contrary to the Directive because the national law absolutely prohibited such practices, whereas the Directive requires the national legislation merely to require an assessment of the practice according to the various definitions of unfair commercial practices. Hence the Belgium law should have imitated the approach of the U.K. in respect of the prohibition against the misuse of the phrase ‘by royal appointment’ contrary to s.12 Trade Descriptions Act 1968, an offence which is preserved, but is committed only if the conduct also satisfies the requirements of being an unfair commercial practice under the Regulations.

Having lost the debate over the need for the proposed Directive, the UK government concentrated its efforts on improving the content of the legislation. Instead of a positive duty to trade fairly, as originally mooted, the Directive creates a negative duty not to trade unfairly. The central principle or general clause of Regulation 3.-(1) states boldly: ‘Unfair commercial practices are prohibited...’ This shift to negative terminology fits more comfortably into the traditional British liberal perspective on the state that what is not prohibited is therefore permitted, thereby avoiding the appearance of the imposition on businesses of a vague positive duty to behave in ways dictated by the government.

As well as the general clause, the Directive achieves greater specificity by the introduction of a more detailed description of the most likely forms of unfair commercial practices in Articles 6-9: the prohibitions against misleading practices, misleading omissions, and aggressive practices. In addition, following the pattern set by Swiss law, Spanish law and the German legal reform, the Directive includes an Annex that provides a lengthy description of commercial practices which ‘in all circumstances shall be regarded as unfair’.³⁵ Given the wide disparity of the national laws of Member States,³⁶

³³ Art 3(9).

³⁴ Joined Cases C-261/07 *TB-NAB NV v Total Belgium* and C-299/07 *Galatea BVBA v Sonoma Magazines Belgium NV*, 23 April 2009.

³⁵ Art.5.5, referring to Annex 1.

³⁶ The Commission obtained detailed information about the laws from a large research team led by H-W. Micklitz, which was put on the web: http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/. See also: F. Henning-Bodewig, *Unfair Competition Law: European Union and Member States* (The Hague: Kluwer Law International, 2006); R. W. de Vry, *Towards a European Unfair Competition Law: A Clash Between Legal Families* (Leiden/Boston: Martinus Nijhoff, 2006). Another report obtained by the Commission, led by R. Schulze and H. Schulte-Nocke, investigated the potential impact of the Directive on national laws: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/impact_assessment_en.pdf. For an assessment of the likely impact in the UK: R. Bradgate, R. Brownsword, C. Twigg-Flessner, *The Impact of Adopting a Duty to Trade Fairly*, a report prepared for the Department of Trade and Industry by Institute for Commercial law Studies, University of Sheffield (July, 2003).

agreement on all these detailed provisions was a considerable achievement. It is expected that these specific rules and examples will cover the vast majority of cases and that it will be rare to have recourse to the general prohibition against unfair commercial practices. As well as the general clause in Regulation 3, the UK Regulations therefore include both three more specific (though still broad) prohibitions – the ‘mini general clauses’ of misleading actions (Regulation 5), misleading omissions (Regulation 6), and aggressive commercial practices (Regulation 7) – and a ‘black list’ of 31 factually described practices that are automatically regarded as unfair practices (Schedule 1).

From an original position of scepticism with respect to the value of an initiative containing a general clause, the UK government has, after all, found merit in this European law. The legislation has been presented by the Ministry of Business Enterprise and Regulatory Reform (BERR) as a desirable modernisation and simplification of the law. It will be ‘better regulation’, because it will be shorter and state general standards rather than endless complex detail. ‘This follows the Government’s belief that the existing consumer protection framework is complicated and fragmented and does not reflect the requirements of a simplified and modern legal framework’.³⁷ The principal benefits of the Directive and the Regulations are perceived to lie in the way uniform laws should make it easier for UK businesses to market their products to consumers in other Member States without falling foul of local marketing regulations, whilst at the same time contributing to a high standard of consumer protection.

2 The General Clause

- Regulation 3 (3) A commercial practice is unfair if-
- (a) it contravenes the requirements of professional diligence; and
 - (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

Does this general clause in Regulation 3(3) have a significant role to play in the application of the new law? The legislation provides that there is no need to invoke the general clause in Regulation 3(3) if a more particular provision is applicable. The ‘mini-general clauses’ and the ‘black list’ are self-standing offences, so that when they apply to the facts of a case, no reference to the general clause is required. Given that the black list identifies the most common forms of deception and trickery in its list of 31 items and that the mini general clauses have a wide range, it seems likely that the general clause will rarely be needed. The case for having a general clause is to provide a means by which enforcement authorities can attack novel forms of unfair commercial practices that have not been foreseen by the legislation. The general clause is supposed to make the legislation ‘future-proof’. The prior UK law also had a mechanism for achieving this goal in Part II of the Fair Trading Act 1973. In theory, this legislation enabled the Office of Fair Trading (OFT) to introduce new statutory instruments to counter novel kinds of unfair commercial practices. In practice, however, the mechanism proved cumbersome and fell into disuse. It proved simpler for the OFT to publicise a new abusive marketing technique and then ask the relevant Minister to do something about it in the form of a

³⁷ DTI, Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive (December 2006) URN 06/2121.

statutory instrument. The general clause in Regulation 3(3) should remove the need to create fresh regulations, provided that the impugned marketing technique falls within its scope. We should recognise, however, that the existence of the general clause opens the door to the possibility that when a novel unfair marketing technique comes along, which does not appear to be covered by the more specific rules and examples, national courts may differ in their applications of the general clause.

It is worth considering, therefore, how far the European legislator has been able to communicate precise standards through the general clause. In specifying the conditions to govern its scope, the general clause introduces the concepts of the breach of the requirements of ‘professional diligence’, and ‘material distortion’ of economic behaviour of the ‘average consumer’. In accordance with the Directive, the Regulations provide detailed definitions of these three concepts.³⁸ Some of these concepts are repeated in the mini general clauses, thus revealing how they inform the underlying philosophy and purpose of the legislation.

Professional Diligence

The concept of ‘professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either- (a) honest market practice in the trader’s field of activity, or (b) the general principle of good faith in the trader’s field of activity.’³⁹ The concepts of special skill and care, honesty, and good faith are not further defined. Despite its brevity, this definition contains many intertwining strands. Its first element comprises the notion that ‘professionals’ (a poor translation of the French concept that includes all kinds of businesses) owe a duty to bargain and to behave with care when dealing with consumers. The standard of care itself is fixed by a combination of the reasonable expectations of consumers and the idea that the trader should possess the appropriate skills for that line of business. But this standard of care is further specified by the minimum requirement that it must be either honest or comply with standards of good faith. In trying to define this concept of professional diligence, the legislature is struggling with two problems. On the one hand, it wants the standard of care to reflect the appropriate level of expertise for the trader: if the business holds itself out as having special expertise, the reasonable expectation of the consumer rises, and so accordingly the standard of care should be more demanding. On the other hand, the legislation does not want to endorse the low level of expectations which consumers may have when dealing with certain kinds of notorious rogue traders – perhaps used car salesmen or organisers of prize lotteries. Thus the sliding scale of reasonable care may be adjusted according to the ‘field of activity’, but there is an attempt to place a floor on acceptable behaviour by reference to honesty or good faith. The concept of professional diligence resembles the private law concept of ‘culpa in contrahendo’ by its attempt to combine the private law ideas of a duty to bargain with care and a duty to bargain in good faith into a single formulation. Has the attempt to impose a clear minimum standard on acceptable behaviour by use of the novel concept of professional diligence been successful?

³⁸ Reg. 2(1).

³⁹ Reg.2(1).

If a rogue trader uses selling techniques that avoid outright dishonesty, but nevertheless seem misleading and rather sharp practice, will this conduct be caught by the general clause? The official guidance issued by BERR and the OFT argues that ‘poor current practice that is widespread in an industry/sector cannot amount to an acceptable objective standard’ that meets the requirement of the reasonable expectation of the consumer.⁴⁰ This interpretation of the Regulations assumes that the concept of honesty has an objective element that sets a standard of care that may rise above current market practice. Although that view is likely to be correct with respect to the alternative concept of good faith, at least if it is awarded the meaning it usually has in European private law systems, it is hard to interpret the concept of honesty in other than its common legal meaning, which usually expresses a strong subjective element. Dishonest behaviour requires the person whose conduct is being impugned to appreciate that his behaviour is deviant or falling below expected standards. If a business merely follows standard market practices used by competitors, an unscrupulous trader may think this conduct is honest enough. This concern that the standard of honesty may permit low standards of care by reference to subjective beliefs is further strengthened by the enforcement provisions in the Regulations. Unlike the strict liability rules of the remainder of the Regulations, in order to obtain a conviction for a criminal offence under the general clause, the prosecution must prove *mens rea* in the form of intention or recklessness.⁴¹ This reinforcement of a subjective approach is, however, slightly diluted because a trader will be regarded as reckless if he engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence, whether or not the trader actually believes that the practice might contravene those requirements.⁴² Even so, the wording of the general clause does seem to allow considerable scope for traders to insist that their practices, though perhaps rather sharp or unscrupulous, avoid dishonesty and are so common in the line of business that consumers have no reasonable expectation of any different behaviour.

If that rather pessimistic view of the meaning of professional diligence is correct, it tends to confirm the view that the general clause merely provides a safety net behind the more particular provisions, one with a rather large mesh. Furthermore, the ambiguities in the concepts of good faith and honesty seem to provide considerable scope for divergence between national legal systems. It is worth noting, however, one final route for tightening up the meaning of the clause, at least at a national level. There is an incentive for honest traders to create and subscribe to a code of practice in the hope of influencing or even determining what a court might regard as honest practice, which will simultaneously protect them from criticism under the general clause whilst flushing out rogue traders who do not sign up to the code of practice.⁴³

Average Consumer

⁴⁰ BERR/OFT, *Consumer Protection from Unfair Trading: Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive* (2008) para.10.5.

⁴¹ Reg. 8(1).

⁴² Reg.8(2).

⁴³ The honest traders need to be careful, however, since the promotion of any unfair commercial practice in a code of conduct is itself an unfair commercial practice: Reg. 4.

The second concept in the general clause regarding ‘the distortion of the economic behaviour of an average consumer’ provoked considerable controversy. The most contentious problem concerned the definition of an ‘average’ consumer, a concept that is also employed in the three mini general clauses.⁴⁴ Since rogue traders may prey upon vulnerable groups, the question arose 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? In its interpretation of previous European Directives in consumer law, the European Court of Justice (ECJ) had favoured the concept of the average consumer, who is presumed to be reasonably well informed, reasonably observant and circumspect, though taking into account social, cultural and linguistic factors.⁴⁵ Critics of the proposed Directive were concerned that such a concept of the average consumer would leave vulnerable groups unprotected against deceptive and aggressive sales practices. Following proposed amendments by the European Parliament, the Directive modified the standard of the average consumer in two respects. In the first place, where the commercial practice is directed to a particular group, the concept of an average consumer should be read as the average member of that particular group.⁴⁶ Secondly, where a clearly identifiable group is particularly vulnerable to a commercial practice by reason of infirmity, age or credulity, and where the practice is likely to distort only the behaviour of that group, the reference to the average consumer should be understood as referring to the average of that group.⁴⁷ Suppose, for instance, a credit business places advertisements in local papers offering in a misleading way low interest rate terms for home loans to those urgently needing to re-mortgage property in order to avoid higher interest rates that commence at the end of a period of a fixed rate loan. Such an advertisement is clearly directed at a particular group and so falls within the first exception to the average consumer test. It is less clear that it falls into the second exception, unless it can be argued that this identifiable group of sub-prime borrowers is likely to be particularly credulous. A clearer example of the second group would be advertisements that target persons with a particular illness or disability in order to sell some new alleged wonder drug.⁴⁸ One welcome effect of these new rules 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. The concept of the ‘average consumer’ in the Directive now seems sufficiently precise to achieve a high level of uniformity, because the legislators have sensibly built on and articulated further the notions developed originally by the ECJ, rather than starting afresh.

Material Distortion

⁴⁴ S. Weatherill, ‘Who is the ‘Average Consumer?’ in Weatherill and Bernitz, above n 18, 115.

⁴⁵ Reg. 2(2) endorses this standard for unfair commercial practices, though omitting any express reference to social, cultural, and linguistic factors, which are sometimes important in cross-border trade: e.g. C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group (Lifting)* [2000] ECR I-117, ECJ.

⁴⁶ Reg. 2(4). The Regulations, unlike the Directive, make it clear that these special concepts of the average consumer should be applicable not only to the general test of unfairness but also to the more specific prohibitions against misleading and aggressive practices.

⁴⁷ Reg. 2(5).

⁴⁸ Schedule 1, paragraph 17 may also cover this case: ‘Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.’

The final requirement under the general clause is that the commercial practice should be likely ‘to materially distort the consumer’s economic behaviour’. In the Regulations, this requirement is further defined as ‘appreciably to impair the average consumer’s ability to make an informed decision thereby causing him to take a transactional decision that he would not have taken otherwise’.⁴⁹ Much the same phrase referring to a transactional decision that would not have been taken otherwise applies also to the three mini general clauses. This definition (drawn from the Directive) is odd, because it seems to assume that the only cause of a material distortion of economic behaviour is conduct that impairs the consumer’s access to accurate information, whereas other factors such as aggressive sales techniques may disrupt the operation of a competitive market. The Directive might have been clearer without this particular definition.⁵⁰ A ‘transactional decision’ is defined extremely broadly to include not only a decision to purchase goods and services, but also the selection of the terms of purchase, whether to make a purchase with this trader at all, whether to pay a bill, whether to cancel the contract, and whether to exercise any contractual rights.⁵¹ The purpose of the requirement of ‘material distortion’, which only appears in the general clause and not the mini general clauses, appears to be primarily to exempt unfair commercial practices that did not influence the consumer’s decision, perhaps because the claims were so far fetched that no one took them seriously.⁵² It is also designed to exclude from the scope of the uniform European law any regulation based on considerations of taste and decency, leaving national legislatures free to occupy that field.⁵³ However, the materiality requirement also appears to exempt statements regarding minor matters that are not commercially significant and do not affect the fitness of a product for its normal purposes. In the Trade Descriptions Act 1968 there was also a requirement that the false trade description should be ‘false to a material degree’,⁵⁴ which suggests that the notion of materiality also refers to the degree of error. For example, if the packaging states that a box contains 1000 nails, but in fact the box was one nail short of that number, the inaccuracy might not be regarded as ‘material’. In the common law concept of a ‘material misrepresentation’, the requirement of materiality is similar, though with the additional element that the claimant must demonstrate a causal link between the misrepresentation and the decision that is sought to be avoided. In the case of the Regulations, however, proof of such a causal link seems unnecessary, because the general clause only requires the likely distortion of economic behaviour.

Although the materiality requirement seems reasonably clear in its meaning, from a practical point of view it may serve to obstruct enforcement of the general clause. Assuming that the general clause is employed as a safety net when the other prohibitions do not apply, traders accused of committing an unfair commercial practice will certainly try to insist that any impugned aspects of their conduct did not distort the economic

⁴⁹ Reg. 2(1).

⁵⁰ For more detailed criticism to similar effect: H-W. Micklitz, ‘The General Clause on Unfair Practices’, in G. Howells, H-W. Micklitz, T. Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (Aldershot: Ashgate, 2006) 83, 106-8.

⁵¹ Reg.2(1).

⁵² Though such exaggerated statements that are not meant to be taken literally are exempted independently by Reg. 2(6).

⁵³ Recital 7 to the preamble of Dir. 2005/29.

⁵⁴ Trade Descriptions Act 1968 s.3(1).

behaviour of consumers. It may prove hard for the prosecuting authorities to produce evidence to the contrary. That difficulty, which may be addressed differently in national jurisdictions, may again provoke some divergence.

3. Misleading Actions

The mini general clauses should provide more determinate guidance for national legislation and courts in relation to all the most common forms of unfair commercial practices. The prohibition against misleading actions, which is implemented by Regulation 5, commences with a general principle, but then guides its detailed application through elaborate rules. The central prohibition is against a commercial practice:

- (a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and
- (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.⁵⁵

Regulation 5(4) then provides a long list of the matters about which false information should not be given:

- (a) the existence or nature of the product; (b) the main characteristics of the product (as defined in paragraph 5); (c) the extent of the trader's commitments; (d) the motives for the commercial practice; (e) the nature of the sales process; (f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product; (g) the price or the manner in which the price is calculated; (h) the existence of a specific price advantage; (i) the need for a service, part, replacement or repair; (j) the nature, attributes and rights of the trader (as defined in paragraph 6); (k) the consumer's rights or the risks he may face.

Regulation 5(5) further spells out in a detailed list what may be understood to be the 'main characteristics of the product'. As well as expected items such as the composition of the product and its fitness for purpose, it also includes '(g) after-sale customer assistance concerning the product; (h) the handling of complaints about the product...(p) geographical or commercial origin of the product; (q) results to be expected from use of the product.'

This level of detail in the mini general clause turns it into an extensive set of precise rules, leaving little scope for deviation between national legal systems. Divergences may arise, however, with respect to the question of whether the 'overall presentation' 'is likely to deceive the average consumer'. Some legal systems may be more solicitous of the consumer who is misled than others, though the application of the average consumer test, with its insistence that such a consumer is circumspect, should curtail excessive protectionism. This approach to deliberately confusing statements seems much clearer than the prior UK law, which extended protection to statements

⁵⁵ Regulation 5(3) also contains two further specific prohibitions: (a) marketing practices that create confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or (b) any failure by a trade to comply with a commitment contained in a code of conduct with which the trader has indicated that he has undertaken to comply.

which, though not false, were misleading.⁵⁶ The concept of a misleading statement was defined as one that was likely to be taken as a trade description that was false to a material degree. This confusing notion of deeming a true statement to be false on the basis of its degree of falsehood is replaced by the more precise and relevant question of whether the consumer is likely to be misled in the sense of being affected in a purchasing decision.⁵⁷

Although the prohibition against misleading actions is largely a restatement and more detailed elaboration upon the prohibitions in the existing UK laws under the Trade Descriptions Act 1968, Consumer Protection Act 1987 ss. 20-26 (misleading price indications), and the Control of Misleading Advertising Regulations 1988, in several respects the new Regulations are more extensive in their scope. There is no longer the requirement that the false description should be ‘applied’ to goods.⁵⁸ Under that requirement, precedents indicated that a false statement made after a sale of goods had been effected did not amount to a commission of an offence.⁵⁹ Under the new legislation, a post-sale statement may be an offence, as for example in an inaccurate statement about the rights of the consumer in relation to a complaint. Indeed, the new Regulations pay considerable attention to post-sales matters with a view to deterring the ‘customer is always wrong’ strategy adopted by some traders. This practice consists of never really dealing with complaints or telling the consumer that he or she needs to take some unnecessary or expensive remedial step such as replacement of a part.⁶⁰ The rules on misleading prices in the Consumer Protection Act 1987, Part III, did not generally apply to the prices of immovable property,⁶¹ though estate agents could be prosecuted for false statements under separate legislation,⁶² whereas the new Regulations, through the broad definition of the concept of a ‘product’, apply to statements and commercial practices regarding ‘immovable property, rights and obligations’.⁶³ The definition of what amounts to a misleading price was detailed in the 1987 Act,⁶⁴ whereas the Regulation applies the two general tests recited above in Regulation 5(4)(g) and (h). In so far as the 1987 Act tries to expand its coverage by, for instance, explicitly including false statements that the trader expects the price to go up (when he does not in fact have such an expectation), it is possible that Regulation 5(4) may not exactly cover this kind of

⁵⁶ Trade Descriptions Act 1968 s.3(2).

⁵⁷ The European formulation had already been introduced to UK law by the Control of Misleading Advertising Regulations 1998, Reg.2(2).

⁵⁸ Trade Descriptions Act 1968 s.1(1) and s.4.

⁵⁹ *Hall v Wickens Motors Ltd* [1972] 1 WLR 1418; D. Oughton and J. Lowry, *Consumer Law* 2nd edn (London: Blackstone, 2000) 496.

⁶⁰ H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) 343; D.I. Greenberg, ‘Easy Terms, Hard Times: Complaint Handling in the Ghetto’, In L. Nader (ed.), *No Access to Law: Alternatives to the American Judicial System* (New York: Academic Press, 1980) 379.

⁶¹ S. 23.

⁶² Property Misdescriptions Act 1991; Property Misdescriptions (Specified Matters) Order 1992, SI 1992/2834, Sched. Para.16.

⁶³ Reg. 2(1).

⁶⁴ S. 21.

misleading statement. However, this kind of deceptive practice is included independently in the black list of prohibited practices.⁶⁵

4. Misleading Omissions

Although the prohibition on misleading actions seems likely to achieve a high degree of uniformity in the laws of Member States, building as it does on prior legislation and fitting fairly neatly into existing national provisions, the ban on misleading omissions faces an uphill struggle. One frequently noted divergence between national legal systems is the extent to which they permit liability for omissions. UK law generally rejects such liability in cases, for instance, of a failure to disclose material information. Departing from this principle, and indeed probably going further in this direction than most European legal systems,⁶⁶ the Directive introduces the offence of committing an unfair commercial practice by a misleading omission.

Regulation 6.-(1) A commercial practice is a misleading omission if, in its factual context, taking into account of the matters in paragraph (2)-

- (a) the commercial practice omits material information,
- (b) the commercial practice hides material information,
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

Paragraph (2) explains that the factual context should include the limitations of the medium used to communicate the commercial practice (including limitations of space and time), taking into account other measures taken by the trader to make the information available by other means. Under this crucial qualification, therefore, the type or mode of communication might justify an omission of material information. Bold claims on a chocolate bar wrapper that purchasers might win a luxury holiday, whilst omitting to mention the need to satisfy various onerous conditions, might avoid an offence either on the ground that there simply was not space available on the wrapper to mention these conditions, or perhaps and with greater certainty of avoiding an offence by stating on the wrapper that the offer is subject to various conditions that can be discovered easily, for instance, on a website.

Duty to Disclose Material Information

The major innovation in this measure from the point of view of UK law is the duty to disclose 'material information' in Regulation 6(1)(a). The other examples of misleading omissions, such as the provision of partial or ambiguous information, could probably be

⁶⁵ Schedule 1, para. 7 'Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.'

⁶⁶ For a helpful comparative study: R. Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005).

fitted into the existing notions of misleading trade practices or misleading price indications. In the case of misleading price indications, for instance, the UK legislation specified that an indication might be misleading if it omitted information that a consumer might reasonably expect to have been included.⁶⁷ Prior consumer protection law has not, however, imposed a general duty to provide material information. Instead, legislation identified particular instances where such information had to be supplied. For instance, it was a misleading price indication if a statement, though correct at the time it was given, subsequently became false and the trader failed to take reasonable steps to prevent consumers from relying on the indication.⁶⁸ There were also sector specific duties to provide information, such as the Tourism (Sleeping Accommodation Price Display) Order of 1977 that required hotels to post the prices for rooms in the reception area, which is now revoked.⁶⁹

Under the duty to provide ‘material information’, the crucial question is what in any particular circumstance should be regarded as material. Regulation 6(3) explains that ‘material information’ is ‘the information which the average consumer needs, according to the context, to take an informed transactional decision’. But what information does a consumer ‘need to know’ as opposed to ‘would like to know’? One assumes that such material information includes the price and the main characteristics of the product or service. The health and safety risks of a product are also regarded as necessary information, though the existing rules on product safety and risks that must be disclosed are preserved by the Directive.⁷⁰ With regard to price information, the Code of Practice for Traders on Price Indications no longer has effect, but BERR has issued non-statutory best practice guidance on pricing, which seeks to comply with the new Regulations.⁷¹ In their guidance on the Regulations, BERR and the OFT suggest other examples of material information: the minimum length of a service contract, the need to make other purchases in addition to the contemplated transaction, whether or not the product is new or second hand, and whether a new television is ready for digital transmissions (i.e. warnings of technological obsolescence).⁷² The requirement to disclose what the consumer ‘needs’ is an objective requirement in addition to the requirement that an average consumer would have been influenced in a transactional decision by the absence of that information.⁷³ The information must be material in that transactional influence sense, but additionally it must have been in the view ultimately of a court also necessary information for the consumer to make an informed decision. It is here that opportunities

⁶⁷ Consumer Protection Act 1987, s. 21(1).

⁶⁸ Consumer Protection Act 1987, s. 20(2).

⁶⁹ SI 1977/1877. By virtue of Regulation 6(3)(b), sector specific duties to provide material information that originate from EU Directives, such as the Package Travel, Package Holidays and Package Tours Regulations 1992 SI 1992/3288, Electronic Commerce (EC Directive) Regulations 2002 SI 2002/2013, The Consumer Protection (Distance Selling) Regulations 2000 SI 2000/2334 as amended, but otherwise such duties to provide information have either been abolished or must be read in such a way as to ensure conformity with Regulation 6(1)(a)

⁷⁰ Dir. 3.3. The General Product Safety Regulations 1994, SI 1994/2328, Reg. 8 requires producers to provide consumers with the relevant information to enable them to assess the risks inherent in a product.

⁷¹ BERR Pricing Practices Guide: Guidance for traders on good practice in giving information about process URN 08/918.

⁷² BERR/OFT, above n. 40, para.7.18.

⁷³ See: T. Wilhelmsson, ‘Misleading Practices’ in Howells, Micklitz, and Wilhelmsson, above n 50, 123, 149.

arise for divergences between national enforcement authorities. Consider, for instance, environmental issues: is it necessary for the consumer to be given information about the power consumption of appliances, the emissions of cars, the potential for recycling, or the sustainable sourcing of an agricultural product? Does the consumer need to know whether eggs have been produced in factory conditions or from free range chickens? National courts will be required to make difficult decisions on such issues as whether information about environmental risks and humanitarian concerns was necessary material information in the circumstances. It should be remembered, though, that even if a court determines that omitted information was both material and necessary for the consumer, the trader may still avoid liability if the medium of communication and other circumstances can justify the brevity of the communication.

Invitation to Purchase

The potential uncertainty and divergence created by the duty to provide material information to consumers is considerably reduced, however, by more detailed regulation of omissions in the most common situation of an 'invitation to purchase'. An invitation to purchase is defined broadly to include any 'commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase'.⁷⁴ This definition includes not only offers to sell, but also 'invitations to treat', such as putting goods with price labels on display in a shop, a price list in a bar or outside a parking garage, or an advertisement for the sale of goods in a magazine that includes an order form that can be completed and sent to the trader. Owing to the broad definition of 'product', the duty to supply material information applies to goods and services. In relation to 'invitations to purchase', Regulation 6(4) specifies that the following information will always be deemed to be material:

- (a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;
- (b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;
- (c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;
- (d) either – (i) the price, including any taxes; or (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- (e) where appropriate, either- (i) all additional freight, delivery or postal charges; or (ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (f) the following matters where they depart from the requirements of professional diligence- (i) arrangements for payment, (ii) arrangements for delivery, (iii) arrangements for performance, (iv) complaint handling policy;
- (g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

⁷⁴ Reg.2(1).

It is possible, according to the nature of the transaction and the context, that other information will be regarded as material to an invitation to purchase: the above list is merely a minimum set of requirements. The Schedule of prohibited practices effectively adds an item to this list:

Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of the advertising of the product and the price offered (bait advertising).⁷⁵

In practice, of course, much of this information will be readily apparent without the need for the trader to make a special communication. When purchasing goods in a shop, for instance, putting the goods on display with a clearly marked price should normally satisfy the trader's duty to provide information. When traders seek to sell on the Internet, however, they will need to ensure that the above information is clearly displayed or at least is readily discoverable by clear links posted to other pages of the website.

The most troublesome aspect of the list of material information that must be disclosed with an invitation to purchase is likely to be item (f) above. These are matters that only must be disclosed in the communication of the invitation to purchase if they differ from what a consumer might reasonably expect from a trader, in accordance with honest market practice or good faith. Suppose, for instance, that the trader provides a removal of furniture service and requires payment in advance for the work rather than only after satisfactory completion; does the trader have to reveal this pre-payment requirement prior to the consumer agreeing to contract for the service? The answer to that question depends rather unsatisfactorily on whether pre-payment is regarded as honest or good faith practice in the removal of furniture trade. Particularly odd is the notion of a complaint handling policy that deviates from the requirements of professional diligence. If the trader handles complaints by never really doing anything about them or by demanding vast amounts of evidence to back up a complaint that few, if any, consumers will bother to satisfy, assuming that this conduct falls below the standards of professional diligence, the trader will be under a legal duty to reveal this practice, which seems a very unlikely scenario. It might have been better if the Directive and the Regulation had insisted that an accurate description of the complaint handling procedure should be material information in invitations to purchase. More generally, we can predict that the unfamiliarity of the concept of a duty of disclosure of material information combined with the reinsertion of the vague notion of professional diligence is likely to permit considerable divergence between national applications of this regulation.

5. Aggressive Commercial Practices

Perhaps the greatest innovation of the Regulations from the point of view of UK consumer law is the prohibition of aggressive commercial practices.

⁷⁵ Reg. Schedule 1. 5.

Regulation 7.-(1) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances-

(a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and

(b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

The concept of 'undue influence' is further defined for this purpose as '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.'⁷⁶ The Regulations also add that, in determining whether a practice is aggressive, account should be taken of 'the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product.'⁷⁷ Taken together with the possible modifications to the concept of the average consumer in the case of vulnerable consumers, these provisions introduce a general offence that applies not only when the trader behaves in an aggressive or threatening manner, but also when the trader deviously takes advantage of a special weakness or predicament of the consumer to induce entry into a contract. An offence might be committed under this Regulation, for instance, where an undertaker takes advantage of the distress and shock of a recently bereaved person to sell a package of expensive funeral arrangements.

This welcome reform should catch a number of unsavoury practices that somehow slipped through the consumer law net or were inadequately deterred by existing provisions. For example, there were cases reported in the UK media of traders visiting the homes of elderly and frail consumers and effectively refusing to leave before a contract was signed.⁷⁸ In such circumstances, the consumer would have the right to cancel the contract.⁷⁹ Failure by the trader to inform the consumer of the right to cancel the contract is itself an offence.⁸⁰ Notwithstanding these protections, the consumer might reasonably fear another oppressive visit from the trader and so not exercise the right to cancel and not report the problem to the authorities. As a result, the commercial practice would probably go undetected and unpunished. The new Regulations make it clear that the practice itself is likely to be unlawful, which should help to deter it more effectively.

⁷⁶ Reg. 7(3)(b). There is no further elucidation of the concept of harassment, and with regard to coercion Reg.7(3)(a) merely states that it does not have to be physical coercion.

⁷⁷ Reg.7(2)(c).

⁷⁸ 'The NCC makes a particular issue of oppressive doorstep selling. The organisation told the story of an elderly lady who was visited, without invitation or appointment, by doorstep salesmen. They sold her a bed for £3,000—with various gadgets—which was entirely inappropriate to her medical condition and far too complex for her to use. They stayed in her home for five hours, until she signed the contract. I do not think that many elderly, frail ladies would be able to resist signing, if only to get rid of such ghastly people.' Mr Waterson, House of Commons Standing Committee B, 23 April 2002, Column 228.

⁷⁹ The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, Reg. 7 (reforming, extending and revoking The Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 SI 1987/2117,) made under power conferred by Consumers, Estate Agents, Redress Act 2007 s.59.

⁸⁰ Ibid Reg. 17.

The general concept of aggressive commercial practices represents a novel and hitherto unexplored concept in national and European consumer protection laws.⁸¹ To grasp the proper scope of the new offences, it is important to remember that Regulation 7(1) only applies to aggressive practices that impair freedom of choice and induce transactional decisions. Irritating and annoying practices, such as automated phone calls and junk e-mails will probably fall outside the prohibition of Regulation 7(1), because they are not likely significantly to impair freedom of choice or induce a consumer to buy something; on the contrary, such communications are surely usually counterproductive for the trader.⁸² Similarly, threatening or abusive language, though undoubtedly relevant to a finding that there has been harassment or coercion,⁸³ will not in itself amount to a prohibited aggressive commercial practice unless it can be shown to have been likely to induce the consumer to take a transactional decision he would not have taken otherwise. Although this narrowing of the scope of the new offence by reference to the concept of inducing transactions provides some determinacy to the regulation, again the innovative character of the law for many European legal systems including the UK creates the potential for considerable divergence in interpretations.

6. The Black List

In the above discussion of the mini general clauses, it becomes clear that the level of detail and specificity of the Directive and the implementing Regulation only leaves a few areas where the national courts have much scope for striking out in different directions. Their flexibility in marginal areas is further confined, however, by the black list of prohibited practices. These examples are not merely illustrations of the mini general clauses, but in several instances deliberately expand the scope of the prohibitions significantly. Consider, for instance, the prohibited practices in the black list in Schedule 1 that fall into the general area of aggressive practices.

24. Creating the impression that the consumer cannot leave the premises until a contract is formed.

25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return, except in circumstances and to the extent justified to enforce a contractual obligation.

26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.

Persistent telephone calls marketing the provision of electricity supplies might not fall within Regulation 7, as noted above, but they might be prohibited by item 26 on the list,

⁸¹ G. Howells, 'Aggressive Commercial Practices' in Howells, Micklitz, Wilhelmsson, above n 50, 167, 170.

⁸² Such practices are, however, likely to be prohibited under The Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426 Regs. 19-22 (Based on Dir 2002/58, 2002 OJ L 201/37).

⁸³ Reg. 7(2)(b). Such practices may fall within paragraph 26 of Schedule 1 of the Regulation by amounting to 'persistent and unwanted solicitations'.

which is not qualified by the need to demonstrate that the consumer's ability to make a transactional decision was impaired.

The black list illustrates a third technique of harmonisation: in addition to general principles and specific rules, the Directive seeks to confine national discretion by the use of binding examples. It is as if a court had already set a number of precedents in the application of the Directive to particular situations. The generation of such precedents is normally difficult under European law. Under the procedure for making references to the ECJ,⁸⁴ not only can the national courts effectively prevent the ECJ from making binding rulings by declining to refer issues of interpretation to the court,⁸⁵ but also the ECJ is extremely reluctant to apply its interpretations of European law to the facts of a particular case as opposed to offering general guidance on the meaning of the words contained in a Directive.⁸⁶ National decisions on the application of Directives and their implementing legislation are unlikely to be known or cited in other national courts, and in any case comprise doubtful value as precedents. European law thus lacks what most legal systems explicitly or more covertly use as a primary tool to establish certainty and predictability in the application of the law: the following of precedent decisions. By providing binding examples in the black list, the Directive on unfair commercial practices harnesses this tool for harmonisation, with a view to maximising the prospects for uniformity in application of the law.

7. Enforcement

Criminal offences

In discussions in the UK regarding the implementation of the Directive on Unfair Commercial Practices, business interests raised the question whether it was necessary to employ criminal proceedings as well as the system of injunctive relief, clearly mandated by the Directive,⁸⁷ and provided in the Enterprise Act 2002 Part 8.⁸⁸ With only a couple of exceptions, however, like the preceding domestic law, the Regulations impose criminal penalties enforceable by local authority trading standards officers.⁸⁹ These exceptions are the prohibitions against a trader who fails to live up to a commitment contained in a code of conduct which the trader has undertaken to comply with;⁹⁰ and two prohibitions in the Annex of prohibited practices:

⁸⁴ Art 234 EC.

⁸⁵ C-350/03, *Schulte v Deutsche Bausparkasse Badenia AG* [2005] I-9215 ECJ, para. 43.

⁸⁶ C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* [2004] ECR I-3403, ECJ; J. Rutgers, 'Note' (2005) 1 *European Review of Contract Law* 87; Collins, *The European Civil Code*, above n. 5, 200.

⁸⁷ Art. 11.

⁸⁸ See also Schedule 13 of the Act and Enterprise Act (Part 8 Community Infringements Specified UK Laws) Order 2003; the underlying EU law is Injunctions Directive 98/27.

⁸⁹ The government has also been piloting regional 'Scambuster' teams: Department of Trade and Industry, *A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business* URN 05/1303 (London: DTI, 2005) 21. It plans to spend £7.5 million on these teams over 3 years.

⁹⁰ Reg. 5(3)(b) and Reg. 9.

11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.

It seems that the minister believes that parents should be able to withstand the demands of children to purchase heavily advertised junk food, computer games, and toys without the help of the prosecuting authorities.

In response to a concern that the general prohibition against unfair commercial practices presents a rather vague offence, this prohibition has the special additional requirement of proof of *mens rea* in the form of intention and recklessness. For the other offences, including the prohibitions in the black list of Schedule 1, the trader has two general defences. Regulation 17 provides the customary ‘due diligence defence’ under which the trader can show that the commission of the offence was due to a mistake, reliance on information supplied to him by another person, the act or default of another person, an accident, or another cause beyond his control, and that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. Regulation 18 provides a defence to publishers of advertisements that they did not know and had no reason to know that its publication would amount to an offence.

Injunctions

The new Regulations also provide that all the prohibitions should be subject to the injunctions procedures, colloquially known as ‘Stop Now Orders’, in Part 8 of the Enterprise Act 2002.⁹¹ Injunctions can only be obtained if the conduct of the trader harms the ‘collective interests of consumers’.⁹² There is a question whether the injunctions procedure of 2002 Act may not apply to a ‘one-off’ case of deception that seems unlikely to happen again. In such a case a court might decline to issue an injunction. The aim behind the 2002 Act was certainly to prevent bad trade practices from continuing despite the risk of prosecution. It seems to have been assumed that the phrase ‘collective interests’ of consumers would always be satisfied by such forward-looking measures. Another concern is that under the statutory framework, the task of seeking injunctions was given to particular bodies such as the OFT, various regulators, and the consumers’ association known now as a result of reckless re-branding as ‘Which?’.⁹³ These bodies were thought to represent consumers in general. As a result, the injunctive regime is not made available to ‘competitors’, as envisaged in the Unfair Commercial Practices Directive Article 11(1). The UK government believes that it has the option under the Directive to restrict the enforcers to the existing recognised bodies and not to include the possibility of competitors bringing actions for injunctions.⁹⁴ The Regulations do, however, amend the Enterprise Act 2002 with respect to the burden of proof in injunction

⁹¹ Reg. 26.

⁹² S.211(1)(c).

⁹³ Enterprise Act 2002, s. 213.

⁹⁴ That possibility may arise, however, as a result of a review of the law of intellectual property rights, which may recommend the strengthening of civil remedies available to competitors.

procedures, in order to give the courts the power to require proof by the trader of the accuracy of factual claims made in the commercial communication, failing which, the court may consider that the factual claim is inaccurate.⁹⁵

8. A Private Right of Redress?

The Directive states laconically that it ‘is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’.⁹⁶ Accordingly, the Regulations are silent on the question whether individual consumers may obtain any private right of redress against a trader who commits an unfair commercial practice. There is no provision that transactions formed under the influence of an unfair commercial practice should be voidable, unenforceable, or cancellable by the consumer. Unlike some previous consumer protection laws,⁹⁷ nor do the new Regulations address the question whether or not a consumer might bring a claim for compensation in tort for breach of statutory duty. On these matters, therefore, the Directive does not seek to achieve harmonisation. National legal systems will therefore diverge on the issue of whether a consumer has a right to claim compensation for losses caused by unfair commercial practices. Because some legal systems grant the consumer a right of action, either for rescission of a contract or compensation for losses for breach of statutory duty or in tort, the Directive will end up maintaining and provoking creating new divergences between the private law systems of Member States.⁹⁸ For instance, in Ireland, which follows closely the English common law, the new legislation provides for a consumer’s action for damages, including exemplary damages.⁹⁹ Similarly, in Australia the Trade Practices Act 1974 s.82 provides for a claim in damages for a person who suffers loss as result of a business having used misleading or deceptive practices contrary to s. 52(1), and consumers benefit from a further protection in against ‘unconscionable conduct’ in business marketing practices.¹⁰⁰ Two questions need to be considered: might the Regulations nevertheless have some effects on private law; and, should the UK government introduce private rights of redress for individual consumers?

Impact on Private Law

It is possible that the UK courts might decide that private rights of redress could be implied into the Regulations. That has happened many times before when the courts

⁹⁵ Reg.27, inserting a new s.218 A into the Enterprise Act 2002, in order to implement Article 12 of the Directive.

⁹⁶ Art. 3(2).

⁹⁷ Consumer Protection Act 1987 s.41.

⁹⁸ For a survey of national laws prior to the Directive: Henning-Bodewig, above n 36. The survey reveals considerable diversity, ranging from the absence of the ability for consumers to make private claims to the possibility (in Germany) of collective claims on the part of consumers to strip a rogue trader of profits made by use of the unfair commercial practice.

⁹⁹ Consumer Protection Act S.74. This section excludes claims under the mini general clause regarding misleading commercial practices, though these are likely to be covered by the private law of misrepresentation.

¹⁰⁰ S. 51AB; P. Heffey, J. Paterson, A. Robertson, *Principles of Contract Law* (Sydney: Lawbook Co., 2002) Chapters 28, 33, 36.

have implied statutory torts from health and safety regulations.¹⁰¹ But there is a general presumption against the view that a breach of a statutory duty gives rise to any private law cause of action, unless it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.¹⁰² This presumption against a statutory tort is likely to be stronger in the context of unfair commercial practices where the losses will probably be mostly economic rather than personal injury or property damage.

Alternatively, the courts may develop the common law in directions that harmonise the rules regarding the invalidity of contracts in the laws of misrepresentation, duress, and undue influence with the prohibitions in the Regulations.¹⁰³ In some European civil law jurisdictions, for instance, it is expected that a failure to disclose material information contrary to statutory regulations of this kind will provide a ground for avoidance of the contract on the ground of mistake and that other unfair commercial practices will amount to the ground of rescission and compensation known as ‘dol’.¹⁰⁴ It would be odd result, indeed, if the actions of an unscrupulous trader amounted to a criminal offence, but the contract obtained by an unfair commercial practice were nevertheless to remain fully enforceable against the consumer. This possible development of the common law seems particularly likely with regard to the law of duress.

Under the common law of duress, a contract may be avoided where an illegitimate act performed by one party causes the other to consent to the contract. The precise scope of the concept of an ‘illegitimate act’ remains uncertain,¹⁰⁵ but it is generally thought to include torts involving threats to the person or property and some threats of breach of contract (economic duress). But the illegitimate act can possibly be constituted by other wrongs such as breach of statutory duty or a criminal offence such as blackmail. Given that a breach of the Regulations constitutes a criminal offence and that often the aggressive conduct may amount to an implicit threat to the person, it seems possible that an unlawful aggressive practice that causes the victim to consent to a contract will constitute duress, so that the victim may avoid the contract. The crucial issue will be whether the aggressive conduct was an inducement to enter the contract or whether the consumer had another course of action available, such as walking away, which could have reasonably been taken to remove the coercion.

Introduction of a Private Rights of Redress

¹⁰¹ *Groves v Lord Wimborne* [1898] 2 QB 402.

¹⁰² E.g. *X (Minors) Bedfordshire County Council* [1995] 2 AC 633; *O'Rourke v Camden London Borough Council* [1998] AC 188.

¹⁰³ Collins, above n 28, 424. For similar observations with respect to European contract law and French contract law, see S. Whittaker, ‘The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws’, in Weatherill and Bernitz, above n 18, 139.

¹⁰⁴ C. Péres, ‘Contrats: Les pratiques commerciales trompeuses sur les sources du droit des contrats’ *Revue des Contrats*, 01 Octobre 2008 no. 4, p. 1083.

¹⁰⁵ *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366, HL.

A private right of redress could comprise a right to rescission or a claim for compensation for material (and perhaps non-pecuniary) losses incurred as a result of being misled or bullied into a transaction by an unfair commercial practice. A major benefit of such a right of action would be to enhance the possibilities of the enforcement of the new standards of the Directive. It would fit into a broader regulatory strategy advocated by the Macrory Review to use a flexible toolkit of measures designed to stimulate compliance.¹⁰⁶ A private right of redress would also serve the goal of restorative justice. Similar goals might also be achieved by permitting ‘enforcement undertakings’ to be added to the remedies available to a criminal court under the Regulatory Enforcement and Sanctions Act 2008 Part 3,¹⁰⁷ though such a measure would not empower consumers in the same way as a private right of redress. But the UK Government is apparently concerned that a private right of action might have ‘unintended and adverse consequences, by potentially providing consumers with undesirable latitude to sue traders and by impacting on the law of misrepresentation.’¹⁰⁸

What are these possible consequences? The answer is that the new right of action would in effect create a new kind of private law claim. The current laws of misrepresentation, duress, and undue influence could be supplemented by an action for compensation for losses caused by unfair commercial practices. The existing common law is cautious in providing compensation for actions during pre-contractual negotiations. It does not accept a general duty to bargain in good faith or with professional diligence and it imposes few duties of disclosure of information on businesses. A private right of redress might introduce some significant changes. For example, it might give the right to claim compensation for misleading, but not false, statements. Similarly, it might give the right to claim compensation for failure to disclose material information, a right that has been steadfastly denied by the common law judges for centuries. A private right of redress might also create for the first time a remedy of compensation for undue influence or aggressive business practices, where the traditional remedy has been confined to rescission of the contract and restitution. The Government has given the task of assessing the implications of a civil action to the Law Commission. Its preliminary advice,¹⁰⁹ pending a full report, confirms the complexity of the issue of providing private redress.

The report notes that the opportunity might be taken to reform the English law of misrepresentation, both to rid the law of the unnecessary complexity of the duplication of causes of action in tort, equity, and statute, and to clarify the appropriate measure of damages.¹¹⁰ Such a reform would be welcome, but it would need to address the question of the availability of civil law remedies such as rescission for misrepresentation in circumstances where the trader has not committed an offence, as for example where the trader can rely on a due diligence defence. With regard to the measure of damages for

¹⁰⁶ *Regulatory: Justice: Making Sanctions Effective* <http://www.berr.gov.uk/files/file44593.pdf>

¹⁰⁷ Section 50(3). This provision makes clear that rescission of any contract and compensation to the victim of an offence, including a consumer, could be part of an enforcement undertaking. Under s. 50(4), if the business complies with the enforcement undertaking, it avoids any criminal prosecution, but there is no independent sanction for failure to comply with the enforcement undertaking.

¹⁰⁸ Response to the Consultation Paper on implementing the Unfair Commercial Practices Directive (December 2006) <http://www.berr.gov.uk/files/file35750.pdf> at p.7.

¹⁰⁹ Law Commission, *A Private Right of Redress for Unfair Commercial Practices?* (London: Law Commission, November 2008).

¹¹⁰ *Ibid* para. 2.37.

misrepresentation, the reform would need to consider not only the existing irrational distinctions between the statutory measures and the common law measures damages, but also assess the possibility of claims for non-pecuniary loss. For instance, in case where a trader misleadingly claims that a ‘scientifically tested’ product will restore hair for men or remove wrinkles for women, should the consumer’s remedy be confined to the return of the price of the goods or should the consumer receive compensation for disappointment as well?

In connection with liability for omissions of material information, the major impact of a private right of action would probably concern the conduct of professionals in relation to sales of land and to the conduct of businesses supplying services more generally. The topic of the application of duties of disclosure or implied warranties to sales of land may prove to be a more fundamental issue than most governments may wish to tackle in view of the experience of the pressure to water down the requirements of Home Information Packs.

In relation to aggressive market practices, a private right of redress would clarify the scope of the law of duress and it might introduce a novel claim for compensation. Such a claim for damages would be particularly significant in circumstances where the ‘transactional decision’ induced by the aggression was not one of entering a contract, where rescission and restitution might be available, but was instead one concerning such matters as the repayment of a debt, or not to take legal action, or not to cancel a contract under statutory cancellation rights.¹¹¹

With regard to the general clause of professional diligence, the Law Commission expresses itself unable to assess in its preliminary report how far the common law provides private redress.¹¹² Indeed, the ramifications of permitting private law claims for redress on the basis of the standard of professional diligence seem daunting. A claim for compensation under this heading opens up the possibility that consumers might be awarded a remedy for a trader’s failure to bargain in good faith or with due care, a rather revolutionary notion in the context of the common law.

Even from this preliminary advice from the Law Commission, it is evident that the interaction between the Directive and national private law systems will provide fertile territory for divergence. Does this matter? In the context of cross-border trade, a consumer might be able to rely on his or her home law to mount a private law claim for compensation, punitive damages, or cancellation of the contract that would not be permitted in the trader’s home state.¹¹³ Although the regulatory rules might be harmonised by the Directive, the disincentive for businesses to market their products and services abroad might persist in the face of fears that consumers might enjoy unexpected rights to redress. If so, we may anticipate that the European Commission will respond to a call from the European Parliament and revert to the topic of harmonisation of private law with respect to unfair marketing practices before long.¹¹⁴

¹¹¹ Ibid, para. 2.77.

¹¹² Ibid para. 2.97.

¹¹³ Relying on Art 6 of Regulation 593/2008/EC on the law applicable to contractual obligations (2008) OJ L177/6.

¹¹⁴ Resolution of the European Parliament of 13 January 2009 on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (2008/2114 (INI).

8. Harmonisation by Example

We can now return to our initial question: will the Directive on unfair commercial practices succeed in producing uniformity throughout the laws of the European Member States? There are three crucial features working in favour of this outcome. First, the full harmonisation requirement compels Member States to review all their current legislation in the field of commercial practices in order to determine whether the rules are sufficiently comprehensive whilst not being overly protective of consumers. In the UK, the consequent legislative process has effectively rewritten the statute book in the field of consumer protection. In thirteen out of the fifteen Member States that initially approved the Directive, their previous legislation with regard to fair trading was founded on a general clause,¹¹⁵ so they will need at least to introduce the more specific demands of the Directive such as the black list. The European Commission will certainly police compliance carefully and require even small adjustments of non-conforming laws. Second, the three ‘mini-general clauses’ achieve much better specificity than a single general clause could have done. In this respect it is likely to provide more determinate guidance than some previous Directives such as the prohibition against unfair contract terms. Furthermore – and this is perhaps crucial – the mini general clauses for the most part eschew familiar legal terminology, such as good faith, good morals, honesty, misrepresentation, and the like, so that when judges and officials have to interpret them, the meaning of the provisions will not be weighed down or guided by national legal traditions.

Finally, the major innovation in the technique of harmonisation consists of the black list of prohibited practices. The Directive on unfair terms possesses a ‘grey list’ of terms that will normally be regarded as unfair, but, in principle, terms that apparently fall within that list can be rescued by arguments that they do not in all the circumstances breach the general clause about unfairness.¹¹⁶ In contrast, in the Directive on unfair commercial practices, courts and officials are instructed to look only at the list of examples. If a case falls within one of the descriptions of prohibited behaviour, it is an offence, subject only to the general defences to criminal charges available for businesses such as due diligence. We have also noted above at several points that the black list of prohibited practices appears to have a wider scope of application in some respects than the general clause and the mini general clauses. It can be anticipated that the black list will be the first port of call for most courts and administrators when applying the new legislation. Interpretations of the meaning of those factual scenarios will provide the meat of the precedents in determining the scope of the legislation. For the purpose of European harmonisation, what will unify the laws is not so much shared interpretations of concepts in broad legal rules as agreement on examples of marketing practices that fall within the black list. Consider, for example, the marketing practice of ‘bogofs’ (buy one, get one free): is this practice lawful? The first question to ask is whether this example is prohibited in the black list? Example 20 in the list is ‘Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the

¹¹⁵ H-W. Micklitz, ‘A General Framework Directive on Fair Trading’, in Collins, above n 18, 43, 63.

¹¹⁶ In the proposed consumer rights directive, above n 4, some of these examples such as exclusions of liability for personal injury are transferred into a black list.

unavoidable cost of responding to the commercial practice and collecting or paying for the delivery of the item.’ Using this example, one could argue that unless the product is sold at its normal or previous price, the second ‘free’ item is not in reality free, but rather the consumer is paying a premium, contrary to the rule. That conclusion seems reasonably clear, so there is no need to turn to the more general prohibition against misleading actions, which includes rules against statements of a specific price advantage that are likely to deceive the average consumer. If that prediction of the legal process proves correct, the Directive will achieve harmonisation by example rather than rules.

In these three respects, the Directive presents a much more aggressive approach towards harmonisation of national laws than we have witnessed in previous consumer measures. In all but name, this kind of full harmonisation is federal pre-emption. In this instance, the topic concerns regulation of competition in consumer markets, but the proposed Directive on consumer rights extends the approach to the ordinary private law of contract. Will these measures achieve uniformity in the application of the law? Ultimately, given the divergences in national legal traditions and practices, complete uniformity seems an unlikely outcome. In the case of misleading omissions, for instance, English courts are much less familiar than their civil law counterparts with the notion that businesses should disclose material information, and as a consequence may adopt a narrower view of what information is necessary for the consumer to be given. Furthermore, the absence in the Directive of any determination of the private law consequences of unfair commercial practices will permit considerable diversity to persist. Even so, sceptics regarding the ability of the institutions of the European Union to deliver on its goals may discover that this Directive marks a turning-point that will confound their criticisms.