

When protecting the consumer interest in market transactions, legislative bodies often enact market-enhancing laws that are designed to help consumers make better informed decisions, resulting in more efficient market transactions. The most recent major consumer initiative in the European Union, the Unfair Commercial Practices Directive,<sup>1</sup> is primarily a market-regulating measure designed to foster informed consumer choices. The law focuses on prohibiting 'misleading' and 'aggressive' selling behavior that can influence consumer decisions and distort open and fair competition.

The Directive is an important step toward harmonizing the law of unfair commercial practices throughout Europe. As is often the case, its purposes are mixed: the Directive seeks to protect consumers from unfair marketing tactics, but also to break down barriers to cross-border sales by harmonizing unfair trade laws in the twenty-seven EU Members States. Whether the Directive is good or bad for European consumers remains to be seen, a subject addressed in depth by Geraint Howells of the United Kingdom, Hans W. Micklitz of Germany, and Thomas Wilhelmsson of Finland in their extensively researched book. The authors assess the Directive in its wider European law context and provide keen insight for governments and private parties who will implement the Directive in the coming years. Each of the authors participated in the debates leading the adoption of the Directive, and each comes from a legal system that has been, or will soon be, profoundly affected by its legal mandates. Germany's pro-consumer fair competition laws may have to change dramatically to conform with the uniform fairness standards imposed by the Directive. Finland's tradition of strong, interventionist consumer protection may be threatened by the open borders philosophy that drove adoption of the Directive. The United Kingdom is more accustomed to a market-regulating approach to consumer protection, but it must adjust to the legal uncertainties of the Directive's general prohibitive clause, which has no parallel in the UK and may require a major review of its more specific fair trading laws to ensure compliance.

The Directive is one of the most noteworthy consumer initiatives to emerge from Brussels in recent years, largely because of its preemptive effect. The maximum harmonization approach of the Directive restricts Member States from enforcing national fair trade laws that are more restrictive of trade practices,<sup>2</sup> thus raising concerns that it could actually weaken consumer rights in Member States that have a strong tradition protecting the consumer interest, a point the

---

<sup>1</sup> Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, O.J. 2005 L149/22 (hereinafter, the "Directive" or "Unfair Commercial Practices Directive").

<sup>2</sup> Unfair Commercial Practices Directive, Article 4, which states, "Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive."

authors make with some force. In previous consumer initiatives, the Commission had usually strived for minimal harmonization, setting a base level of consumer protection that Member States could choose to exceed, although the Commission was showing signs of shifting its approach in recent years.<sup>3</sup>

Under the maximum harmonization approach of the Directive, Member States cannot enact or enforce laws that create a higher level of consumer protection if doing so could impede the sale of goods or services across borders. Consumer organizations argued against maximum harmonization because they did not want the Directive to limit the stronger consumer protection regimes that exist in some Member States.<sup>4</sup> As the Directive worked its way through the European Parliament and Council, the Commission successfully argued that businesses needed confidence that they would not be confronted with more restrictive national laws when they tried to market their goods and services in other EU countries. A uniform standard of unfair commercial practices would encourage more trade across borders, and maximum harmonization was critical to this end.<sup>5</sup>

The authors observe, however, that the Commission's maximum harmonization approach may have limited effect because there is plenty of room for varying interpretations of the Directive's mandates. As Member States amend or apply national laws to implement the Directive, national courts and administrative tribunals may create varying standards for 'misleading' or 'aggressive' commercial conduct on a case-by-case basis.<sup>6</sup> The harmonization goal can thus be undermined and barriers to cross-border marketing will remain. Ultimately, the European Court of Justice may have to ensure harmonization through the resolution of disputes that challenge a Member State's trade practices laws. The Court's jurisdiction is limited, however, to cases brought by the Commission and referrals from national courts, so much will be left to the tribunals of Member States to implement the Directive in a way that is consistent with its reach in other Member States.

The authors criticize the Directive on several fronts. One point of contention is the Directive's focus on protecting the 'average' consumer, not the most vulnerable, credulous, or trusting consumer.<sup>7</sup> As described in the Directive, the average consumer has abilities that are likely superior to the abilities of many citizens. Recital 18, echoing European Court of Justice decisions, refers to the average consumer as someone who is "reasonably well-informed and reasonably observant and circumspect."<sup>8</sup> Many riches have been gained at the expense

<sup>3</sup> European Fair Trading Law, at 28-29, 35.

<sup>4</sup> See National Consumer Council, United Kingdom, *Unfair Commercial Practices: Response to DTI Consultation on the Draft EU Directive (2003)*; European Consumer Law Group, *The Proposed Directive on Unfair Commercial Practices (2004)*.

<sup>5</sup> European Fair Trading Law, at 35. The Directive does provide for a transition period, however, in which Member States may apply more restrictive laws through June 12, 2013, if certain conditions are met. *Unfair Commercial Practices Directive*, Art. 3(5).

<sup>6</sup> European Fair Trading Law, at 100-101.

<sup>7</sup> European Fair Trading Law, at 111.

<sup>8</sup> *Unfair Commercial Practices Directive*, Recital 18. This has been an issue in the United States as well. The Directive's focus on the 'average' consumer may not be materially different from the standard that the FTC uses, banning misleading practices only if they are likely to mislead

of people who are not reasonably well informed. Indeed, the most credulous consumers may have the greatest need for protection in the law.

With respect to maximum harmonization principle, the Directive omits a 'safeguard' clause that would have allowed Member States to enact more restrictive laws if unexpected events rendered the mandates of the Directive too limiting.<sup>9</sup> A safeguard clause would have weakened the maximum harmonization principle because it would have given Member States an opportunity to exceed the Directive's mandates if unexpected or emergency circumstances arose, but it would have allowed Member States to react to practices that might develop outside the purview of the Directive. Traders are creative, look for loopholes, and tend to push legal rules to their limits. A safeguard clause, which was included in the General Product Safety Directive<sup>10</sup> and the E-Commerce Directive,<sup>11</sup> might have been a sensible precaution.

Most notably, there is considerable uncertainty about the effect of the Directive's general clause, which prohibits any commercial practice that is "contrary to the requirements of professional diligence" and "is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed."<sup>12</sup> Although most of the civil law Member States had general clauses prior to the enactment of the Directive,<sup>13</sup> they varied in content and the manner in which legal institutions applied them.<sup>14</sup> Even though the Directive adopts the form of general clause that appears in the laws of some continental Member States, differences in culture persist as to what are acceptable commercial practices in those Member States, so it is not clear what effect, if any, the Directive will have even in those locales. It may take years to see if Member States interpret the clause in similar ways.

The authors conclude that the Directive will be one of the most important consumer protection directives in the EU, but they are most concerned about the Commission's maximum harmonization goal. On the one hand, they fear that harmonization will succeed and the resulting European fair trading rules will not be as consumer friendly as the rules that currently exist in several Member States.<sup>15</sup> There is a risk that the European Court of Justice will strike down national laws as impeding cross-border trade if they are not clearly authorized by the Directive.

---

consumers "acting reasonably under the circumstances." *F.T.C. v. Pantron I Corp.*, 33 F. 3d 1088, 1095 (9<sup>th</sup> Cir. 1994).

<sup>9</sup> European Fair Trading Law, at 31-36.

<sup>10</sup> Art. 3(4), Directive 2001/95/EC on general product safety, O.J. 2002 L11/4.

<sup>11</sup> Art. 3(4), Directive 2003/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. L178/1.

<sup>12</sup> Unfair Commercial Practices Directive, Art. 5.2(a) and (b).

<sup>13</sup> European Fair Trading Law, at 3.

<sup>14</sup> R. Schulze & H. Schulte-Nolke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, at 12, available at: [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/studies/unfair\\_practices\\_en.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf).

<sup>15</sup> European Fair Trading Law, at 242-244, 248-249.

On the other hand, the authors see practical obstacles that may limit the harmonization goal.<sup>16</sup> States with general clauses may be tempted to retain their own consumer protection schemes rather than move to the Directive's standards. National traditions and social understandings of fairness are bound to affect legislative and judicial outcomes. If the European Court of Justice allows Member States to use the general clause broadly to justify continued enforcement of a wide array of idiosyncratic fair trading restrictions, the Directive will have little effect and its primary purpose – breaking down barriers to cross-border trade – will be frustrated.

The introduction of a common standard seeks to create a base level of consumer protection and a mechanism for developing a European-wide concept of fair trading, but the field of commercial activity may be too varied and complex for all problems to be resolved by a simple rule. Complete uniformity of fair trade laws across Europe may be unattainable. For the next several years at least, the Directive will more likely increase legal complexity in this area of the law rather than simplify it.

James P. Nehf  
Professor of Law and Cleon H. Foust Fellow  
Indiana University School of Law-Indianapolis;  
Executive Board,  
International Association of Consumer Law.

---

<sup>16</sup> European Fair Trading Law, at 254.