

European Fair Trading Law

The Unfair Commercial
Practices Directive

Geraint Howells,
Hans-W. Micklitz and
Thomas Wilhelmsson

European Fair Trading Law

The Unfair Commercial Practices Directive

GERAINT HOWELLS
Lancaster University, UK

HANS-W. MICKLITZ
University of Bamberg, Germany

THOMAS WILHELMSSON
University of Helsinki, Finland

ASHGATE

© Geraint Howells, Hans-W. Micklitz and Thomas Wilhelmsson 2006

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Geraint Howells, Hans-W. Micklitz and Thomas Wilhelmsson have asserted their moral right under the Copyright, Designs and Patents Act, 1988, to be identified as the authors of this work.

Published by

Ashgate Publishing Limited

Gower House

Croft Road

Aldershot

Hampshire GU11 3HR

England

Ashgate Publishing Company

Suite 420

101 Cherry Street

Burlington, VT 05401-4405

USA

Ashgate website: <http://www.ashgate.com>

British Library Cataloguing in Publication Data

Howells, Geraint G.

European fair trading law : the Unfair Commercial Practices Directive. - (Markets and the law)

1. European Union. Directive 2005/29/EC 2. Competition,

Unfair - Law and legislation - European Union countries

3. Restraint of trade - European Union countries 4. Consumer protection - European Union countries

I. Title II. Micklitz, Hans-W. III. Wilhelmsson, Thomas, 1949-343.4'072

Library of Congress Cataloging-in-Publication Data

Howells, Geraint G.

European fair trading law : the unfair commercial practices directive / by Geraint Howells, Hans Micklitz, Thomas Wilhelmsson.

p. cm. (Markets and the law)

Includes index.

ISBN 0-7546-4589-4

1. Competition, Unfair--European Union countries. 2. Consumer protection--Law and legislation--European Union countries. I. Micklitz, Hans-W. II. Wilhelmsson, Thomas, 1949- III. Title. IV. Series.

KJE6536.H69 2006

343.24'072--dc22

2006012259

ISBN-10: 0-7546-4589-4

ISBN-13: 978-0-7546-4589-4

Printed and bound in Great Britain by MPG Books Ltd, Bodmin Cornwall.

EUROPEAN FAIR TRADING LAW

THE
EUROPEAN
FAIR TRADING LAW

The European Fair Trading Law is a comprehensive legal framework designed to ensure fair competition and protect consumers within the European Union. It addresses various aspects of market behavior, including anti-competitive practices, misleading advertising, and unfair commercial practices. The law aims to create a level playing field for businesses and to empower consumers by providing them with clear rules and legal recourse. Key provisions include the prohibition of cartels and abuse of dominant positions, the regulation of comparative advertising, and the prohibition of aggressive marketing tactics. The law also establishes the role of national competition authorities and the European Commission in enforcing these provisions across member states.

The European Fair Trading Law is a comprehensive legal framework designed to ensure fair competition and protect consumers within the European Union. It addresses various aspects of market behavior, including anti-competitive practices, misleading advertising, and unfair commercial practices. The law aims to create a level playing field for businesses and to empower consumers by providing them with clear rules and legal recourse. Key provisions include the prohibition of cartels and abuse of dominant positions, the regulation of comparative advertising, and the prohibition of aggressive marketing tactics. The law also establishes the role of national competition authorities and the European Commission in enforcing these provisions across member states.

THE
EUROPEAN
FAIR TRADING LAW

The European Fair Trading Law is a comprehensive legal framework designed to ensure fair competition and protect consumers within the European Union. It addresses various aspects of market behavior, including anti-competitive practices, misleading advertising, and unfair commercial practices. The law aims to create a level playing field for businesses and to empower consumers by providing them with clear rules and legal recourse. Key provisions include the prohibition of cartels and abuse of dominant positions, the regulation of comparative advertising, and the prohibition of aggressive marketing tactics. The law also establishes the role of national competition authorities and the European Commission in enforcing these provisions across member states.



Markets and the Law

Series Editor:
Geraint Howells,
Lancaster University, UK

Markets and the Law is concerned with the way the law interacts with the market through regulation, self-regulation and the impact of private law regimes. It looks at the impact of regional and international organizations (eg EC and WTO) and many of the works adopt a comparative approach and/or appeal to an international audience. Examples of subjects covered include trade laws, intellectual property, sales law, insurance, consumer law, banking, financial markets, labour law, environmental law and social regulation affecting the market as well as competition law. The series includes texts covering a broad area, monographs on focused issues, and collections of essays dealing with particular themes.

Other titles in the series

Information Rights and Obligations
A Challenge for Party Autonomy and Transactional Fairness

Edited by
Geraint Howells, André Janssen and Reiner Schulze
ISBN 0 7546 2432 3

Cyber Consumer Law and Unfair Trading Practices

Cristina Coteanu
ISBN 0 7546 2417 X

Consumer Protection Law

Geraint Howells and Stephen Weatherill
ISBN 0 7546 2338 6 (Pbk)
ISBN 0 7546 2331 9 (Hbk)

Personal Insolvency Law, Regulation and Policy

David Milman
ISBN 0 7546 4302 6

Preface

The Unfair Commercial Practices Directive is one of the most significant pieces of legislation to emanate from Brussels in recent times. It seeks to introduce a European conception of fairness by introducing a general clause to cover all economic harm caused to consumers by unfair practices. Moreover, it seeks to adopt a maximal harmonisation approach that would for the most part prevent Member States from introducing stricter national laws.

The three authors have followed the development of this Directive closely and to varying degrees have more or less formally engaged in debates with the European legislator about what the scope and content of the Directive should have been. Now the European law is in place, we wanted to come together to produce a work which took stock of the evolution of European fair trading law, evaluated the Directive and assessed it in this wider European law context and gave some assistance to those grappling to implement the Directive and thereafter apply it.

This is neither a collection of essays nor a multi-authored work. We each took responsibility for distinct chapters and, whilst we discussed and compared notes, we allowed room for individual expressions of opinion. Whilst we agree on most aspects, there were some differences between us. Rather than always paper over these differences, we thought it would be more interesting, for the reader, to flag some of them up and explain why we take different approaches.

Every difference of opinion on legal interpretation depends to some extent on individual judgment, but we also suspect traits of our national legal experience remain with us when considering the Directive. This needs to be recognised as an important dimension of the European convergence process and either respected or techniques developed to overcome it (depending on one's perspective).

All three authors come from legal systems that have been or will be most profoundly affected by European fair trade law. Germany's very protective unfair competition laws, under which trader protection often masqueraded as consumer protection, have been uprooted by European free movement, misleading advertising and now the fairness standard in this Directive. Finland's strong tradition of consumer protection feels threatened by the more market-oriented philosophy that lies behind much of the Directive. The United Kingdom is familiar with such a robust approach, but will have to come to terms with a new style of regulation based on the use of general clauses.

This background explains some of our differences of opinion (or sometimes emphasis). The majority did not always result from the same traditions combining. For instance, the German contributor was more concerned to see the fairness doctrine

in the Directive underpin the movement away from the previous draconian German conception of fairness and was wary in case over-protectionism crept in through arguments that the national rules being invoked fell outside the economic scope of the Directive. The other two were keener to emphasise that the Directive's conception of fairness only applied within its scope. By contrast the two continental scholars were fairly complimentary about the drafting of the Directive, admiring its structure of general clause, clauses on misleading and aggressive practices and blacklist of prohibited practices. The common lawyer still complained that the drafting left too many unanswered questions and sometimes caused difficulty in reconciling the rules with the stated policy objectives.

If we had involved colleagues from other traditions we might have had an even richer debate. However, our experience supports our decision to restrict cooperation to just three legal traditions. One thing on which we agree is that this would have been a better piece of legislation if it had not attempted to achieve maximal harmonisation. Our debates highlight to us the complexity of this area and the folly of attempting to impose a European model with little room for national flexibility.

Hopefully the reader will come away understanding the Directive and its context better. We cannot claim to offer answers to every question or even agreement on all answers, but even where we offer different opinions we hope the discussion throws some light on this complex area of European law which is certain to generate even greater complexity at the national level, both on implementation and afterwards when it has to be enforced.

Finally, we wish to acknowledge some institutions and people that have supported the writing of this book. The work of Thomas Wilhelmsson has been done within a research project funded by the Academy of Finland on 'Private Law in a Multicultural and Multilingual European Society (PriME)'. In addition, Wilhelmsson also wants to thank the Universities of Oslo and Bamberg for their hospitality, as he wrote the main parts of his contribution during stays at these institutions. All authors wish to record their thanks to Julie Prescott who helped prepare the manuscript for publication and to Ashgate, especially Alison Kirk, for their faith in this project.

Geraint Howells
Hans-W. Micklitz
Thomas Wilhelmsson
September, 2006

List of Directives with Abbreviations

Directive 84/450/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising: OJ 1984 L250/17 (hereafter Misleading Advertising Directive).

Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises: OJ 1985 L372/31 (hereafter Doorstep Selling Directive).

Directive 89/552/EEC concerning the pursuit of television broadcasting activities: OJ 1989 L298/23 as amended by OJ 1997 L202/60 (hereafter 'Television without Frontiers' Directive).

Directive 1993/13/EEC on unfair terms in consumer contracts: 1993 OJ 1993 L95/29 (hereafter Unfair Contract Terms Directive).

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data: OJ 1995 L281/31 (hereafter Data Protection Directive).

Directive 97/7/EC on the protection of consumers in respect of distance contracts: OJ 1997 L1444/19 (hereafter Distance Selling Directive).

Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising: OJ 1997 L290/18 (hereafter Comparative Advertising Directive).

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers: OJ 1980 L80/27 (hereafter the Price Indications Directive).

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests: OJ 1998 L166/51 (hereafter the Consumer Injunctions Directive).

Directive 1999/44/EC on certain aspects of the sale of goods and associated guarantees: OJ 1999 L171/12 (hereafter the Consumer Sales Directive).

Directive 2000/13/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market: OJ 2000 L178/1 (hereafter Electronic Commerce Directive).

Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: OJ 2000 L180/82, see Article 3(1)(h) (hereafter Race Discrimination Directive).

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: OJ 2001 L12/1 (hereafter Regulation on Jurisdiction and the Recognition and Enforcement of Judgments).

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector: OJ 2002 L201/37 (hereafter Privacy and Electronic Communications Directive).

Directive 2002/65/EC concerning the distance marketing of consumer financial services: OJ 2002 L271/16 (hereafter Distance Selling of Financial Services Directive).

Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services: OJ 2004 L373/37 (hereafter Sex Discrimination Directive).

Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection co-operation): OJ 2004 L364/1 (hereafter the Regulation on Consumer Protection Co-operation).

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market: OJ 2005 L149/22 (hereafter Unfair Commercial Practices Directive).

Proposal for a Council Regulation on the law applicable to non-contractual obligations (Rome II) COM [2003] 427 final (hereafter Rome II).

Contents

<i>Preface</i>	<i>xiii</i>
<i>List of Directives with Abbreviations</i>	<i>xv</i>
1 INTRODUCTION	
<i>Geraint Howells</i>	1
a. Background	1
b. The Traditions of Fair Trade Regulation within the Member States	1
(i) Special regime for consumers?	2
(ii) Use of general clause?	4
(iii) Consumer typology	5
(iv) Strict liability?	6
(v) Civil/criminal law	7
(vi) Sanctions	7
(vii) Soft law	8
c. The Community Acquis	9
(i) Negative harmonisation	9
(ii) Legislative competence	12
(iii) Positive regulation before the Unfair Commercial Practices Directive	13
(iv) Community policy	16
d. The Preparation of the Directive and Major Points of Debate	19
(i) Unfairness standard	20
(ii) Maximum harmonisation	21
(iii) Blacklist	22
(iv) Codes of conduct	23
(v) Enforcement	23
e. Outline of the Directive	23
f. Revision, Transposition and Entry into Force	24
(i) Entry into force	24
(ii) Transposition	24
(iii) Informing consumers	25
(iv) Revision	25

2 MINIMUM/MAXIMUM HARMONISATION AND THE INTERNAL MARKET CLAUSE

<i>Hans-W. Micklitz</i>	27
a. Introduction to the Debate	27
b. The Legal Background to Maximum Harmonisation and the Internal Market Clause	28
(i) Background of the minimum–maximum debate	28
(ii) Background of the country of origin principle	30
(iii) Background for combining maximum harmonisation and the country of origin principle	32
c. Maximum Harmonisation in the Directive	35
(i) The principle and its justification	35
(ii) The transition period, Articles 3(5) and (6)	36
(iii) Uncertainties in minimum–maximum harmonisation	39
d. The Relationship Between the Directive and the Proposed Regulation on Sales Promotions	39
e. Maximum Harmonisation and the Internal Market Clause in the Directive	40
(i) The internal market clause in the legislative process	40
(ii) The possible scenario of conflict	42
(iii) The correct interpretation of the internal market clause in the Directive	43
(iii) Article 4 in the harmonised field of the Directive	44
(iv) Article 4 in the non-harmonised area of the Directive	47
(v) Article 4 and the deferring effect of full harmonisation	47

3 SCOPE OF THE DIRECTIVE

<i>Thomas Wilhelmsson</i>	49
a. Introduction	49
b. Collective Protection	51
c. Commercial Practices	53
(i) Content of the definition	53
(ii) Before and after the transaction	56
d. Harming Consumers' Economic Interests	58
(i) Economic interests	58
(ii) Taste and decency	59
(iii) Protection of other societal interests	62
e. Business-to-Consumer Practices	63
(i) Introduction	63
(ii) Definition of consumer	64
(iii) Definition of trader	67
(iv) Business-to-consumer practice	69

f. Some Explicit Additional Delimitations	70
(i) Introduction	70
(ii) Intellectual property rights	71
(iii) Contract law	71
(iv) Health and safety	74
(v) Other Community rules	76
(vi) National rules based on minimum clause	77
(vii) Jurisdiction	77
(viii) Regulated professions	78
(ix) Financial services and immovable property	80
(x) Precious metal	80
 4 THE GENERAL CLAUSE ON UNFAIR PRACTICES	
<i>Hans-W. Micklitz</i>	83
 a. Fair Trading <i>de lege lata</i> – References in Secondary Law	83
b. The Structure of the General Clause in the Unfair Commercial Practices Directive	84
(i) Threefold structure	85
(ii) Consequences and questions arising from the threefold structure	86
c. The Concept of Fairness	86
(i) The challenge – fairness, national morals, taste and decency, national cultures – how are they interrelated?	86
(ii) European fairness as an autonomous concept	88
(iii) European fairness and national morals	91
(iv) Taste and decency	95
(v) National cultures	96
d. Requirements of Professional Diligence	97
(i) Criticism of the conceptual approach	98
(ii) National, European and international professional diligence	100
(iii) The significance of professional diligence for misleading and aggressive commercial practices	101
(iv) Consequences arising from the lack of Europeanised professional diligence	102
e. Material Distortion of the Economic Behaviour of the Consumer	102
(i) Economic behaviour, informed and transactional decisions	103
(ii) The objective side of the distortion: the autonomy of the consumer	104
(iii) The subjective side of the distortion – intent and fault	105
(iv) The relevance of the materiality criterion	106
(v) The practical significance of the materiality threshold	107
(vi) Actual or potential distortion	109
(vii) Causality between the distortion and the process of taking the decision	110

f.	The 'Average Consumer' and Particularly Vulnerable Groups	111
(i)	The average consumer as a standard model	111
(ii)	Particularly vulnerable consumer groups as a special provision	112
(iii)	Children, the elderly, disabled and credulous people	113
(iv)	The purpose of the commercial practices	115
(v)	The abolition of statistical evidence?	116
g.	Language and Fairness	117
h.	Relationship of the General Clause and the Special Provisions	117
(i)	Concept and practical significance	117
(ii)	The general clause as safety net	119
(iii)	The system of Annex I	121
5	MISLEADING PRACTICES	
	<i>Thomas Wilhelmsson</i>	123
a.	Introduction	123
b.	Misleading Actions	125
(i)	Definition	125
(ii)	The untruthfulness/deceptiveness condition	127
(iii)	The average consumer test	131
(iv)	The materiality condition	136
(v)	What information?	138
(vi)	Imitative marketing	145
(vii)	Non-compliance with codes of conduct	146
c.	Misleading Omissions	147
(i)	An indirect duty to inform	147
(ii)	Omission and withholding of information	150
(iii)	The consumers' informational needs test	152
(iv)	Material information in invitation to purchase	154
(v)	Established information requirements	157
d.	Practices That Are Always Regarded as Unfair	158
(i)	Nature of the Annex	158
(ii)	The cases	160
e.	Understanding Misleading Practices	164
6	AGGRESSIVE COMMERCIAL PRACTICES	
	<i>Geraint Howells</i>	167
a.	Introduction	167
(i)	Beyond misleading practice	167
(ii)	How far beyond misleading practices?	168
(iii)	Aggressive practices – elements of an underdeveloped concept	170
b.	Aggressive Practices	171
(i)	Harassment, coercion, or undue influence	172

(ii) Impairment of the consumer's freedom of choice or conduct	174
(iii) Taking a transactional decision that he would not otherwise have taken	177
(iv) In its factual context	178
(v) Legal and illegal means	178
c. Harassment	178
(i) Protection of private sphere	178
(ii) Relevant factors	179
(iii) Objective or subjective test	179
(iv) General harassment laws	180
(v) Particular practices	181
d. Coercion	184
(i) Relationship with other concepts	184
(ii) Physical and psychological	184
(iii) Relevant factors	185
(iv) Borderline with legitimate pressure	185
e. Undue Influence	187
(i) The definition	187
(ii) Physical force	187
(iii) Position of power	187
(iv) Exploitation of position of power	189
f. Relevant Factors	190
g. Practices Considered Aggressive in all Circumstances	192
h. Towards an Understanding of Aggressive Practices	193

7 CODES OF CONDUCT

<i>Geraint Howells</i>	195
a. Codes, Soft Law, Self-Regulation and Co-Regulation	195
b. A 'Win-Win-Win' Solution	196
c. Varying Attitudes to Codes	197
d. Support for Codes in EU Policy	199
e. Codes in EU Legal Instruments	200
f. Code of Conduct – the Definition	202
(i) Agreement or set of rules	203
(ii) Trader behaviour	205
(iii) Commercial practice or business sectors	205
(iv) Trader undertaking	206
g. Code Owner	206
h. Non-Compliance With a Code as Misleading Conduct	206
(i) Not aspirational	208
(ii) Firm	208
(iii) Verifiable	209
(iv) Indication in a commercial practice	210

i.	Unfair Practices in All Circumstances	211
j.	Encouraging Reliance on Codes	211
k.	Codes and Standards of Fairness	212
l.	Policy	215
8	LEGAL REDRESS	
	<i>Hans-W. Micklitz</i>	217
a.	Regulation of Enforcement Under the Unfair Commercial Practices Directive: Some Introductory Remarks	217
	(i) The rules under the Unfair Commercial Practices Directive	217
	(ii) The unanswered questions on enforcement	218
	(iii) The broader picture: individual and collective legal protection in unfair commercial practices law outside the Directive	219
	(iv) A connected issue: cross-border litigation and cross-border enforcement	219
	(v) A disclaimer	220
b.	Individual Legal Redress	220
	(i) The individual legal redress of competitors	221
	(ii) Individual legal redress for the consumer	221
c.	Collective Legal Redress Through Public Authorities, Consumer or Trade Organisations	222
	(i) Freedom of choice or limited choice?	222
	(ii) The rules under Article 11 of the Unfair Commercial Practices Directive	223
	(iii) Other Directives containing provisions on legal actions taken by associations	223
	(iv) Standing to sue as an EC obligation	226
	(v) Minimum requirements for enforcement bodies	227
d.	Procedure and Remedies	228
	(i) Prior consultation	228
	(ii) Interim relief	229
	(iii) Injunction	229
	(iv) Penalties, sanctions and compensation for damages	230
	(v) Substantiation of claims	231
e.	Enforcement of Collective Consumer Interests in Conflicts Across National Borders	232
	(i) Problems and experiences with legal enforcement across national borders	232
	(ii) International jurisdiction for actions against cross-border injunctions	233
	(iii) The right to take action and the legitimate interest to take legal action	233

(iv) The determination of the law applicable under EC private international law	235
(v) Execution of a judgment	236
f. The Regulation (EC) No 2006/2004 on Consumer Protection Cooperation	237
(i) The objective and contents of the Regulation	238
(ii) The significance of the Regulation with regard to the organisation of law enforcement	239
9 CONCLUSIONS	
<i>Thomas Wilhelmsson</i>	241
a. A Directive of Legal and Practical Importance	241
b. The Measure of Assessment: The Purposes of the Directive	242
c. Consumer Confidence	244
d. The Level of Protection	247
e. Traders' Costs and Risks	250
f. Legal Certainty	254
g. United in Diversity	256
<i>Appendix</i>	261
<i>Index</i>	289

Chapter 1

Introduction

Geraint Howells

a. Background

On 11 May 2005 the European Community adopted Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.¹ This introduces a general prohibition on unfair business-to-consumer commercial practices that is fleshed out by reference to the concepts of misleading and aggressive commercial practices and an annex listing practices considered unfair in all circumstances. The reference point for judging the fairness of a practice is the average consumer, building on the jurisprudence of the European Court of Justice; although this standard is adapted to take the interests of vulnerable consumers into account as considered appropriate. A controversial aspect of the Directive is its maximum harmonisation nature, by which is meant that Member States cannot, for reasons other than those specified in the Directive, restrict the freedom to provide services nor restrict the movement of goods for reasons falling within the field approximated by the Directive.

This book is concerned with explaining the Unfair Commercial Practices Directive, exploring the many ambiguities in its drafting and considering its implications for trading and consumer protection within Europe as well as the relationship between European and national trade practices law. Towards the end of this introductory chapter certain key features of the Directive will be set out in outline to prepare the reader for the detailed discussion later in the text. First, however, some background will be provided on the pre-existing national traditions of fair trade regulation; the EC rules that had already been developed in this area; and the preparatory process that led to the adoption of the Directive highlighting the major points of debate.

b. The Traditions of Fair Trade Regulation within the Member States

We are fortunate in having some excellent studies outlining the laws of the Member States prior to the Directive that were commissioned by the EU as part of its background research whilst developing policy in this area. Two studies in particular warrant careful attention, that by the research institute VIEW on *The Feasibility of a*

1 OJ 2005 L149/22 (hereafter Unfair Commercial Practices Directive).