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Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive

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Abstract This article analyses the unfairness concept from the Unfair Commercial Practices Directive (UCPD). It considers why the nature and level of protection is particularly important given the range of coverage of the regime and the Europeanisation agenda. It argues that the UCPD concept provides the potential for a relatively protective approach to consumer decision making. At the same time, it emphasizes that realisation of this potential is partly dependent on recognizing the limits of transparency as a protective tool and in understanding the "professional diligence" and "average consumer" concepts in particular ways. It is further suggested that the protective potential of the regime is not necessarily undermined by the "average consumer" concept or by the "informed decision-making" paradigm of the general unfairness clause. Indeed, the general clause may be capable of extending the protective effects to some extent. Finally, it is suggested that regulators may have a key role to play in maximizing both the level of protection and the prospects for a genuinely common European approach.

Keywords Importance · Misleading practices · Aggressive practices · Average consumer · Professional diligence

Introduction

Overview

The Unfair Commercial Practices Directive (UCPD)[1] seeks to regulate the fairness of business to consumer trading practices by reference to a "high level of consumer protection."[2] The broader goal is further integration of the European market: removing

[1]2005/29/EC.

[2]Preamble, recital 1.

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the variations in national standards that are perceived to generate competitive distortions and undermine the business and consumer confidence that is needed if full advantage is to be taken of the single market.[3] (Generally, see Bernitz and Weatherill 2007; Collins 2010; European Commission 2009a; Howells et al. 2006; Schulze and Schulte-Nolke 2003; Twigg-Flesner et al. 2005; VIEW 2000; and Willett 2007, chapter 9).

The UCPD requires member states to use "adequate and effective means to combat" unfair business to consumer practices. The means are to involve bodies with a legitimate interest in combating such practices being empowered to take action before courts or administrative authorities.[4] It is then specified that the regime used shall confer powers to order cessation of existing unfair practices or prohibition of those that are imminent.[5] The typical national response has been to give some form of power to regulatory bodies to seek injunctions (or some functional equivalent) against continued use of practices defined as unfair under the UCPD.[6] In addition, some member states have criminalized such practices.[7]

Practices may be unfair on the basis that they violate the general ("professional diligence") test.[8] In particular, practices are unfair where they are either misleading (whether by action and omission) or where they are aggressive;[9] within the meaning of the general tests on these issues.[10] There is also a list of (misleading and aggressive) practices that are always treated unfair;[11] i.e., without the need to satisfy the general tests.

Key Arguments

This article focuses on the nature and level of protection; in particular, whether, in relation to consumer decision making, the regime can be said to achieve the high level of protection aspired to. The first part of the article explains how the broad coverage of the regime, the Europeanisation context and the potential impact on private law make these issues especially important.

Next, it is argued that the key conceptual elements of the unfairness standard do provide the potential for a relatively protective European model of consumer decision making. However, a key message is that it is important to make proper use of transparency under the misleading omissions test and to recognize the limits of transparency in relation to both the omissions concept and the aggressive practices concept.

The discussion then turns to the role to be played by the general clause on professional diligence. Various suggestions are made as to how it can be interpreted such as to maximize levels of protection.

The next key question is as to the significance of the "average consumer" concept, the benchmark used in most cases to assess the impact (and, through this, the fairness) of

[3] Recitals 2–4.
[4] Art 11 (1).
[5] Art 11 (2).
[6] E.g., in the UK, see the Consumer Protection From Unfair Trading Regulations (CPUTR) 2008, SI 1277 , reg. 26 and Enterprise Act 2002, s. 212 and Schedule 13.
[7] CPUTR, ibid., regs. 8–18.
[8] UCPD, art 5 (2).
[9] Art 5 (4), (a) and (b).
[10] The full tests for misleading and aggressive practices are laid down in article 6 (misleading actions); article 7 (misleading omissions); and articles 8 and 9 (aggressive practices).
[11] Art 5 (5) and Annex 1.

practices. Despite well-known concerns, the argument below is that the average consumer concept need not necessarily pose a serious threat to levels of protection.[12]

The article concludes by arguing that a rigorous, research-based approach by regulators, as well as cross-border co-operation, may be the key to maximizing the level of protection and improving the prospects of a genuinely pan-European approach.

The Importance of the UCPD Fairness Concept

For several reasons, the regime will be of unprecedented importance in regulating the European marketplace, so that it is especially important to clarify the nature and level of the protection provided for.

Transactional Coverage

The first reason is that the regime applies to all types of trader–consumer transactions. There need only be a "commercial transaction" in relation to "any goods or service including immovable property, rights and obligations."[13] So, the regime is not restricted[14] to particular types of transactions. It covers any of the vast range of transactions that consumers might enter into, so long as there is some commercial flavour.

But the adaptability of this coverage must also be emphasized. Business (particularly in the internet era) has the capacity to adapt imaginatively and quickly in the way in which goods and services are promoted, sold and delivered and how post-sale service is delivered. With this comes the capacity to create forms of interaction and practices that side step the coverage of existing rules. However, this is particularly difficult under the UCPD regime. For example, whatever way relationships are designed by imaginative lawyers acting for traders, it is almost impossible to get around the fact that these relationships involve a "commercial transaction."[15]

The regime is also important because of the sheer range of activities it regulates within any given transaction. It catches "any act, omission, course of conduct or representation... [or] commercial communication... by a trader, directly connected with the promotion, sale or supply of a product to...consumers'."[16] Such a practice may be "before, during or after" a transaction.[17]

What we have then is a "cradle to grave" regime, applicable to promotion, negotiation, conclusion, performance, and enforcement of the contract. It covers practices such as advertising and negotiation at the pre-contractual stage; post-contractual alterations or variations; performance, delivery, etc. by the trader; payment by the consumer; complaint handling; after sales service and enforcement by either party. The breadth of coverage is further confirmed when we consider the "consumer side" of the equation. Under the

[12] In certain circumstances, the unfairness concept is, in fact, to be understood in ways nuanced to the situation of vulnerable and other particular groups of consumers (arts 5 (2b) and 5 (3)). There are many important questions as to the scope and limitations of this approach (Wilhelmsson 2007; Willett 2010); but there is no space to consider these here.

[13] Arts 3 (1) and 2 (c).

[14] Like, for example, rules on package travel or sale of goods.

[15] It is certainly more difficult than side-stepping traditional classifications based on the notion of a "contract" or, yet more narrowly, specific categories of contract.

[16] UCPD, art 2 (d).

[17] UCPD, art 3 (1).

misleading and aggressive practice tests in articles 6–9, unfairness depends on the practice in question causing, or being likely to cause, consumers to take a "transactional decision" that would not otherwise be taken. This is defined as:

> "any decision taken by a consumer, concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting."[18]

This seems to cover the vast majority of decisions that consumers might make throughout the life of a relationship with a trader.[19] Importantly, we are not restricted to decisions that involve entering into a contractual obligation, whether an initial contract or a variation of it that represents a fresh contractual obligation.

So, the approach appears to be particularly "relationally" sensitive. Fairness is taken to matter in relation to practices affecting consumer decision making whenever the decision might be made; and is assessed based on the circumstances existing at that point in the relationship when the decision itself is made. This is important because these circumstances may be different from those existing when the relationship was first entered into.

We shall see below that this relational approach represents a significant expansion of regulation for European law and for at least some national systems.[20]

Europeanisation

The vast coverage just described would make it especially important to clarify the nature and level of protection intended in the case of any regime. However, the level of protection is of particular interest here because the regime aims to achieve a "high level of consumer protection" across the European Union (EU), and it is important to assess whether this goal has been achieved.

In addition, the UCPD seeks to integrate the single market by eradicating competitive distortions. For this to be successful, the regime must be understood in as similar a manner as possible across Europe. This poses a difficult challenge in the case of many Directives due to differing national traditions (Collins 2010, pp. 91–92). There is an inevitable risk that rules will be approached and interpreted with strong reference to the pre-existing (and divergent) national legal, social, and cultural contexts.[21]

It is true that, by comparison with other "general clause" based measures such as the Unfair Terms Directive,[22] the UCPD provides quite a lot of specification (sub-division into "sub-general" clauses on misleading practices, omissions and aggressive practices, an annex of quite closely defined practices that are always unfair, and definitions, such as the one set out above on "transactional decision making" and a definition of "undue influence" to which we turn later). However, there is still much scope for interpretation. So, under the sub-general clauses, member states must decide how to interpret the notions of an

[18] UCPD, art 2 (k).

[19] As long as the decision is linked to a practice of the trader.

[20] While the broad definition of "transactional decision making" emphasizes the relational element to the regime, the very existence of a transactional decision requirement does have some potential to place a restriction on levels of protection; although, as suggested below, these risks should not be overstated.

[21] For example, systems display differences in relation to rules, doctrines, principles, regulatory policy, judicial reasoning, lawyer attitudes, legal argument, the "region" of the legal system that the rule is inserted into, etc.

[22] 93/13/EEC.

"informed decision," "freedom of choice," "material information," "relationship of power," etc. Indeed, even the descriptions on the Annex as to what is banned outright are not so clear-cut as may first appear. For instance, four of the Annex paragraphs depend on whether information is "false;"[23] two refer to it being "materially inaccurate;"[24] and others (even without express reference to falsehood or inaccuracy) seem also to call for some assessment as to whether the practice is likely to mislead.[25] There is no space here to analyse the Annex in detail. However, the point is that it cannot be fully understood without coming to some assessment as to whether something is "false" or "materially inaccurate."[26] Presumably, the benchmark here (as for the general and sub-general clauses) must be the "average consumer" concept.[27] So, the discussion here as to the nature and level of protection set by this concept is not just vitally important for an understanding of the general clause and the sub-general clauses, but also, possibly, for an understanding and further concretisation of the Annex.[28]

It is true that the European Court of Justice (ECJ) may well assist the cause of common understanding of the regime by providing autonomous European interpretations which involve cross-fertilization between national traditions[29] and clarify potential misunderstandings. Indeed, the "average consumer" concept is linked by the Directive itself to pre-existing ECJ jurisprudence on this concept;[30] and this may, to at least a degree, involve imposition of a particular ECJ philosophy. There may, also, be guidance in response to a reference made by the Austrian courts as to the meaning of the general clause on professional diligence.[31] This reference provides the opportunity for the Court to elaborate on the meaning of the unfairness concept.

Nevertheless, there are likely to be limits on the extent to which the ECJ will choose to "flesh out" the unfairness concept. Certainly, under the Directive on Unfair Terms in Consumer Contracts,[32] the ECJ have not really gone beyond saying that there must be some "benefit" for the consumer, otherwise the term is unfair.[33]

To emphasize the main point of the above discussion, the UCPD is full of concepts that require further unpacking if we are to (a) clarify whether it sets a high level of protection and (b) have a clear enough notion of what is intended, so as to maximize the chances of a high degree of common interpretation by different member states (and, thereby, maximize

[23] Paragraphs 7, 17, 22, and 23.

[24] Paragraphs 12 and 18.

[25] For example, paragraph 21 refers to giving consumers the "impression" of having ordered goods when they have not, but it must be decided where on the spectrum between absolute truth and absolute falsehood something must stand before it can be said to give an "impression."

[26] See Collins (2010), generally, on the greater specification and the increased prospects of European integration this brings.

[27] The point here is that the average consumer concept lies expressly at the centre of the general and sub-general clauses, but is not mentioned as such in relation to the Annex.

[28] In other words, the approach under the Annex may not be as far removed from that under the general and sub-general clauses as is often assumed.

[29] On cross-fertilization, more generally, see Weatherill (2005, p. 122); Willett (2007, pp. 110–118).

[30] Preamble, recital 18 and see the section below on *Influencing The Average Consumer and His Transactional Decision Making*.

[31] *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH Co. KG v "Österreich"-Zeitungsverlag GmbH*, C-540/08. The precise question is whether providing the chance to enter a competition if a newspaper is purchased is unfair under article 5 (2); on the basis that such a chance would be a decisive reason for purchasing the newspaper.

[32] 93/13/EEC.

[33] Joined cases *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, C-240/98, and C-244/98, and *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG*, C-237/02.

the prospects of achieving genuine eradication of competitive distortions). This unpacking is not necessarily guaranteed to arise through ECJ intervention alone. So, it is important to seek to work toward a more nuanced notion as to the nature and level of protection.

The precise nature and level of protection is also especially important because article 4 provides that:

> "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."

This means that, within the scope of the Directive, the concept of unfairness provides the ceiling as well as the floor for member states in terms of the level of protection (Howells et al. 2006, pp. 27–47). So, member states are tied to any (upper as well as lower) limits on the level of fairness provided for in the Directive.[34]

This sort of concern has not arisen in the context of the vast majority of other Directives in the acquis, as these contain "minimum clauses," allowing for the maintenance or introduction of higher levels of protection than that provided for in the Directives.[35]

In fact, ECJ case law has now begun to show how the internal market clause might affect national approaches to unfairness. It has been held recently[36] that, unless a practice is one of those deemed to be unfair in all circumstances,[37] member states must assess the question of unfairness under the criteria laid down in either the misleading, aggressive or professional diligence tests. It cannot simply be decided that such a practice is unfair without it being established that one of these tests has been met. This emphasizes that it is unfairness *as* variously defined in the Directive that determines national regulatory standards—nothing less, but also, nothing more. There is no space for national notions of unfairness that set a higher standard of fairness than what is provided for in the Directive.[38] So, once again, it is vital to understand just what this standard is. Clearly, the higher the standard set by the Directive, the less risk there is of pre-existing national standards of protection being dragged down.

Impact on Private Law

A final reason that the precise nature and level of protection is important relates to its potential impact on private law in the member states. The Directive is said to be "without prejudice to contract law and, in particular, to the rules on the validity, formation or effect

[34] However, due to article 3 (9), the internal market clause does not apply to financial services.

[35] See, for example, directives, 85/577/EEC (doorstep selling), art 8; 90/314/EEC (package travel), art 8; 93/13/EEC (unfair terms), art 8; 97/7/EC (distance selling), art 14; and 99/44/EC (consumer sales), art 8 (2). Note, however, the proposed Consumer Rights Directive that would turn to maximum provisions the rules on doorstep and distance selling, unfair terms, and consumer sales (COM (2008) 614 final, art 4).

[36] Joined cases *VTB-VAB NV v Total Belgium NV (C-261/07) and Galatea BVBA v Sanoma Magazines Belgium NV (C-299/07)*.

[37] See n 11 above.

[38] This is subject to limits on the scope of the Directive. For example, it does not cover rules on taste and decency, health and safety, intellectual property, or contract law rules (Preamble, recitals 7 & 9 and arts 3 (2) and 3 (4)). Also, although it indirectly protects competitors from unfair competitive practices, the direct aim is the protection of consumers (Preamble, recital 8). More generally, on the scope of the Directive, see the references in *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH Co. KG v "Österreich"-Zeitungsverlag GmbH,* supra, n. 31 above, and *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. v Plus Warenhandelsgesellschaft mbH*, C-304/08.

of a contract."[39] Nevertheless, it is hard to imagine that the concept of unfairness will not, ultimately, have some impact on the private law of the member states. First of all, it seems inevitable that it will have an impact on contracting practice, as traders shape the way that they interact with consumers by reference to this regulatory backdrop.[40] Second, some countries have already introduced a private law right of redress based on unfairness as defined in the Directive.[41] Third, in the common law jurisdictions of the UK in particular, it would be remarkable if courts were not pressed to develop concepts such as misrepresentation, duress and undue influence in ways that reflect the unfairness concept from the UCPD, and it would be surprising if this did not meet with at least a degree of sympathy.[42] Fourth, some governments have considered the future introduction of private law remedies for breach of the unfairness concept.[43] Finally, the European Parliament has called for the Commission to consider harmonization of private law on unfair practices (European Parliament 2009) and any such initiative would surely be based very significantly on the UCPD concepts.

So, it is vital to better understand the UCPD concepts in order to inform the debate surrounding any possible reception into private law and to reduce the likelihood of historical and cultural divergences resulting in a purely superficial harmonization of private law.

Misleading Actions and Omissions

This part of the regime aims to promote informed decision making by outlawing "misleading actions"[44] and "misleading omissions."[45]

Misleading Actions

There is only space here to focus on one main theme, i.e., the potential for a more relational approach to fairness.

The test broadly reflects that in, the old Control of Misleading Advertisements Directive (CMAD).[46] The question is whether the practice "deceives or is likely to deceive" the average consumer[47] and thereby causes or is likely to cause him to take a transactional decision that would not otherwise have been taken.[48] However, as indicated above, the new regime is *relationally* sensitive, in applying right across the relationship. This opens up to scrutiny, inter alia, statements made in the context of enforcement, e.g., trader statements

[39] Art 3 (3).
[40] On viewing and understanding contract law in light of the broader regulatory picture see Collins (1999) and Brownsword (2009).
[41] See the Irish Consumer Protection Act 1987, s. 74.
[42] It also appears to be expected that French courts will develop the mistake and "dol" concepts to reflect the notion of unfairness in the UCPD (see Collins 2010, p. 114).
[43] The issue has already been subject to an initial review by the English and Scottish Law Commissions (Law Commission 2008).
[44] UCPD, art 6.
[45] UCPD, art 7.
[46] 84/450/EEC.
[47] See UCPD, art 6 (1) and CMAD, art. 2 (2) (referring more generally to deceiving "the person to whom it is addressed").
[48] Cf. the CMAD, which referred to the likelihood that the deceptive advertisement would affect the "economic behaviour" of the parties to whom it was addressed (art. 2 (2)).

that mislead consumers as to consumer and/or trader legal rights in relation to a dispute between them.[49] This contrasts with the CMAD, which was restricted to statements *promoting* the goods or services.[50] In addition, some national regimes (e.g., the UK) only previously contained control over certain specific types of statements made at the performance or enforcement stage;[51] the more general rules against "misleading" or "false" statements being restricted to statements about the goods, services or price;[52] thereby generally only catching promotional and pre-contractual statements.

Misleading Omissions

Article 7 (1) provides that:

> "A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise."[53]

The idea that traders must not omit information that consumers need involves a rejection of the idea that consumers must exercise total self-reliance in discovering whatever they think might be important. Consumers are, rather, to be helped to make more informed decisions (Willett 2007, pp. 39–43). The omissions rule is clearly premised on recognition that businesses often have limited incentives to highlight issues (OFT 1997, Chapter 3; Cartwright 2004, Chapter 3) and that, for a variety of reasons, consumers have limited capacity to work out what they need to know and to search for it (Willett 2007, pp. 39–43).

Where "invitations to purchase" are concerned, particular types of information are deemed (expressly) to be "material" and therefore needed for an informed decision.[54] In brief, this is information as to the main characteristics of the product; the identity and address of the trader; the price (including taxes) and associated charges or how the price or such charges are calculated; arrangements for payment, delivery, performance or complaint handling that deviate from professional diligence and any cancellation right. There were requirements to disclose a lot of this sort of information in the pre-existing regimes applicable to various specific types of contracts.[55] So, in these areas, the idea of using disclosure to try to assist informed decision making is not new. Nevertheless, the effect of the new regime is that such an approach is "rolled out" to contracts generally, in that these particular types of information must now be provided in invitations to purchase preceding all types of potential contract or transaction.

[49] Statements about rights are expressly said to be covered, as are potentially consequent transactional decisions as to whether to exercise rights (see UCPD, arts 6 (1) (g) and (2) (k)).
[50] Art 2 (1).
[51] See, for example, the UK Administration of Justice Act, s. 40, covering specific types of statement made in the course of pursuit of a debt (but not other types of statement made in this context and no types of statement made in any other context).
[52] On goods, for example, see Hall v Wickens [1972] 1 WLR 1418.
[53] Even if information is provided there is still a misleading omission if it is hidden, unclear, unintelligible, ambiguous, or untimely (art 7 (2)).
[54] UCPD, art 7 (4).
[55] See, e.g., the Distance Selling Directive, 97/7/EC, art. 4; and the Doorstep Selling Directive, 85/577/EEC, art. 4.

So, given the huge transactional coverage emphasized above, the "invitation to purchase" rule represents, for EU law, a very considerable extension of the policy of seeking to promote informed decision making by disclosure.

Of course, even more radical is the general test, requiring disclosure of information that the consumer "needs" for an "informed" decision. Again, it must be remembered that this applies to decision making at all stages of the relationship (well beyond the invitation to purchase scenario). Furthermore, the notion of information that consumers "need" clearly spreads the net much more widely than the specific information required under the invitation to purchase rule. Such a rule marks a new development for EU consumer law. It is certainly new for those national systems (particularly the common law countries) where such general duties of disclosure have never before been accepted. Taking the UK as an example, the general rules on misleading and false statements might sometimes be interpreted so as to catch failure to provide information.[56] However, the starting point for these rules was not consumer need as such, but, rather, the positive provision of incorrect information. What tends to be required under these rules is some statement or representation that in some way does not tell the whole truth and therefore triggers an obligation of disclosure.[57] This model retains a significant freedom-oriented ethic. The trader is liable only when there has been some form of voluntary "assumption of responsibility" for the information, rather than simply where consumers "need" the information to take an informed decision.

The UCPD approach may even be more protective than many jurisdictions having a tradition of a general duty of disclosure.[58]

Of course, it must be remembered that there is a qualification on the breadth of the provision. Whether there has been an omission of information needed by consumers is to be viewed in light of the "factual context, taking account of all its features and circumstances and the limitations of the communication medium." But, this may not leave undue scope for limiting the level of protection. The grammar would seem to indicate that the main focus remains the needs of consumers. Primarily, the intention seems to be to clarify that these needs may vary depending on the factors mentioned. So, for instance, information might not be needed because it is well known. Alternatively, given space and/or time factors, all consumers may really need is a reference to the existence of a readily accessible source of the full information.[59] Nevertheless, it could certainly be argued that the intention is not to exonerate traders from disclosure obligations purely on the basis of space and time limitations affecting the trader, where, these difficulties notwithstanding, the information is needed by consumers. It is yet more strongly arguable that (all else being equal in terms of consumer need) the intention is not to create some broad "defence" based on doing what is a "fair burden" to place on traders. This might import all sorts of arguments about the cost to traders, what is normal practice in the trade sector, the likelihood of consumers making use of the information, etc. However, while factors of this nature may affect the trader, they do not remove or ameliorate a consumer "need" for information, and, to reiterate, the core focus of the test seems to be on consumer needs.

[56] Cottee v Douglas Seaton [1972] 1 WLR 1408.

[57] See *Spice Girls Ltd v Aprilia*, Times 5 April, [2000] EMLR 478 and *R v Ford Motor Co.* [1974] 1 WLR 1221.

[58] See Collins (2010, p. 104).

[59] See, for example, the example given by Collins (2010, p. 105) of a promotion on a chocolate bar that does not reproduce the full conditions, but does refer to where they can be found.

Possible Concrete Applications of the Omissions Rule

A key priority must be to seek to identify categories of information that could be said to be "needed" by consumers. This is important in terms of developing regulatory strategy and ensuring useful protection. It is also important in increasing the chances that a common approach is taken across the EU and in helping to clarify to what, if any extent, full harmonization will depress national standards of protection.

Some categories are obvious. Product safety risks already needed to be disclosed under the Product Safety Directive, and this is preserved by the UCPD;[60] but the omissions concept gives an opportunity to extend this logic to safety risks associated with pure services.[61]

Next, it has been made very clear in the recent European Commission report that the Commission regards information as to environmental matters as relevant (European Commission 2009a, pp. 37–46). This is of interest in itself, i.e., in terms of the specific sort of environmental information that might need to be disclosed. The Commission provides a lot of food for thought in this regard, although there is no space to develop this further here. The broader point, however, is that providing information about environmental risks and benefits is about recognizing the social and ethical concerns of consumers, rather than protecting the selfish economic interests of consumers (a genuinely eco-friendly product may actually be more expensive). Does it logically follow that, in appropriate circumstances, information might be needed on other matters of social or ethical concern, e.g., production processes that involve exploitation of workers or cruelty to animals?

Next, the type of information that is always deemed to be material in invitations to purchase may be of some assistance in concretizing the general misleading omissions concept, i.e., the concept applicable outside the special invitation to purchase rules.

One theme here seems to be information relating to two connected issues: the extent of the financial commitment and whether the consumer will obtain "value for money" in relation to trader and product performance. So, in invitations to purchase there must be disclosure as to the main characteristics of the product or service; the price and various other charges (including how the price is calculated if it cannot be calculated in advance); and "arrangements" for payment, delivery or performance, if they "depart from the requirements of professional diligence."

All of these matters are potentially related to what the consumer pays and what is received in return. So how might such an approach be "rolled out" from the "deemed material" cases so as to flesh out the general omissions/informational needs test (both in relation to invitations to purchase and more generally across the relationship)?

First of all, let us consider the requirement to disclose the price, other charges and the mode of price calculation. This does not catch all of the ways in which a consumer might underestimate what needs to be paid. For instance, it may be important to know that one is "tied in" for a minimum period or that the contract involves a commitment to future purchases (see OFT/BERR 2008, 7.18). Secondly, the above reference to "arrangements" (for payment, delivery or performance) suggests that the focus is on the plans of the trader on these issues. What if it is known to the trader that *external factors* (e.g., shortages, supplier/employee problems, etc.) stand a better than average chance of frustrating these plans to the detriment of the consumer? Arguably, the consumer "needs" this information as well. Third, the consumer may need to know about inherent risks of poor quality, limited

[60] General Product Safety Directive (GPSD), 2001/95/EC, art. 5; UCPD, art. 3 (3).

[61] The GPSD covers products supplied with services (art. 2 (a)), but not the service element itself.

fitness for purpose, etc., where these are not obvious. So, for example, given the forthcoming introduction of digital reception, it could be important to know that a TV only has an analogue tuner (OFT/BERR 2008, 7.18). Again, it is not clear that this would be caught by the reference to the trader's "arrangements for delivery or performance," but it might well be caught by the general test.

The second broad theme that is identifiable in relation to invitations to purchase is fairness in relation to enforcement. For example, a complaint handling policy is material if it deviates from "the requirements of professional diligence." This provision raises particular difficulties in itself. It has been pointed out that if traders have poor complaint handling policies, they are unlikely to be keen to disclose this and that it would make more sense to have a positive obligation to describe the nature of the complaint handling policy (Collins 2010, p. 108). This must be correct. Indeed, apart from anything else, the "negative" approach is problematic because traders are likely to find it very difficult to assess whether their policy does or does not violate professional diligence.

However, the more general point is that this provision demonstrates a concern with treating consumers fairly in relation to enforcement by making them aware of how complaints are resolved. So, under the general test, it might be reasoned that consumers sometimes need to be made aware of complaint handling policies at times when there is actually a complaint and this knowledge is likely to be digested (i.e., not only at the invitation to purchase stage).

Furthermore, the question arises as to whether consumers need to be aware (at the stage of a dispute) of certain important legal rights that they have and therefore, whether disclosure of such rights might sometimes be required under the general omissions test.[62] It is probably too ambitious an interpretation to suggest that key rights should be disclosed in all cases where there is a dispute between the parties. However, there might be an argument for disclosure of such rights where there is a pressing need. Aside from the UCPD regime, one example of this is the obligation under the Sales Directive, when a guarantee is given, to set out clearly how to make a claim, as well as the duration of the guarantee and trader details.[63] This seems to recognize that a lack of knowledge on procedures for enforcing guarantees might deter consumers from making claims. Apart from cases where "how to enforce rights" is in particular need of explanation, the Sales Directive requires a guarantee to state that legal rights are available in addition to and are not affected by, the guarantee commitments.[64] Under the misleading omissions concept, similar reasoning might be applied to cases involving guarantees given for services, e.g., guarantees covering the "labour" (service) element of home improvement or car repair work. Again, the requirement would be that attention should be drawn to the existence of the relevant national legal rights in this context. For both goods and services, an actual brief summary of the relevant rights might be needed where very significant losses are likely without such disclosure.

Finally, a more radically consumer-oriented approach would be to move beyond the notion of risks associated with the product or service as such and focus on risks associated with the trader. This might cover, for example, risks (to consumers making pre-payments) of impending trader insolvency. Equally, it might cover risks posed by a history of poor customer care (in particular, where this involves consistent breaches of consumer protection

[62] E.g., the repair, replacement, price reduction, and rescission remedies available for breach of the conformity obligation in the Sales Directive (99/44/EC, arts 2 and 3); and see also the discussion of rights arising in a consumer credit default context in Willett (2010, at 3 (ii)).

[63] 99/44/EC, art 6 (2).

[64] Ibid.

laws). Such information could surely sometimes be argued to be needed in order to allow for informed decisions as to whether to deal with the trader.

The Limits and Potential of Disclosure Rules

In considering the prospects for the omissions rule to improve informed decision making, certain factors must be considered. First of all, behavioural science research highlights various limitations on consumer information processing abilities (Ramsay 2007, pp. 71–85), and these must be taken seriously. Essentially, the point is that consumers will often simply not focus on and digest the information that is provided. There are numerous reasons for this. There may be a large quantity of information to be processed prior to the decision in question (Better Regulation Executive and the National Consumer Council 2007). The result may be that consumers focus only on the core aspects of the transaction. Furthermore, consumers may suffer from over-optimism and an inclination to discount future risks (so called "hyperbolic discounting," on which see Frederick et al. 2002). This may be partly because of factors such as the very positive general marketing messages; the deeply embedded nature of consumption culture; prior psychological commitment to purchases (Willett 2007, p. 41) and the particular way in which certain risks and benefits are "framed" (Ramsay 2007, pp. 73–74).

So, if there is to be any real chance of the omissions rule serving to improve informed decision making for the average consumer, requirements as to presentation and timing must be firmly grounded in the increasing empirical and behavioural science insights as to what is most likely to impact on consumer consciousness (Durkin 2006; Mann 2006). (It is noteworthy that the European Commission has said that the unfairness concept should be interpreted in the light of "the most recent findings of behavioural economics" (European Commission 2009a, p. 32)).

In fact, the misleading omissions regime does actually provide a particular type of foundation for taking such an approach. There is not only a misleading omission when information is not provided, but also when it is "hidden," "unintelligible," "ambiguous," or "untimely,"[65] It is certainly arguable that these concepts must be understood by reference to the empirical evidence referred to. So, for instance, in some cases it may be that giving information in a more eye-catching, non-written form (e.g., pictures) is necessary for a real impact. In such cases, it is arguable that not to do so may mean that the information is "unintelligible" or perhaps even "hidden." In other cases, information may not be digested because it is "framed" very much as a formality, rather than something to take seriously. In this situation, might it not be (for practical purposes) unintelligible or even hidden? Equally, information as to risks may not be digested because it is given very late in the sales process (after the consumer has already had too much information to process and has been conditioned by the whole sales process to think positively about the purchase). Is such information not "untimely?"

Even if this sort of approach is taken, it is uncertain as to just how much impact disclosure will have in terms of improving the informed decision making of the average consumer. But, even if information has little impact on the average consumer, it may have some impact on the decision making of a better informed "active margin" of consumers.[66] How likely this is to occur would need to be established by empirical evidence, but it is, at least, more likely than the prospect of affecting the average consumer.

[65] Art 7 (2).

[66] On the role of the active margin see Trebilcock (1980).

If the decision making of the active margin *is* affected by such information, this may serve to impose a competitive discipline on traders in relation to their substantive offerings (on price, performance, and enforcement processes). In other words, traders may be very reluctant to disclose information which might show them in a negative light to the active margin of consumers. So (following some of the examples given above), traders may not wish to make the service appear less attractive by disclosing the full extent of the consumer's financial commitment and disclosing certain risks as to quality, delivery, completion, etc. This may incentivize traders to improve provide better substantive offerings on such issues.

Aggressive Practices

Introduction

This category is very important because, while EU law had regulated misleading actions and omissions before,[67] legislating against aggressive practices adds a completely new piece to the EU regulatory jigsaw. It is especially important, then, to develop a clear conceptual map. Without this, the previous total dominance of national rules and traditions is likely to make divergent approaches all the more likely (see Collins 2010, p. 110).

A practice is aggressive if:

> ".. in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force or undue influence, it significantly impairs or is likely to impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise."[68]

In deciding whether a practice uses coercion, harassment, or undue influence, account is to be taken of:

(a) its timing, location, nature, or persistence;
(b) the use of threatening or abusive language or behaviour;
(c) 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;
(d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and
(e) any threat to take any action which cannot legally be taken.[69]

Aggression and Informed Decision Making

The above definition refers generally to whether undue influence (or coercion or harassment) restricts the "freedom of choice" of the consumer. Nevertheless, where undue influence is concerned, the restriction of choice that affects transactional decision making

[67] The latter, albeit, only through specific rules.
[68] UCPD, art 8.
[69] UCPD, art 9.

must, specifically, be a restriction of choice that results from an information problem. Undue influence is defined as:

> "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening physical force, in a way which significantly limits the consumer's ability to make an informed decision."[70]

The idea here is that trader exploitation of a position of power through pressure may compromise the informed decision making of consumers. Presumably, a key concern is that consumers (due to the pressure) will not reflect properly on the risks and benefits of the decision. Guidelines (a) and (b) (timing, location, nature, persistence, language, and behaviour) are indicative of the sort of factors that might come into play here. Guideline (c) also appears to be potentially relevant. It refers to exploitation of misfortunes or circumstances that would "impair the consumer's judgement." Certainly, one of the ways in which undue influence seems to have been understood (under some pre-existing national rules) involves exploitation of concerns and emotions (Schulze and Schulte-Nolke 2003, p. 37).[71]

So, the notion of consumer decision making is certainly not one that always expects consumers to exercise self-reliance in the face of pressure. There is at least something of an understanding as to how consumers may be affected by various forms of pressure applied within a relationship of power.

It seems likely that the power relationship required under the concept of undue influence could include the relationship that exists post-contractually in cases where the consumer is in some way "at the mercy" of the trader. This may be, for example, because the consumer is struggling with existing commitments and possibly actually in arrears. The situation may enable traders to pressure consumers to take decisions that may not be in their best interests. For example, consumers may be pressured to commit to some form of refinancing or to pay off everything that is owed rather than seeking a compromise of some type. The informed decision making problem lies in the fact that, due to the circumstances, consumers may not reflect properly on the decision.

The undue influence concept may also extend to pre-contractual situations. Here, the requisite "position of power" could be said to derive from the greater market understanding and "negotiation" skill possessed by traders. So, there may be undue influence in the case of some high pressure sales, where the effect is that consumers are unlikely to reflect adequately on the benefits and risks of the transaction. The problem will often derive from the fact that the salesperson creates the need for a quick decision (e.g., because the consumer is made to feel that otherwise he will not escape the attentions of the salesperson or because there are promised benefits only available to those making an early commitment).[72] Another potential problem is that an insurance salesperson exploits concerns or emotions relating to risks that consumers or their families face, with the result that consumers do not properly reflect on the benefits and costs of the insurance.[73]

Of course, it is possible that the undue influence concept is not supposed to be understood as broadly as described. It has been suggested that there may only be the requisite "position of power" in post-contractual situations (Howells et al. 2006, pp. 187–

[70] UCPD, art 2 (j).

[71] As suggested at the section on *Europeanisation* above, the ECJ might seek to draw on national traditions in developing an autonomous notion of fairness.

[72] See guideline (a) above.

[73] See guideline (c) above.

189). However, even if this is the case, it may well be that pre-contractual informed decision making problems could be caught by the more general "freedom of choice" concept applicable in cases of coercion and harassment. Whatever freedom of choice may mean beyond informed decision making,[74] it is arguable that it requires informed decision making as a basic minimum. Surely, a choice is not free (at least in the sense arguably intended in a consumer protection measure) if there are not at least the conditions for the consumer to understand what is on the table.

If this is correct, then, even where there is not the necessary power relationship for undue influence, trader actions that prevent consumers from reflecting on the decision could potentially be categorized as coercion or harassment, on the basis that if there is no informed decision, there is no "freedom of choice."

It does seem that the elements of undue influence (and possibly coercion and harassment) discussed so far, set a reasonably high level of protection in relation to informed decision making. It is true that the practice in question must cause or be likely to cause the average consumer to take a transactional decision they would not take otherwise, this being a requirement that does not exist in some national systems.[75] Nevertheless, the discussion of the average consumer concept below suggests that this may not be as onerous a requirement to establish as might be imagined.

One indication of a relatively high level of protection is the fact that, as we have seen, the whole spectrum of pre- and post-contract decision making is covered. Compare this, for instance, with the pre-existing UK preventive/criminal regime on aggression (specifically harassment). The only broadly applicable regime required establishment of either intention or recklessness by the trader;[76] while another key UK regime is focused solely on the problem of harassment of debtors.[77]

Another point is that private law concepts of undue influence, which may have been of some assistance in the situations described above, tend to be restricted to cases where an actual contract results, rather than there simply being the likelihood of a transactional decision (there being many transactional decisions that do not necessarily amount to an actual contract as this is variously defined by national systems). Furthermore, the UCPD concept, as we have seen, requires only a "power relationship" (arguably satisfied in most trader–consumer encounters), while, in the UK, for instance, a special relationship of trust and confidence is required (and this is not taken to exist as a matter of routine in trader–consumer relations).[78]

Aggression, Informed Decision Making, and Transparency

Above we have outlined various practices that cause informed decision-making problems. It seems likely that such practices will often be viewed as aggressive notwithstanding any opportunities that are provided for consumers to reflect more fully on the decision in

[74] See section on *Aggression, Choice, and Substance* below.

[75] See the UK Administration of Justice Act, s. 40 on harassment of debtors, where the sole focus is on whether the trader puts the consumer in a state of fear, distress, or humiliation. Private law rules are usually concerned only with aggressive behaviour that induces a contract, but even here it is sometimes enough to show subjective inducement, while the UCPD transactional decision requirement is apparently wholly objective (based on the average consumer benchmark).

[76] Protection form Harassment Act 1997, s. 1.

[77] Supra, n. 75.

[78] E.g., parent/child, lawyer/client, and religious adviser/follower (see Allcard v Skinner (1887) 36 Ch. D. 145).

question. Now, it might be argued that the problem of uninformed decision making could routinely be "corrected:"

1. by standardized transparent disclosure as to the nature of the transactional decision and the risks associated with it, and/or
2. by provision for a period of reflection after the decision, during which the consumer could cancel the decision. I should emphasize that I am not referring here to statutory cancellation rights that might apply to the contract in question (e.g., the cancellation rights routinely applicable in doorstep and distance selling),[79] but to cancellation rights offered by traders when the above sort of practices are used. In other words, the model would be one in which aggression is acceptable, so long as traders voluntarily provide a cancellation right.[80]

However, such a transparency based approach would surely seriously weaken the protective effect of the unfairness concept, placing far too much emphasis on consumer self-reliance. It would ignore:

1. the information processing difficulties highlighted by behavioural science research,[81] which are likely to be faced by consumers when dealing with standardized literature from traders;
2. the fact that these difficulties are likely to be exacerbated by the harassment, coercion or pressure. These difficulties will often exist in routine transactions, i.e., where there has not been any actual aggression, but they may be made worse by aggressive practices. Such practices may make it even less likely that consumers will focus on and digest any standardized explanations;
3. the empirical research as to the limited impact of cancellation periods. There is no space here to develop this, but evidence suggests that, even where there is no aggression, cancellation periods are often not taken advantage of (Ramsay 2007, pp. 345–346). So, it may be unlikely that consumers would actually make use of a cancellation period to assess more fully the risks of the transaction.

In short, if informed decision making is realistic at all, then it is surely generally only achievable by the avoidance of such aggressive practices in the first place (certainly if the concept of informed decision making is interpreted in the light of the consumer protection and confidence goals of the UCPD).[82]

Aggression, Choice, and Substance

There seems to be a separate category of aggression in which substantive reasonableness is core to the concept of freedom of choice in consumer decision making. In essence, the issue is that the trader creates a situation in which there are substantively unreasonable consequences for the consumer whatever decision is taken. This is a category in which the

[79] See the Distance Selling Directive, supra, n. 55, art.6; and the Doorstep Selling Directive, supra, n. 55, art.5.

[80] In other words, this would (in cases of aggression) provide a cancellation right in contracts where there is no statutory cancellation right. In those cases, such as doorstep and distance selling where there is a statutory cancellation period, the idea would be that, based on the aggression, the cancellation period should be lengthened.

[81] See the section on *The Limits and Potential of Disclosure Rules* above.

[82] See Recitals 1 and 4 to the Preamble and Article 1.

fundamental issue is not informed decision making at all and where, therefore, informing the consumer about the risks involved in the decision is certainly not a sufficient response.

As indicated above, in the case of harassment and coercion, the question is whether there is a restriction on "freedom of choice or conduct." As suggested above, this may include cases in which freedom of choice is restricted in the sense that there is not an informed decision. However, it arguably also covers cases in which choice is restricted in the sense that there are substantively unreasonable consequences for the consumer whatever decision is taken.

There seems to be support for such an approach in guideline (d), which refers to:

> "any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract..."[83]

Here, the issue is not whether consumers are informed or not. Indeed, they are likely to be perfectly well aware as to what barriers they face and possibly also as to what they stand to lose if they do not enforce their rights. The problem is that they face substantively unreasonable consequences whatever decision they take. They must either take the onerous steps (e.g., involving cost, time, and trouble) required to exercise their rights or lose out by deciding to give up on enforcing their rights.

The further significance of this example is that it is a case where there is not necessarily anything independently unlawful about what the trader is doing. Guideline (e) refers to a threat to take action that cannot lawfully be taken. However, in the context of guideline (d), the erection of the barrier to enforcement is not necessarily independently unlawful.

So, it seems that there can be an aggressive practice where (in the face of consumer attempts to enforce contractual rights) a trader acts in an obstructive (albeit otherwise lawful) manner, and this leaves the consumer with substantively unreasonable consequences whatever decision is taken. This could cover, for example, requiring consumers to go through time-consuming or complicated formalities or expend unreasonable resources (time and/or money) on calling help centres and the like. Could it also cover failure to set up a help-line in such a way that complaints could be dealt with virtually immediately? The potential to seriously police such obstructive and un-cooperative practices could have real significance as it might begin to call into question a lot of modern "customer care" practices. Not only are many of these obstructive, but is often hard to see how they could be argued to be genuinely necessary for resolution of the problem. Often, it appears, rather, that they are focused fundamentally on the convenience and further enrichment of the business.

The freedom of choice principle can also apply to enforcement by the trader. Again, the key would be coercive or harassing behaviour that is not necessarily independently unlawful and which causes consumers to face substantively unreasonable consequences whatever decision they take. This may cover pressurizing consumers to pay a debt by making contact at unreasonable times and/or in unreasonable places, e.g., late at night, at work, etc.[84]

Here, consumer freedom of choice is restricted in the sense that there are unreasonable substantive consequences whatever decision is taken. One alternative (which might be considered unreasonable) is to make immediate payment, with no scope being provided for negotiation or compromise. The alternative to making such payment is to face the

[83] See guideline (d) above.

[84] See guideline (a) above on the relevance of "timing, location, nature, or persistence" in assessing whether there has been aggression.

continuing inconvenience and invasion of private space involved in being contacted at unreasonable times, places, etc.

All in all, the coercion/harassment/freedom of choice concept may set a reasonably high level of protection. For instance, consumer decisions to give up on a claim or give in to trader claims for money would often not be caught by private law as they would not be decisions to enter contracts as such. Furthermore, the net is cast much wider than in systems such as the UK, which have previously focused on harassment of debtors.[85] Clearly, this does not cover trader obstruction of consumer claims (as we have seen that the UCPD does). Even in relation to enforcement by the trader, the UCPD seems broader. UK "harassment of debtor" rules require "distress, alarm, or humiliation," often covering the above examples about unreasonable times and places of contact. However, these rules may not cover enforcement methods that pressurize the consumer in a purely financial sense, e.g., requiring consumers to discuss debts by making contact on premium rate telephone lines. UK regulators certainly seem to consider that this is covered by the UCPD regime (OFT/BERR 2008, 8.11). It does appear that there is a freedom of choice issue here: the alternative to making immediate payment being to bear the significant cost of the telephone calls.

It also seems conceivable that the UCPD concept could cover threats to take immediate court action unless there is immediate payment (giving little or no leeway or scope for an alternative solution or compromise). Such a threat might be considered unreasonable (especially where consumers have already paid significant parts of the debt, are suffering from a drop in income, etc.; see Willett 2010). Consumers are then faced with substantively unreasonable consequences whatever decision is taken. Either they make immediate payment, which puts them in deeper financial trouble or they face the prospects of court action, which may involve further cost, including the loss of property secured against the debt. Again, to take the UK as an example, it is unclear that this sort of case would be covered by the "harassment of debtors" regime. The distress, alarm, or humiliation criteria under this regime might require something in the nature of persistent contact, contact at unreasonable times, places, etc., rather than simply a refusal to take account of the payment history and current circumstances of the debtor.

Violation of Professional Diligence

Introduction

As already indicated, the misleading and aggressive practice concepts are merely supposed to be categories of unfairness as defined in the more general "professional diligence" clause. This provides that a practice is unfair if:

> "(a) it is contrary to the requirements of professional diligence, and
> (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed..."[86]

[85] Administration of Justice Act 1970, s. 40.
[86] UCPD, art 5 (2).

It is further provided that:

> "to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise."

So, once again, we find the notion of informed decision making. The violation of professional diligence must affect the informed decision making of consumers. But, this causes a potential problem in relation to the above analysis of the aggressive practices concept. It must be remembered that (whatever work the general clause does outside the misleading and aggressive practice clauses); these misleading and aggressive practice clauses are also supposed to be instances of unfairness as conceptualized in the general professional diligence clause. In other words, the concept of unfairness under this general clause should accommodate, in a coherent manner, the aggressive and misleading practice concepts. The difficulty is that, as we have seen, the general clause is focused on the issue of informed decision making. Yet, as we have also seen, the aggressive practices clause covers a form of choice constraint (substantively unreasonable consequences for consumers whatever decision is taken) that has nothing to do with information. At best, there might be said to be an unfortunate incoherence between this notion of choice constraint and the "informed" decision paradigm under the general clause. At worst, the overriding role of the general clause might be said to mean that choice constraint (under the aggressive practices clause) is to be interpreted at least sometimes as focusing simply on the "understanding" dimension of free choice.[87] The result might then be that presenting consumers with substantively unreasonable alternatives might become acceptable so long as consumers are properly informed about it.[88] This would seriously undermine the level of protection available. First, it would fail to give concrete protection against the sort of choice constraint described. Second, it would be unlikely actually to improve informed decision making. In practice, informing consumers would involve providing standardized, transparent information. The limits of this in actually improving informed decision making have been consistently emphasized above.[89]

[87] "Freedom of choice" can be understood as referring to both the "understanding" and "freedom form choice constraint" elements. The separate references to "informed decision making" and "freedom of choice" in the misleading omissions/undue influence and coercion/harassment contexts, respectively, does suggest, that "freedom of choice" is supposed to refer only to the choice constraint element. At the same time, it may well be an instance of loose drafting; the intention being that "freedom of choice," while being a concept taking choice constraint into account, also takes account of, and is to be understood as dominated by, the "understanding" dimension.

[88] Of course, one response here is that the sub-general clauses are supposed to be interpreted wholly autonomously from the general clause, and this may well be the case, given that, after setting out the general clause (art 5 (2)), it is provided in a quite separate paragraph (art 5 (4)), that, "in particular," practices are unfair if they fail the tests under the sub-clauses (these tests then being set out). At the same time, it is not impossible that any uncertainty as to the meaning of the sub-clauses might be interpreted in light of the general clause, and this brings us back to the possible role of the informed decision-making concept in the general clause (and as indicated, ibid., a freedom of choice concept, while taking account of choice constraint, might plausibly give precedence to the "understanding" dimension).

[89] Prior to adoption of the UCPD, a report for the UK government suggested that the general clause be recast so as to express the idea that fairness was about informed decision making and unforced choice (Bradgate et al. 2003, pp. 116–117). This would have made it less likely that the choice concept under the aggressive practices clause could ever be understood as referring merely to informed decision making. Of course, this recommendation was not taken up, and we are left with a general clause that refers only to informed decision making on the consumer side of the equation.

However, even if there is supposed to be some connection or relationship between the general clause and the sub-clauses, there is, in fact, a way to understand this relationship that leaves intact the aggressive practices notion of choice constraint/substantively unreasonable consequences. Perhaps, the general clause can, at least in part, be said to be focused on a quite different type of decision to the type of decision being dealt with by the sub-clauses on misleading and aggressive practices. They are focused on decisions following specific misleading or aggressive action. Perhaps the general clause can be viewed, in part at least, as being focused on the initial decision a consumer makes to enter relations with the trader. It could be argued that in deciding whether to enter such relations, consumers reasonably expect that traders will treat them fairly. Being treated fairly would include not being subjected (later in the relationship) to aggressive practices that restrict freedom of choice (purely in the choice constraint/substantively unreasonable alternatives sense). In other words, it includes not being subject to practices that cause there to be substantively unreasonable consequences whatever decision is taken. If traders do engage in such practices, the initial consumer decision to enter relations with the trader can be said to be one that was not informed. (It was not informed in the sense that these later practices were not reasonably expected at the time when it was decided to enter relations with the trader).

This approach, then, seems to forge a coherent connection between the general and aggressive practice clauses. In the case of aggressive practices, the focus is on choice constraint that is subsequent to the specific aggressive practice. In the case of the general clause, the focus is on the (earlier) lack of awareness as to the future prospect of such an aggressive practice and the choice constraint it will cause. The choice constraint/substantively unreasonable alternatives concept is left as an entirely autonomous, free-standing concept (the general clause simply providing a much "bigger picture" connection to notions of informed decision making).

Another key question about the general clause is as to what role it may or may not have as a basis for forms of fairness that are not covered by the misleading and aggressive sub-clauses.[90] This could, in fact, be affected by the argument made above, i.e., that the "informed decision making" that the general clause is concerned with could be viewed as related to the initial decision to enter relations with the trader. This being the case, the general clause could[91] cover practices arising later that do not, themselves, lead (or have the capacity to lead) to a subsequent consumer decision. In other words, it could cover more "unilateral" unfairness by the trader, i.e., a practice which impacts consumers, although it does not, as such, affect subsequent decision making. This might catch, for instance, withdrawing services without warning or re-routing telecom or internet services in ways that result in consumers being charged significant sums.

The point is this. The misleading and aggressive practice clauses seem to require that the practice actually causes (or is likely to cause) a subsequent transactional decision. When something such as termination or re-routing is simply imposed on consumers, it might be difficult to argue that this causes any actual or likely subsequent consumer decision. However, such practices could violate the general clause on the basis that, when first

[90] One aspect of this (which cannot be developed here) is whether any such role could apply in relation to existing practices; or whether it is restricted to new practices which result from market and technological developments (Howells et al. 2006, p. 121).

[91] On this approach it is operating as a free-standing basis of a finding of unfairness; rather than (as in the discussion above) as a "big picture," theoretical backdrop to the sub-clauses.

entering relations with traders, such unfairness would not reasonably be expected (the initial decision to enter relations therefore not being an informed decision).

But, even if this analysis is valid, bearing in mind that there is only a breach of the general clause where informed decision making is affected, we once again return to the question as to whether the practice becomes acceptable if the prospect of it being used is made transparent from the outset. Is the decision to enter initial relations now an informed one? Is there, in other words, no longer a violation of the general clause?[92] There could be said to be support for such an approach, given that under the omissions test, there is a misleading omission where there is a failure to disclose (in invitations to purchase) arrangements for delivery or performance that deviate from the requirements of professional diligence.[93] It might be said to be illogical to require disclosure of violation of professional standards under the omissions test, while also holding that such violation is itself disallowed despite the disclosure. However, the omissions rule only applies to those matters expressly specified (including, as indicated, delivery and performance arrangements). Perhaps, this is supposed to be interpreted narrowly (e.g., place and time of delivery, main features of performance) and not to extend, for instance, to withdrawing services without warning or re-routing telecom or internet services (the examples given above as possible violations of the general clause). Perhaps, in these cases, the omissions/invitation to purchase rule does not apply. Then, there would be no logical bar to holding that such practices breach the general clause even when they are transparent. Indeed, perhaps even where performance, delivery, etc. matters are clearly involved, a disclosure approach (via the omissions rule) is only supposed to be the end of the matter in the less extreme cases, transparency providing no defence under the general clause where the violation of professional diligence is serious.

Certainly, minimal acceptance of transparency as a defence to violation of professional diligence would properly recognize the information processing difficulties faced by consumers. These difficulties are particularly significant at the pre-contract stage where there is a particularly large quantity of information to be dealt with and when risk underestimation and over-optimism are likely to have a particularly powerful influence.[94] Given these problems, it is arguably unrealistic in most cases to imagine that pre-contract information as to practices will genuinely alter consumer expectations as to how they will be treated.

A final issue is how matters are affected by the specific definition of professional diligence. It is provided that:

> "'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity."[95]

Perhaps the most natural reading of this is that traders always meet the professional diligence standard, so long as they satisfy either the "honest market practice" criterion or

[92] There is a greater risk of such an interpretation where we are dealing with the general clause as an entirely free-standing concept, with its reference to informed decision making, as opposed to where it is viewed (as above) as a broad explanation for the otherwise autonomous sub-clauses (one of which has a clear reference to a concept—"freedom of choice"—clearly capable of carrying a meaning quite independent from the issue of understanding).

[93] Art 7 (4) (d).

[94] See the behavioural science research cited above at *The Limits and Potential of Disclosure Rules*.

[95] Art 2 (h).

the good faith criterion. The difficulty here is that, perhaps, (even when qualified by reference to "reasonable expectation" and "special skill and care"), "honest market practice" might suggest a standard that is closely tied to the prevailing ethics of traders.[96] If satisfaction of this standard is always sufficient, this could place a cap on the level of protection, whatever the given issue. So, for example, if the prevailing trader view of honest market practice is that the forms of unilateral unfairness mentioned above are acceptable, then they would not be taken to violate professional diligence. Equally, if the prevailing trader view of honest market practice is that transparency always legitimizes practices no matter how unfair they are in other respects, then, any free-standing use of the general clause would be limited to a transparency paradigm.

There appear to be two broad routes to avoid such "dumbing down" of protection. One is to read "honest market practice" as being strongly qualified by the reference to "special skill and care" and what can "reasonably be expected" by consumers. The conclusion might then be that what is intended is a much more broadly objective view of fair market practice, one, perhaps, grounded in the standards of the broader community (of which the trading community is a part, but only a part) as to how certain trading communities should behave.

Another possibility is that, even if the "honest market practice" concept sets a relatively low standard, meeting this standard is not necessarily sufficient to satisfy professional diligence. To reach this conclusion, the "and/or" provision needs to be viewed not as conveying that traders have the choice as to which standard to meet, but as conveying that this is a choice for the courts, depending on which standard is higher. This would allow the alternative, "good faith" standard to be imposed if deemed appropriate. This could well set a higher standard than the "honest market practice" concept; given the absence of the subjective connotations that come with "honest." Nevertheless, questions might still remain as to just how high a standard is set by the good faith concept, given that the reference is to good faith "in the trader's field of activity." Some might question whether this loops us back to trader dominated norms. However, one could certainly also view the matter in terms of an objective notion of good faith, fixed by the notions of the broader community as to how trading communities should behave.

Influencing the Average Consumer and His Transactional Decision Making

The above discussion has addressed certain core aspects of the UCPD unfairness regime. Of course, a key element in this regime is the "average consumer" benchmark. Does the average consumer need information to make an informed decision? Would certain pressure or coercion cause the average consumer to be uninformed or restrict their freedom of choice? The "average consumer" concept serves as an objective benchmark on all these issues.

In fact, there is a further element to all of the tests, again involving the average consumer. It is not sufficient to establish that the practice would mislead that information is needed for an informed decision or that aggression would affect informed decision making or choice. It must, also, be shown that the impact of the practice is likely to be such that the average consumer would take a transactional decision different from that which they would take otherwise.[97] In other words, there is this "transactional decision" requirement, also measured by reference to the objective benchmark of the average consumer. This

[96] See discussion of these concepts by Twigg-Flesner et al. (2005, pp. 4–11) and Collins (2010).
[97] Arts 6 (1), 7 (1) and 8.

requirement can make a difference to whether a practice is unfair. For instance, a price that is understated by a few pence arguably still misleads the average consumer. Nevertheless, perhaps the practice is not unfair because it seems unlikely that this small difference would have caused the average consumer to buy a product that he would not have bought in any case.

This objective "transactional decision" requirement was not necessarily present in pre-existing national regimes. For example, UK criminal and preventive rules on false and misleading statements as to goods, services and prices contained no such requirement,[98] and in private law, although the practice must have induced entry into a contract, subjective inducement is often theoretically sufficient.[99]

It is clear, then, that the need to establish a likely impact on the transactional decision making of the average consumer is something that threatens to compromise the level of protection offered by the UCPD regime. A key question, then, is as to how the "average consumer" is understood: as someone whose transactional decision making is readily, or not so readily, influenced?[100]

The broad issue in relation to the average consumer concept is the concern that it may end up setting a relatively low level of protection, thereby undermining the potential for a high level of protection set out above, and, in particular, given the full harmonization context, forcing some member states to reduce their pre-existing levels of protection.

So, how is the average consumer concept to be understood? The ECJ notion of the average consumer is of a consumer that is "reasonably well-informed and reasonably observant and circumspect," this formula is referred to in the Preamble to the UCPD,[101] and there is a rich vein of ECJ case law applying it.[102]

In those cases where this formula has typically been applied, the issue has been positively provided information and whether it would mislead such a "reasonably well-informed, etc." consumer. It has often been concluded that such a consumer would not have been misled by the information in question.[103] This is sometimes viewed as confirmation of the fact that the "reasonably well informed, etc." model expects too much of consumers in terms of self-reliance.

The essential argument here is that the ECJ case law may not pose as significant a threat to levels of protection as might be feared. First of all, the ties between the UCPD and the ECJ jurisprudence may be looser than might be imagined. The reference in the Preamble was originally contained in the actual text of the Directive, but was relegated to the Preamble during negotiation of the Directive.

Secondly, there is the reference in the Preamble to the test taking into account "social, cultural and linguistic factors."[104] This suggests that there is scope to read the concept in

[98] Trade Descriptions Act 1968, ss. 1 and 14 (goods and services, respectively); Consumer Protection Act 1987, s. 20 (1) (prices); and Administration of Justice Act 1970, s. 40 (harassment of debtors).

[99] *Smith v Chadwick* (18840 9 App. Cas. 187). (misrepresentation); *DSND Subsea Ltd v Petroleum Geo services Ltd* [2000] Build LR 530, Dyson J, at 545 (duress); and *Royal Bank of Scotland v Etridge* (No. 2) [2002] 2AC 773 (undue influence).

[100] Indeed, as indicated above, the same average consumer is also the benchmark for the first phase of the various concepts: where the issue is whether the average consumer would be misled, have his freedom of choice restricted, etc.

[101] Recital 18.

[102] See, for example, *Gut Springenheide and Tusky*, Case C–210/96; *Verein gegen Unwesen in Handel und Gewerbe Köln e. V. v Mars GmbH*,C–470/93; *Criminal Proceedings against Gottfried Linhart and Hans Biffl*, C–99/01; and see Weatherill (2007) for a review of the cases.

[103] Ibid.

[104] Recital 18.

the context of local markets. Based on such a reading, it seems that member states might legitimately conclude that, at least sometimes, the average consumer in their country is not as well informed and circumspect as the ECJ image of the average consumer. Based on this, the member state might justify maintenance or introduction of a relatively robust level of protection without being taken to have broken the full harmonization rule.

Thirdly, there is a general tendency for the ECJ to leave it to national courts to apply the law to the facts within the national legal context.[105] This may provide further scope to national courts to develop their own distinctive applications of the average consumer concept.

Fourthly, the European Commission has emphasized recently that, under the UCPD, the "reasonably well-informed, etc." formula is to be understood in the light of Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides for a high level of consumer protection (European Commission 2009a, p. 26).

Fifthly, the European Commission has also emphasized the importance of reading the unfairness concept in the light of the "most recent findings of behavioural economics" (European Commission 2009a, p. 32). As indicated above, the general thrust of this research is to highlight limitations on consumer information processing abilities. Reading the average consumer concept in this light suggests acceptance that practices may rather readily impact consumers and influence their decision making. In other words, it suggests a softening of the self-reliant message that tends to be implied by (or at least inferred from) the "reasonably well-informed and circumspect" formula.

A sixth point is as to the quality of the arguments presented when the ECJ has applied the average consumer concept. The issue has often been member states seeking to defend national rules against the allegation that they constituted a barrier to trade. Member states have sought to argue that the rule was required for consumer protection, while the ECJ response has often been that the average consumer did not require such protection. However, it has been pointed out that this conclusion may often have been reached at least in part due to the rather weak and lazy arguments put by member states (Weatherill 2007). So, the ECJ may well accept a relatively protective approach to the average consumer concept if the case is carefully and rigorously made based on the text of the UCPD and any relevant research, including behavioural economics. It is also likely to help if clear links are made between the level of protection argued for and the high level of protection aimed at by Article 114 TFEU, as well as the consumer confidence that is viewed as being needed to encourage use of, and development of, the single market.[106]

There is a final point about the sort of advertising and labelling that has often been involved in the ECJ cases. It has tended to concern messages on relatively core matters, e.g., as to quality, size, etc.[107] Consumers are bombarded with promotional information of this type all the time and may at least be assumed to view it with a certain degree of cynicism (whether or not one believes that too much cynicism or "circumspection" is being assumed).

By contrast, in the omissions context, the consumer position is more vulnerable. First, this is because the need is to work out what one has not been told (and then decide if this is important and, if so, to search it out). Second, the substance of the information that we have discussed in this context (e.g., environmental impact, value for money, rights, etc.) is not what consumers routinely engage with. In short, there would seem to be ample scope to

[105] See *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG*, supra, n 33.
[106] Preamble, recital 4.
[107] See cases at supra, n 102.

take a relatively protective approach in the case of omissions. This simply involves recognizing these differences between the capabilities of the average consumer in the face of advertising on core issues and the capabilities of such a consumer in the omissions context.

What of the impact that aggressive action might be taken to have on the informed decision making capacities of the average consumer? Again, whatever view is taken as to consumer abilities in the face of advertising, it could still reasonably be recognized that aggressive action will fairly readily exacerbate the pre-existing information search and processing difficulties likely to be suffered by the average consumer.

Finally, the context moves even further from that of the previous ECJ case law where the issue is whether freedom of choice is likely to be affected by the substantive consequences of taking certain decisions. This is because we are no longer concerned with the information processing and search abilities of the average consumer. The issue, now, is surely as to the impact on the average consumer of the substantive risks or consequences in question. The "reasonably well-informed and circumspect" formula does not seem to have much application to this question at all. So, the question seems to remain open as to how to view the average consumer in this context.

Concluding Remarks

It has been argued that understanding the precise nature and level of protection under the UCPD is especially important because of its breadth of application, in order to aid genuine removal of competitive distortions, in order to help determine whether full harmonization will drive down national standards and because of the potential impact on private law.

Various key conceptual features of the regime have been unpacked and it is hoped that this helps improve the chances of achieving a degree of commonality in national approaches, thereby making removal of competitive distortions more likely and clarifying the precise nature of certain concepts in anticipation of future transplantation into private law.

As to the level of protection, on the whole the argument has been that the UCPD provides the potential for reasonably strong protection. It is vital, however, to remember that such potential can be undermined, in particular, by failure to take seriously the limits of transparency. Much also depends upon the way in which the "average consumer" concept is developed, although it has been suggested that it may be capable of developing in relatively protective ways.

Regulators and national governments may have a key role to play in maximizing both the level of protection and the prospects for a genuinely common European approach. There are two elements to this.

First, the argument has already been made that a rigorous, research-based[108] approach is vital in addressing arguments to the ECJ in relation to the "average consumer" concept. Such an approach must also be taken on all the other key aspects of the unfairness concept discussed above. Furthermore, regulators, in particular, surely have a key role to play here, given that, in practice, they are in the front line in terms of fleshing out the unfairness concept.

[108] There should be a particular focus on behavioural economics research, given the increasing acceptance of its value (see European Commission 2009a, b).

Of course, the above discussion as to the pre-UCPD "average consumer" cases suggests that member states may often have failed to provide the degree of rigour that is needed. Unfortunately, the same appears to have been true in some cases under the UCPD. For example, a challenge was made to national bans on "combined offers" on the basis that full harmonization meant that such bans needed to be based on their being unfair under the UCPD.[109] Such practices are not banned by the Annex. However, the French and Belgian governments seemed to confine their response to arguments about the scope of the UCPD and the date for transposition, points on which they were unsuccessful. What they did not do was to make a case (any case, far less a rigorous, research-based one) as to why the practices were unfair under the general or sub-general clauses. Perhaps they would have won!

The second point is that the prospects of a genuinely pan-European approach are likely to be improved by working on intensive cross-border co-operation between regulators and national governments, not simply on enforcement in a narrow sense, but on developing a common core of ideas as to how the UCPD concepts should be interpreted and applied. This is already happening to an extent. The Commission has very recently produced guidance on the UCPD that is based on input from member states and enforcers and is to be updated regularly and feed into a report planned for 2011 (European Commission 2009a, p. 6). However, if the work is to be more useful it will need to cover the issues more evenly. At present, the focus is almost exclusively on misleading practices (leaving out aggressive), and there is a strong bias to environmental claims. It would also help if the discussion was given a stronger conceptual/theoretical foundation, spelling out precisely the nature of unfairness.

Regulatory bodies have a role to play here in improving the quality of the analysis. Of course, even more direct co-operation between enforcement bodies is fostered by the Regulation on Enforcement Co-operation.[110] This sets up a network of enforcers and provides mechanisms for exchange of information and for other co-operation on enforcement where cross-border issues exist. It does appear that there has been some work on developing common standards (European Commission 2009b, p. 8), although the early evidence suggests that much greater use could be made of the co-operation networks. This should be a key focus of future research into the prospects for achieving a genuinely pan-European approach to the UCPD unfairness concept.

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