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Book Review: Harmonizing Trade Practices in the EU: Sweet Sounds or Sour Notes?

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Book Review

Harmonizing Trade Practices in the EU: Sweet Sounds or Sour Notes for European Consumers?

James P. Nehf*

Reviewing: EUROPEAN FAIR TRADING LAW: THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE**

There is a longstanding debate in the development of consumer policy: whether consumers are better served by regulatory measures that prohibit unwanted marketing practices outright, or by measures that facilitate informed decision making and more efficient consumer markets, letting consumers decide what is best for them. When protecting the consumer interest in market transactions, Europe is often regarded as more interventionist than the United States, which tends to take a more market-enhancing approach to consumer law. Rather than banning unfair commercial practices outright, Congress and state legislatures generally favor non-interventionist mandates, such as requiring that certain contract terms (such as an APR in a credit transaction) be conspicuously disclosed1 and prohibiting selling tactics that are fraudulent, misleading, or

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** Geraint Howells, Hans W. Micklitz, and Thomas Wilhelmsson, EUROPEAN FAIR TRADING LAW: THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE (Ashgate 2006) (hereinafter, “European Fair Trading Law”). The book is part of a series entitled Markets and the Law, which examines the ways in which the law interacts with the market for consumer goods and services through government regulation, industry self-regulation, and private law regimes. The authors, established consumer law scholars from the United Kingdom, Germany, and Finland, respectively, participated regularly in the legislative process that led to the enactment of the Unfair Commercial Practices Directive by the EU in 2005.

1 See, e.g., U.C.C. § 3-316(2) (a merchant disclaiming the implied warranty of merchantability must do so conspicuously). Rent-to-own transactions are another example. Despite effective interest rates exceeding 200% annually, nearly all state legislatures permit rent-to-own sales under laws that require the disclosure of certain contract terms. See, e.g., Ind. Code § 24-7-1 to -
otherwise inhibit informed consumer choices. Market-enhancing laws are designed to help consumers make better informed decisions, resulting in more efficient market transactions. A more interventionist approach prohibits contract terms and selling practices that regulators deem unfair and therefore illegal in all consumer transactions.²

Although the EU had taken an interventionist approach in other consumer directives, most notably the Directive on Unfair Contract Terms in 1993,³ the most recent initiative, the Unfair Commercial Practices Directive,⁴ is primarily a market-regulating measure designed to foster informed choices. The focus of the law is almost entirely on prohibiting deceptive and “aggressive” selling behavior that can influence consumer decisions. The Directive is an important step toward harmonizing the law of unfair commercial practices throughout Europe, but its primary goal is breaking down barriers to cross-border sales of goods and services by harmonizing unfair trade laws in the twenty-five EU Members States, thereby promoting efficiency in consumer markets.

Whether the Directive is good or bad for consumers remains to be seen, a subject addressed in depth by Geraint Howells of the United Kingdom, Hans W. Micklitz of Germany, and Thomas Wilhelmsson of Finland in their extensively researched book, European Fair Trading Law: The Unfair Commercial Practices Directie. The authors assess the Directive in its wider European law context and provide keen insight for

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² Examples would include usury laws that cap interest rates and laws that prohibit confession of judgment clauses in consumer credit transactions.


governments and private parties who will implement the Directive in the coming years. Each of the authors participated in the debates leading the adoption of the Directive, and each comes from a legal system that has been, or will soon be, profoundly affected by its legal mandates. Germany’s pro-consumer fair competition laws may have to change dramatically by the uniform fairness standards imposed by the new Directive. Finland’s tradition of strong, interventionist consumer protection may be threatened by the open borders philosophy that drove adoption of the Directive. In contrast, the United Kingdom is more accustomed to a market-regulating approach to consumer protection, but it must adjust to the legal uncertainties of the Directive’s general prohibitive clause, which may require a major review of its fair trading laws to ensure compliance.

1. The Directive’s Place in European Consumer Law

The Directive is one of the most recent EU initiatives that attempt to deal with a fundamental problem in modern life: the lack of truly informed consent in merchant-consumer transactions. How should courts interpret and apply contracts that merchants created but consumers neither read nor understood, and in many cases never even knew existed? Contracts have historically been viewed as legitimate creations of private law between the contracting parties, and therefore justifying the power of the state through court enforcement, because they result from consensual undertakings of willing participants.5 Although the consent model is still taught in most first-year Contracts classes, it is widely criticized as neither an adequate description of, nor a normative

justification for, contractual relationships between businesses and consumers.\(^6\)

Sophisticated commercial parties who negotiate at arms length are nearly always held to the written terms of their bargains, and in resolving disputes about contract meaning, judges are justifiably reluctant to imply limits on contractual autonomy. In the typical merchant-consumer transaction, however, the bargain model is far less descriptive of the actual contracting process. Apart from the most basic terms of the agreement, we seldom view the written contract as reflecting a “meeting of the minds” or even a tacit agreement between consumer and merchant. Most consumer transactions result in contracts of adhesion where all but the most basic terms are neither read by the consumer nor negotiable.

The problem of defective consent in consumer transactions typically elicits three categories of response in an effort to justify enforcement of the resulting agreement. One is to champion measures that create an environment in which informed consent is more likely to occur. Laws calling for conspicuous disclosure of contract terms, notice of rights and obligations, plain language requirements, and mandatory rescission or cooling-off periods all seek to move consumers toward better informed and more voluntary undertakings.\(^7\) When sellers comply with such a law, courts usually conclude that the

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\(^7\) In the early 1990s, Norbert Reich and others labeled this disclosure-based form of consumer
merchant has complied with its legal duties and the resulting bargain is binding on the parties.

A second category of response is to acknowledge the fiction of true consent, even with mandatory disclosures, accept it as unavoidable in the modern world, and argue that non-consensual consumer transactions are legitimized in other ways. Presently, the most widely accepted is rational choice and the efficiency of consumer markets. A nonconsensual contract is just one of many non-negotiable aspects of a product or service being offered to the public. Consumers purchase many products and services without knowing many of their physical, experiential, and legal attributes—good, bad, or otherwise. In the sale of a computer, for example, a typical buyer may be aware of some software and hardware properties, but far from all of them. Similarly, a buyer may be aware of a few contract terms (e.g., a one-year warranty) but is only vaguely aware of others. At time of delivery, the computer comes as a bundled, packaged product, and the buyer takes the entire bundle, contract and all.

Observing that contracts are simply one part of a package deal may describe consumer contracting in today’s world, but it does not necessarily legitimize the contract that the merchant seeks to impose. Without a normative justification to legitimize the private law created in the absence of an informed and voluntary agreement, there is no protection a pre-interventionist approach to the defective consent problem. See Norbert Reich, Diverse Approaches to Consumer Protection Philosophy, 14 J. Cons. Pol. 257 (1992) (observing possible exceptions in Spain and Brazil); J. Goldring, Consumer Law and Legal Theory: Reflections of a Common Lawyer, in Essays on Comparative Commercial and Consumer Law 316, 326-27 (D. King, ed., 1992).

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reason why courts should not ignore the non-bargained for contract and use default rules found in legislation, at common law, or in some other source.

One normative justification for consumer contracts is essentially fault based. If a consumer chooses to enter into a transaction without reading the terms, the consumer takes a risk and the law will not hear the complaint if harm later results. We might say that the consumer waived any legitimacy claim by foregoing the opportunity to withhold consent if the consumer thought a contract term (e.g., a mandatory arbitration provision in a distant locale) or selling practice was unfair. Fault-based justifications often have normative appeal, but only when there is a societal consensus that a person is genuinely at fault. Through personal experience we know that in most contracting situations our failure to read, understand, and negotiate terms is excusable and even expected. If someone insisted on reading, questioning, and dickering over standard terms in consumer contracts, others would likely find the behavior odd and pointless.

Those who argue for enforcing standard form agreements therefore seldom use fault-based justifications. Instead, they argue that if market participants behave rationally, market forces will ensure that merchant’s forms include efficient terms, whether bargained for or not.\(^9\) Market actors make choices in their own best interests, and the resulting equilibrium—of product attributes and contract terms—is roughly as it should be. If efficiency is accepted as a morally legitimate end, then consumer contracts are morally defensible and justifiably enforced in court because the market will ensure efficient results. As Judge Easterbrook wrote in *ProCD, Inc. v. Zeidenberg*, discussing a

term in an adhesion licensing contract that appeared inside software packaging.

“Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy.”\textsuperscript{10}

Our consumer markets work reasonably well, but market failures still abound, which suggests that the rational choice model may not work in all markets for consumer goods and services. Generally perceived market failures include the tendency of markets to concentrate and become less competitive over time; the inability of consumers (through lack of cognitive ability or issues of saliency) to obtain and process relevant information and make intelligent purchasing decisions that will move markets to more efficient outcomes; and the difficulties of ensuring effective consumer representation in political and judicial spheres, when the business community is well organized.\textsuperscript{11}

When market inefficiencies persist, a third category of response to the problem of defective consent is a more interventionist approach. Consumer interventionists posit that disclosure and reliance on market forces are not enough. Non-bargained for terms have no legitimacy if they unreasonably favor the merchant over the consumer, and in their place, mandatory terms should be imposed after parliamentary debate and participation by competing interests. Legitimacy of the consumer-merchant legal relationship is then reestablished through the democratic process and negotiation by committee, rather than by the individual parties themselves. Indeed, broadly speaking, the evolution of law in many fields can be viewed as a movement away from consent-based assumptions and ineffective disclosure-based market enhancements, and toward

\textsuperscript{10} 86 F.3d 1447, 1453 (7th Cir. 1996).

mandatory rules imposed by judges or, more commonly, by statutory or regulatory imperatives. Statute books are filled with laws that impose mandatory terms in relationships that previously had been left to market forces and the immediately affected parties to decide for themselves.

Whether government-mandated contracts are more efficient than terms produced by market exchange is continually debated, but the practice of state interference with private contractual relationships, as a means of legitimizing the law governing those relationships, is commonplace. In the consumer context, laws ban exculpatory clauses deemed unreasonably to favor sellers, and impose minimum standards of protection for consumers, such as minimum warranty and rescission periods. Despite occasional criticism from economists and the business community, the interventionist model is accepted today as necessary when markets forces yield outcomes that policy makers, and their constituents, are not willing to accept.

12 Examples are found in virtually all fields: employment (e.g., exceptions to employment at will, numerous anti-discrimination laws, and mandatory accommodations for workers with disabilities), insurance (e.g., state-imposed insurance terms), competition (e.g., restrictions on anti-competitive mergers and product tie-ins), landlord-tenant (e.g., court- or legislature-imposed habitability requirements, anti-discrimination laws, eviction procedures), to name a few.

13 Debates about regulating the sub-prime lending market are a recent example. In some states, disclosure of subprime lending fees and corresponding annual percentage rates is regarded as sufficient to protect societal interests. In others, caps on fees or outright prohibition of certain lending practices, such as “payday” loans, have been legislated. See Secured Consumer Credit and the Fringe Banking Industry, in Secured Transactions Under the Uniform Commercial Code, ch. 20A (J.B. McDonnell, ed. 2005) (discussing state and federal laws governing traditional pawns, automobile title pawns, “payday” loans, tax refund anticipation loans, and rent-to-own transactions).

14 Beginning in the 1960s and continuing through subsequent decades, the governments of Europe and North America enacted numerous laws that recognized the inadequacy of market mechanisms, competition and freedom of contract to protect consumer interests. For an insightful comparison of the effects of federalism on the development of consumer law in Europe and the United States, see Thierry Bourgoignie & David Trubek, Consumer Law, Consumer Markets and Federalism in Europe and the United States (1987). In less developed countries, the most
It might therefore have been disappointing to some consumer advocates when the EU adopted the Unfair Commercial Practices Directive in 2005, which favors a market-regulating approach focusing almost exclusively on contracting procedures, rather than substantive terms, and ensuring informed consumer decision making. It should not have been surprising, however. The European Commission proposed the Directive only in part to protect consumers from unfair marketing practices. The main purpose of the Directive was to harmonize the unfair trade laws of the EU Member States and thus to remove another barrier to cross-border commerce. More uniform trading laws should make it easier for merchants to market goods and services throughout Europe.

Though limited in its scope, the Directive is one of the most significant consumer initiatives to emerge from Brussels in recent years, largely because it introduces a clause that prohibits unfair trade practices in very general terms, which does not exist in some Member States and which may result in stronger consumer protection than others now provide. The Directive is also noteworthy because of its preemptive effect. The “maximum harmonization” approach of the Directive restricts Member States from enforcing national fair trade laws that are more restrictive, thus raising concerns that it could actually weaken consumer rights in Member States that have a strong tradition protecting the consumer interest.

2. Three Tiers of Prohibited Commercial Conduct

The Directive prohibits “unfair” commercial practices in transactions with consumers. A practice is unfair if it violates at least one of three tiers of prohibited

necessary consumer laws are likely to be those ensuring the safety of foods and health products, not laws mandating information disclosures and other market-regulating devices. Hans B. Thorelli, Consumer Policy in Developing Countries, in 29th Annual Meeting of the American Council on Consumer Interests 149 (Karen P. Goebel, ed., 1983).
conduct, moving from the specific—a laundry list of prohibited practices—to a general clause whose meaning is open to varying interpretations. The first tier is a list of thirty-one specific practices that are per se unlawful throughout the EU. They include marketing tactics such as “claiming to be a signatory to a code of conduct when the trader is not,” “creating the impression that the consumer cannot leave the premises until a contract is formed,” and other specific trade practices that have been identified as deceptive or overly aggressive in all circumstances. This approach is familiar to consumer lawyers in the United States because similar lists of prohibited marketing practices are common in many state deceptive practices statutes.

The second tier is a more general prohibition of practices that fit within the Directive’s definition of “misleading” or “aggressive” practices. A practice is misleading if it “is likely to deceive the average consumer . . . or is likely to cause him to take a transactional decision that he would not have taken otherwise.” It is also misleading to omit “material information that the average consumer needs, according to the context, to make and informed transactional decision.” These are similar to the standards used by the Federal Trade Commission to determine whether a practice is deceptive under Section 5 of the FTC Act, and by courts interpreting state deceptive

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16 Some form of the Uniform Deceptive Sales Practices Act, which contains a list of prohibited practices, has been enacted in many states. See, e.g., 815 Ill. Comp. Stat. § 510, 510/2 (2006).


19 15 U.S.C. § 45 (2006). See F.T.C. v. Pantron I Corp., 33 F. 3d 1088, 1095 (9th Cir. 1994)(a material representation or omission is deceptive if it is likely to mislead a consumer acting
practices acts that follow FTC precedent, as many do.\textsuperscript{20}

A prohibited “aggressive” practice occurs if, by means of “harassment, coercion or undue influence, [it] is likely to significantly impair the average consumer’s freedom of choice or conduct . . . and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.”\textsuperscript{21} This concept has no direct corollary in the FTC Act, but it may roughly correspond to the concept of “unfairness” in Section 5. “Aggressive” sales tactics may not be as broad a concept, however, because the Directive only addresses practices that impair a consumer’s freedom of choice or ability to make decisions. Overbearing door-to-door sales tactics might be an example. Other types of unfair conduct might not be covered.\textsuperscript{22}

The third and most controversial tier is the general clause, which prohibits a commercial practice that is “contrary to the requirements of professional diligence” and “is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.”\textsuperscript{23} “Professional diligence” means the standard that a trader “may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of

\begin{itemize}
\item \textsuperscript{21} Unfair Commercial Practices Directive, Article 8.
\item \textsuperscript{23} Unfair Commercial Practices Directive, Article 5.2(a) and (b).
\end{itemize}
good faith.”24 A practice “materially distorts the economic behaviour of consumers” if it “appreciably impair[s] the consumer’s ability to make an informed decision.”25 Combining the two, the general clause appears to combine principles of good faith and fair dealing that are familiar to lawyers in the United States. These are very flexible concepts, of course, and their application in the twenty-five EU Member States is uncertain. Consequently, the authors devote an entire chapter to analysis of the general clause alone.26

3. Enforcement Issues

All EU consumer protection directives deal with enforcement issues only marginally, and the matter of individual enforcement by consumers (for money damages or injunctive relief) is usually not addressed at all.27 Under general principles of EU law, Member States are responsible for implementing directives and including effective enforcement mechanisms, so long as those mechanisms give full effect to the mandates of the directive and give parties with standing effective legal protection. Decisions of the European Court of Justice emphasize the duties of Member States in this regard and seldom encroach on Member State autonomy when it comes to choosing effective remedies that implement a directive’s legal mandates.28

The Unfair Commercial Practices Directive, however, includes more a bit more

26 European Fair Trading Law, ch. 4.
27 European Fair Trading Law at 220.
28 See, e.g., Palmisani v. INPS, Case C-261/95, 1 E.C.R. 4025 (1997).
concrete direction on enforcement issues, while leaving considerable flexibility to the Member States in deciding how to carry out those directions.\(^{29}\) For example, the Directive tells Member States to give standing to “persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices,” but it allows enforcement by those persons or organizations to be through either court or administrative processes.\(^{30}\) A Member State need not allow individuals to seek money damages in court. Because the Directive is not the first to address consumer rights in market transactions, similar enforcement issues have already been decided in other contexts. Thus, enforcement mechanisms that are already in place to enforce fair trading laws in other contexts should be available to enforce this Directive as well.\(^{31}\)

By referencing actions brought by “persons or organizations,” the Directive leaves open the possibility of collective enforcement actions, and even class actions in some form, but it does not mandate them if they are not already allowed under national law. Member States can decide if collective redress is limited to government enforcement agencies, or whether consumer groups and trade organizations have legal standing as well.\(^{32}\)

4. The Directive’s Maximum Harmonization Approach

Harmonization is the process of creating similar legal rules in all EU Member States. “Maximum” harmonization occurs when a directive creates legal mandates that


\(^{31}\) European Fair Trading Law at 223-25.

\(^{32}\) European Fair Trading Law at 222.
cannot be exceeded by Member States. It is roughly analogous to the concept of federal preemption in the United States, but many of the consumer protection laws in the United States do not preempt state law on the subject. They set a minimum level of consumer protection, and states are free to provided greater protection if they so choose. Similarly, the EU Commission had previously strived for “minimal” harmonization in the field of consumer law, which set a base level of protection that Member States could choose to exceed, although the Commission was showing signs of shifting its approach in recent years. Consequently, when the Directive was being debated, one of the central points of discussion was the European Commission’s decision to make it a maximum harmonization directive.

Maximum harmonization means that Member States are not permitted to enact or enforce laws that are more restrictive on the free movement of goods and services than the Directive allows. In other words, Member States cannot enact or enforce laws that create a higher level of consumer protection if doing so could impede the sale of goods or services across borders. Consumer organizations protested the maximum harmonization approach because they did not want the Directive to limit the stronger consumer protection regimes that exist in some Member States, but to no avail. As the Directive

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33 *European Fair Trading Law* at 28-29, 35.

34 Unfair Commercial Practices Directive, Article 4, which states, “Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.” Although this language is rather obtuse to readers unfamiliar with EU drafting conventions, it means that Member States cannot create laws on unfair trade practices that restrict commercial activity more than the Directive does.

worked its way through the European Parliament and Council, the Commission successfully argued that businesses needed confidence that they would not be confronted with more restrictive national laws when they tried to market their goods and services in other EU countries. A uniform standard of unfair commercial practices throughout Europe would encourage more trade across borders, and maximum harmonization was critical to this end.\textsuperscript{36}

The Commission’s maximum harmonization approach may have limited effect, however, because a wide variety of unfair practices can be attacked under the general clause, and even under the second tier that prohibits “misleading” and “aggressive” practices broadly defined. There is plenty of room for different interpretations of these clauses among the Member States. As Member States amend or apply laws to implement the Directive, they cannot be more restrictive on trade than the Directive allows, but national courts and administrative tribunals may create varying standards for acceptable commercial conduct on a case-by-case basis. The concept of “professional diligence,” for instance, may be interpreted differently from state to state, so that a trade practice that is legal in one state will be banned in another.\textsuperscript{37} To the extent that this occurs, the harmonization goal will be undermined and barriers to cross-border marketing will remain. Ultimately, the European Court of Justice may have to ensure harmonization through case law, as it resolves disputes that challenge a Member State’s trade practices laws. The Court’s jurisdiction is limited, however, to cases brought by the Commission

\textsuperscript{36} \textit{European Fair Trading Law} at 35. The Directive does provide for a transition period, however, in which Member States may apply more restrictive laws through June 12, 2013, if certain conditions are met. Unfair Commercial Practices Directive, Article 3(5).

\textsuperscript{37} \textit{European Fair Trading Law} at 100-01.
and referrals from national courts, so much will be left to the tribunals of Member States to implement the Directive in a way that is consistent with its reach in other Member States.

5. Areas of Consumer Concern

The authors criticize the Directive on several fronts, although only a few will be discussed here. One point of contention is the Directive’s focus on protecting the “average” consumer, not the most vulnerable, credulous, or trusting consumer. As described in the Directive, the average consumer has abilities that are likely superior to the abilities of many citizens. Recital 18, echoing European Court of Justice decisions, refers to the average consumer as someone who is “reasonably well-informed and reasonably observant and circumspect.” Clearly, a trader should not be held liable if its marketing message is taken literally when it is unreasonable to do so. Still, many riches have been gained at the expense of people who are not reasonably well informed, observant, or circumspect. Indeed, the most credulous consumers may have the greatest need for protection in the law. The Directive does provide that one should take “into account social, cultural and linguistic factors,” but it is not clear that this language could be used to protect the most vulnerable consumers in Member States.

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38 *European Fair Trading Law* at 111.

39 Unfair Commercial Practices Directive, Recital 18. This has been an issue in the United States as well. The Directive’s focus on the “average” consumer may not be materially different from the standard that the FTC uses, banning misleading practices only if they are likely to mislead consumers “acting reasonably under the circumstances.” F.T.C. v. Pantron I Corp., 33 F. 3d 1088, 1095 (9th Cir. 1994).

40 Recital 18 also states, “Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.” While this language does allow Member States to protect vulnerable and credulous consumers, it does so only if the
With respect to maximum harmonization principle, the authors are skeptical about its ultimate effect. The Directive omits a “safeguard” clause that would have allowed Member States to enact more restrictive laws if unexpected events rendered the mandates of the Directive too limiting.\footnote{European Fair Trading Law at 31-36.} A safeguard clause would have weakened the maximum harmonization principle because it would have given Member States an opportunity to exceed the Directive’s mandates in the name of unexpected or emergency circumstances, but it would have allowed Member States to react to practices that might develop outside the purview of the Directive. Traders are creative, look for loopholes, and tend to push legal rules to their limits. A safeguard clause, which was included in the General Product Safety Directive\footnote{Article 3(4), Directive 2001/95/EC on general product safety, O.J. 2002 L11/4.} and the E-Commerce Directive,\footnote{Article 3(4), Directive 2003/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. L178/1.} might have been a sensible precaution.

Most notably, there is considerable uncertainty about the effect of the general clause, which prohibits a commercial practice that is “contrary to the requirements of professional diligence” and “is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.”\footnote{Unfair Commercial Practices Directive, Article 5.2(a) and (b).} Although most of the civil law Member States had general clauses prior to the enactment marketing is directed at that subgroup, and not at the public at large. Unfair Commercial Practices Directive, Recital 18.
of the Directive, they varied in content and the manner in which legal institutions applied them. Germany and the Nordic states have traditionally been highly protective of consumers, so it is possible that their stronger limitations on commercial practices will have to be scaled back if they are not covered by the more specific prohibitions of the Directive and do not fit within the confines of the general clause. The United Kingdom and Ireland did not have a general clause, relying instead on a legion of conduct-specific prohibitions, so the Directive’s impact in those Member States is unclear. And even though the Directive adopts the form of general clause that appears in the laws of some continental Member States, differences in culture persist as to what are acceptable commercial practices in those Member States, so it is not clear what effect, if any, the Directive will have in those locales. The reach of the general clause is uncertain, and it will take years to see if Member States interpret it in similar ways.

6. Assessing the Directive’s Impact

The authors conclude that the Directive will be one of the most important consumer protection directives in the EU, but they are concerned about the Directive’s impact on consumer laws across Europe and the Commission’s maximum harmonization goal. On the one hand, they fear that harmonization will succeed and the resulting European fair trading rules will not be as consumer friendly as the rules that currently

\[45\] European Fair Trading Law at 3.


\[47\] European Fair Trading Law at 3.
exist in several Member States. There is a risk that the European Court of Justice will strike down national laws as impeding cross-border trade if they are not clearly authorized by the Directive.

On the other hand, the authors see practical obstacles that may limit the harmonization goal. States with general clauses may be tempted to retain their own consumer protection schemes rather than move to the Directive’s standards. National traditions and social understandings of fairness are bound to affect legislative and judicial outcomes. If the European Court of Justice allows Member States to use the general clause broadly to justify continued enforcement of a wide array of idiosyncratic fair trading restrictions, the Directive will have little effect and its primary purpose will be frustrated. For some Member States, such as the United Kingdom, that had no general clause, it will be a huge task to modify existing conduct-specific legislation to ensure consistency with the mandates of the Directive, and one wonders whether the task will be undertaken vigorously. If it is not, the Commission faces an equally difficult task to see that the Directive has been implemented properly.

Maximum harmonization of some commercial practices laws might be necessary and in many cases desirable, but an attempt at complete harmonization of the whole field may have come too soon. The introduction of a common general clause on fair trading creates a base level of protection and a mechanism for developing a European-wide concept of fair trading, but the field of commercial activity may be too varied and

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49 European Fair Trading Law at 254.

complex for all problems to be resolved by a simple rule. Complete uniformity of fair trade laws across Europe may be unattainable. Consumer laws in the United States still vary greatly among state and local jurisdictions, and Europe is more diverse. At least in the short term, the Directive will more likely increase legal complexity in this area of the law rather than simplify it. If that proves to be true, it would not be the first or last time that policy makers tried and failed to create a simple solution to a complex problem.