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EXPERIENCING UNFAIR COMMERCIAL PRACTICES: AN INTRODUCTION

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1 The Directive

In this issue of *Erasmus Law Review*, the focus is on a particularly interesting piece of EU legislation, the 2005 Unfair Commercial Practices Directive.[1]

The UCP Directive has the ambitious aim of preventing distortion of consumer contracting choice-making, in particular with regard to contract decisions prior to conclusion of a contract and decisions to exercise existing contractual rights. The Directive is of a generic nature and is not limited to specific sectors of economic activity. In principle, any business-to-consumer contract is covered by the Directive. It contains core provisions on unfair commercial practices, a black list of practices deemed unfair, and dedicated rules on various topics such as Codes of Conduct and the relationship with various information duties in other EU legislation.

The core of the Directive lies in the prohibition of practices contrary to the requirements of professional diligence which materially distort or are likely to materially distort the economic behaviour of the average (targeted) consumer with regard to a product or service.[2] The concept of 'unfair practices' is further subcategorized into misleading and aggressive practices.

Misleading practices are divided into two categories:

1) Utterances which contain incorrect information and are therefore untruthful or which in any way deceive or are likely to deceive the average consumer, even if the information is factually correct. Such practices cause distortion of the transactional decision-making process of the average consumer in relation to aspects such as the existence or nature of the product, fitness for purpose, usage, quantity, specification, the price or the manner in which the price is calculated, the need for a service, part, replacement or repair, etcetera.[3]

2) The practice of omitting or hiding material information – including the provision of such information in an unclear, unintelligible, ambiguous or untimely manner – that the average consumer needs, according to the context, to take an informed transactional decision and thus causing distortion of the transactional decision-making process of this average consumer.[4]

Aggressive are those practices that engage in actual harassment, coercion, the use of physical force or the use of more subtle techniques involving undue influence such as exploitation of vulnerability or the use of obstacles discouraging consumers from asserting their rights.[5] For example, artificially raising barriers to exit from a contract or to the exercise of contractual rights may constitute an unfair commercial practice.

In addition to the core provisions on misleading and aggressive practices, Annex I to the Directive consists of a 'black list' of certain practices deemed unfair under any

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1 Directive 2005/29/EC of 11 May 2005, OJ 2005 L 149/22 (Unfair Commercial Practices Directive).

2 Art. 5 UCP Directive.

3 Art. 6(1) UCP Directive.

4 Art. 7 UCP Directive.

5 Art. 8 UCP Directive.

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circumstances.[6] For example, a commercial practice 'describing a product as "gratis", "free", "without charge" or similar, if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item'.[7]

2 The Issues

The Directive has been implemented in the EU Member States and some years have passed since its entry into force. Therefore, an assessment of the experiences with the Directive is in order. It seems that there are a number of issues that deserve further exploration.

First, there is the maximum harmonization character of the Directive which precludes Member States from amending the 'black list' of unfair practices. Does this affect or interfere with the effective regulation of country-specific unfair practices? How far does the maximum harmonisation nature of the Directive reach, given the exclusion of certain sectors (e.g., financial services) and general rules of contract law (e.g., rules on fraud, mistake and misrepresentation) from the suffocating clinch of maximum harmonization?[8]

Secondly, there is the tension between protection and consumer responsibility. On the one hand, the Directive aims at protecting consumers against unfair practices while on the other it underlines the individual's responsibility by reference to the average consumer. According to standing case law, the 'reasonably well informed and reasonably observant and circumspect' consumer can be expected to make a serious effort at collecting and understanding all available information on essential aspects of a contract.[9] The 'average consumer' is neither easily impressed nor quickly deceived. National courts applying this standard may find themselves offering less protection to consumers than they were used to under pre-existing national protective frameworks.

Thirdly, there are enforcement issues. The Directive itself gently admonishes the Member States to introduce adequate and effective means of enforcement.[10] As always, penalties must be 'effective, proportionate and dissuasive'.[11] It was left to the Member States to consider the appropriate enforcement system, ranging from private law, administrative law to criminal law. How is the Directive actually enforced? How do the local enforcement strategies work out in practice?

Fourthly, there is the question how the Directive has impacted on business marketing and sales practices. Such impact is likely to be indirect, namely, only felt when and to the extent courts and supervisory agencies are both willing and able to enforce the UCP framework. What has the experience been in this area? Has the UCP Directive been used ferociously or has it turned out to be a backwater of a niche in law?

Finally, one can ask what the added value of the UCP Directive is. At the end of the day, does the Directive add much to the pre-existing national regulatory frameworks and has it had notable impact on practice and theory? Are there any ramifications for private law theories of contract?

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6 See Art. 5(5) in conjunction with Annex I of the UCP Directive.

7 See Ann. I, no. 20 of the UCP Directive.

8 Exceptions to the maximum harmonisation regime include the following. Art. 3(2) states that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract. Art. 3 (9) allows more restrictive national rules in the area of financial services. Art. 3(4) gives priority to specific EU rules over the UCP Directive in case of conflict.

9 ECJ 16 July 1998, C-210/96 (Gut Springenheide); ECJ 19 September 2006, C-356/04 (Lidl and Colruyt); cf. ECJ 6 July 1995, C-470/93, Jur. 1995 p. I-01923 (Mars).

10 Art. 11 of the UCP Directive provides that the Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers. This includes the duty to allow some sort of collective consumer group action before civil or administrative courts.

11 Art. 13 UCP Directive.

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3 The Contributions

These and related issues merit careful consideration by expert scholars in this field. Therefore, we are very proud to offer four excellent contributions to this issue of the *Erasmus Law Review* which deal with several of the aforementioned aspects.

In the first contribution, Koutsias and Willett analyse the English transposition efforts and give a general account of how the Directive was treated in terms of enforcement. Here, the use of administrative law typology of enforcement orders, the conceptualisation of a preventive protection regime and the emphasis on criminal prosecution has shaped the English implementation process. The English legislature chose not to attach any private law sanctions to unfair commercial practices. Hence, any spill-over effects from the Directive into English private law will be highly indirect at best. Koutsias and Willett address these issues but they furthermore extend their analysis to the relationship between the generic regime of the Directive and sectoral legislation and regulation in the domain of financial services, showing the tension between harmonisation and national preferences for more protective measures in key areas.

Keirsbilck goes on to discuss the maximum harmonisation nature of the Directive. He does so by focussing on the treatment of sale below cost in European consumer and competition law. First, Keirsbilck discusses the well-known line of ECJ case law (e.g., *Oosthoek, Keck and Mithouard*).[12] Then, he reviews initiatives for a regulation at the European level, followed by the current position under the Unfair Commercial Practices Directive. The position seems to be that the Directive does not allow national prohibitions of sales below cost if and to the extent that such national prohibitions aim at consumer protection. This would interfere with the Directive's all-encompassing scope of maximum harmonisation, or so the ECJ holds.[13] Keirsbilck argues, however, that from a European competition law point of view, stricter national rules are not always as suspect as the UCP Directive seems to suggest. Clearly, any divergence of EU competition law and consumer law on this point seems undesirable.

Pavillon addresses the treatment of private initiatives of quality regulation through voluntary Codes of Conduct and the UCP Directive. The Directive has a two-way approach to such Codes: the Directive can help to sustain, amplify and enforce such voluntary arrangements – for instance, by holding traders who publicly undertake to operate in accordance with a particular Code to account for violations – and it can penalize the drafting and operation of 'dodgy codes' that provoke unfair commercial practices. Pavillon analyses the policy path walked by the European policymakers and the underlying rationale of promoting the use of honest and 'fairness enhancing' Codes. She also draws attention to the fact that existing Codes may need to be adjusted in light of the Directive. Pavillon's assessment of the current situation is that the Directive has not had a noticeable impact on existing Codes, that the ideal of having Europe-wide Codes in particular areas has not been attained by the Directive and that national ADR boards such as the English Advertising Standards Authority (ASA) may entertain diverging interpretations of what constitutes 'unfair', 'misleading' and 'aggressive' practices. Here, the author in fact touches upon an inherent weakness of the Directive (and in any Directive, for that matter). Where interpretation and application of EU rules by local authorities and courts differ, true harmonization is not easily achieved.

Finally, Weber addresses the multitude of enforcement strategies at national level in terms of economic efficiency. By applying a law and economics analysis to the case of misleading advertising, Weber offers a comprehensive explanation for the differences in national enforcement design across the European landscape and a framework for evaluating these designs. Weber identifies various behavioural aspects that are of relevance in designing enforcement frameworks such as rational apathy, principal-

[12] Case C-286/81, *Oosthoek's Uitgeversmaatschappij BV,* [1982] ECR I-4575; Joined Cases C-267/91 and C-268/91, *Bernard Keck and Daniel Mithouard*, [1993] ECR I-6097.

[13] Cf. the following cases: Joined Cases C-261/07 and C-299/07, *VTB-VAB NV* v *Total Belgium NV* and *Galatea BVBA* v *Sanoma Magazines Belgium NV*, [2009] ECR I-2949; Case C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* v *Plus Warenhandelsgesellschaft mbH*, nyr; Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* v *'Österreich'-Zeitungsverlag GmbH*.

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agency issues, capture and the likely responses to (monetary) incentives by individuals, companies and enforcement agencies. She also identifies the arguments for individual vs. collective enforcement and then goes on to differentiate between two types of cases: one where the trader is a fly-by-night operator acting in bad faith and indifferent to reputational sanctions, easily terminated, cloaked or fled, and the other where the trader is in good faith and who inadvertently breaks the law, uncertain of the applicable standards of conduct. Her conclusion is that different mixes of elements of private and public law enforcement are necessary to cater for different societal needs. Moreover, the two scenarios show that differences in institutional arrangements at national level to a large extent predispose the achievable 'optimal mix'.

4 Final Considerations

With this brief introduction to this issue of the *Erasmus Law Review*, I hope to have shown that the Unfair Commercial Practices Directive has both tackled and created problems of consumer protection. Among the issues standing out are the problematic nature of maximum harmonisation in a not-so-well-defined problem area, the unpredictable influence on national private law institutions such as contract, tort and self-regulation, and the relative open-endedness of the Directive in relation to the methods of enforcement at State level.

The contributions that follow shed more light on these issues and give guidance for future policy-making. For that, the *Erasmus Law Review* is indebted to the contributors. Obviously, our gratitude extends to the reviewers who kindly agreed to perform blind reviews of the papers. We hope you enjoy the result.