

The Rise of European Consumer Law — Whither National Consumer Law?

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Abstract

This contribution looks at the trend in European Consumer Law away from minimal harmonisation (where European rights provided a floor upon which Member States could choose to build) towards maximal harmonisation (where Member States are prevented from providing additional protection). It argues that there is also a need to analysis when such a policy is required. Whilst there are situations where maximal harmonisation is the appropriate policy response, currently the suspicion is that it is favoured too quickly. The paper looks at this problem with the assistance of two case studies. The first concerns the long standing Product Liability Directive with respect to which the European Court of Justice has recently underlined its maximal harmonisation character. By contrast the Unfair Commercial Practices Directive is a recently adopted measure which clearly demonstrates the Commission's desire to promote maximal harmonisation as an express policy objective. In an area in which the EU has for the most part only indirect competence, it should be cautious about invoking a policy which ousts the powers of the Member States.

1. Introduction

I am honoured to have been asked to contribute a paper on EU consumer policy in this special issue of the *Sydney Law Review* dedicated to the life and memory of our dear friend and colleague David Harland. Norbert Reich has joined me in representing European consumer law in this venture. His paper concentrates on EU contract law developments¹ — a topic on which David was a world authority, having co-authored the leading Australian-originated contract law textbook.² Norbert Reich's paper is a follow-up to his earlier paper published in this Review³ that was written when he spent sometime in the Sydney Law School. I myself had the honour of being a Parsons Visitor and will forever be grateful to David for giving me the chance to experience the City and Law School of which he was so rightly proud. This exemplifies the true international character of David. Not only was he willing to travel long distances and often for short periods to maintain his strong network of contacts in all parts of the world, but he was also keen to bring scholars to Sydney. Indeed his internationalism is reflected in some of his most

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1 Norbert Reich, 'Protection of Consumers' Economic Interests by EC Contract Law – Some Follow-up Remarks' (2006) 28 *Syd LR* 37.

2 John Carter & David Harland, *Contract Law in Australia* (4th ed, 2002).

3 Norbert Reich, 'Protection of Consumers' Economic Interests by the EC' (1992) 14 *Syd LR* 23.

innovative and influential writings on the UN Consumer Protection Guidelines.⁴ However, my task is to cover some of those parts of EU consumer law not dealt with by Norbert Reich. I have chosen to concentrate on two topics that were central to David's work and which give rise to some interesting contemporary debates — product liability and trade practices. In doing so I can only underline Norbert's remark that David's contributions to these topics were not those of a casual overseas observer, but rather were always knowledgeable and informed and listened to with care by European lawyers and policymakers. I myself enjoyed many detailed discussions with David on product liability matters and now that trade practices is rising up the European agenda I will miss not being able to draw upon his expertise; especially as Australia has a wealth of experience with a general fair trading clause that could be useful to the United Kingdom, which is a common law country only belatedly introducing such a principle under the influence of the European Union.⁵

I have chosen to focus on the move from minimal to maximal harmonisation in EC consumer law. In federal systems this would be known as the pre-emption issue. Minimal harmonisation was originally the dominant philosophy of consumer policy in the EC.⁶ This was combined with mutual recognition of national standards, unless receiving states could justify imposing higher standards under EC law. It was recognised that some areas needed to be totally harmonised, but for the most part Europe saw its role as creating a floor of rights on which Member States could build. Indeed for many years the European Commission encouraged states to develop more protective rules so that other Member States could benefit from these experiences. The model was one under which European consumer rights could progressively be improved by building on best practice from the Member States. This has all changed. The Commission now believes that consumers can only be delivered the benefits of the internal market if businesses can trade with ease across borders. In their opinion this demands that no national rules be more protective than European laws. Businesses should not be put off by the risk of being exposed to laws other than those found in their own legal system. This is not, as in the past, limited to rules which actually affect the content of the product, labelling or even advertising that might require producers to change their practice to trade in other states, but seemingly will be extended to all consumer protection laws.

4 See David Harland, 'The United Nations Guidelines for Consumer Protection' (1987) 10 *Journal of Consumer Policy* 245; David Harland, 'The United Nations Guidelines for Consumer Protection. Reply to the comment by Weidenbaum in JCP, 10, 1987/4' (1988) 11 *Journal of Consumer Policy* 111; David Harland, 'Implementing the Principles of the United Nations Guidelines for Consumer Protection' (1991) 33 *Journal of the Indian Law Institute* 189.

5 See Geoff Taperell, Robert Vermeesch & David Harland, *Trade Practices and Consumer Protection: A Commentary on the Trade Practices Act 1974* (3rd ed, 1983).

6 See Michael Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 *Common Market LR* 853; in the consumer context, Hans-W Micklitz & Stephen Weatherill, 'Consumer Policy in the European Community: Before and After Maastricht' (1993) 16 *Journal of Consumer Policy* 285 at 301–303.

Maximal harmonisation turns the EC rules into the ceiling of protection. Any more protective national rules are simply not permitted as a matter of EC law. EC law under a maximal harmonisation approach is no longer a benevolent friend of the consumer guaranteeing minimum rights, but becomes the guardian of trade interests. Business only has to be concerned to lobby hard for favourable European laws and national legislators are unable to react to any remaining consumer concerns. Consumer protection has truly been integrated into other community policies as the European Economic Treaty requires:⁷ in fact it seems sometimes as if consumer protection policy has become internal market policy. It is true that a laudable aim of EC law has always been to remove national consumer protection rules that were either disguised forms of protection or redundant regulation which merely makes industry uncompetitive and indirectly increases costs for consumers.⁸ However, the difference is that under the maximum harmonisation philosophy Member States no longer have the opportunity to justify national rules.⁹

Maximal harmonisation goes beyond the previous Community rule of mutual recognition. The standards are now the same. There is no scope for more protective national laws and therefore no need for the mutual recognition principle. Mutual recognition is being replaced by the country of origin principle, under which it is for the home state to implement European laws and control their observance. The receiving state has to trust in their effectiveness and competence. As Radeideh points out there is a major conceptual difference between mutual recognition and the country of origin principle (which by implication normally assumes a maximal harmonisation policy).¹⁰ The former allows exceptions based on justifications in the overriding public interest, whereas the latter has no exceptions. The control is carried out by the home state and the receiving state has to accept that.

We will start with some general observations on how far the European internal market project requires trade rules to be harmonised. Then we will focus on how this policy manifests itself in the product liability and fair trade contexts.

2. Maximal Harmonisation – General Observations

A. Negative and Positive Tools for Integration

Europe seeks to establish the internal market through both negative and positive integration. The negative route relies upon Article 28 for goods and 49 for services

7 *Treaty Establishing the European Community*, signed in Rome on 25 March 1957 [1997] OJ C 340/03, art 153(2) (hereafter *EC Treaty*).

8 Stephen Weatherill states 'the whole point of the exercise is regulatory renovation and a bonfire of red-tape on the pyre of Article 28 constitutes the anticipated, even necessary, method' in Stephen Weatherill, 'Pre-emption, Harmonization and the Distribution of Competence' in Catherine Barnard & Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (2002).

9 This is particularly extreme where the European laws have no safeguard clauses.

10 Malek Radeideh, *Fair Trading in EC Law: Information and Consumer Choice in the Internal Market* (2005) at 103.

of the EC Treaty. Article 28 prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States. Article 49, within an established framework, prohibits restrictions on the freedom to provide services within the Community in respect of nationals of Member States who are established in a state of the Community other than that of the person for whom the services are intended. The positive route relies upon legislative acts intended to create harmonised European rules. There is a consumer protection provision in the EC Treaty, but this is rather weak. Most consumer protection legislation is based on Article 95 which allows measures to be adopted for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

It is clear that negative and positive harmonisation are not mirror images nor co-extensive. The EC's powers positively to integrate European laws extend beyond its powers to remove national laws. This is obviously the case where national laws are capable of justification despite imposing restrictions on trade. For instance, Article 30 of the EC Treaty lists several justifications for prohibitions and restrictions on imports. Most significantly the European Court of Justice in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon)¹¹ held that:

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

Perhaps more controversial is the argument that even rules that cannot be classed as measures equivalent to quantitative restrictions, can and have been subject to positive harmonisation. In *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA*,¹² the European Court of Justice refused to accept that France's strict contractual rules allowing for an 'action directe' against higher links in the contractual chain was a measure having effects equivalent to quantitative restrictions. Of course the EC has regulated on this topic, notably in the product liability¹³ and sale of goods directives.¹⁴ Equally, in an about turn, the European Court of Justice held in *Criminal proceedings against Bernard Keck and Daniel Mithouard*¹⁵ that:

11 (120/78) [1979] ECR 649.

12 (C-339/89) [1991] ECR I-107.

13 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions for the Member States concerning liability for defective products [1985] OJ L 210/29 (hereafter *Product Liability Directive*).

14 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.

15 Joined (cases C-267/91 and C-268/91) [1993] ECR I-6097.

contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

However, there are no signs that the Commission feels inhibited in regulating such practices. The Unfair Commercial Practices Directive¹⁶ and the admittedly seemingly ill-fated proposal for a Regulation on Sales Promotions¹⁷ are testament to that.

B. Consumer Protection as Integral to the Internal Market Project

Of course there may be a difference between the competence the Community claims and competence it actually has under the EC Treaty. The problem with the EC Treaty as regards consumer protection is that Article 153, the EC Treaty provision on consumer protection, is very weak concerning legislative powers. It restricts legislation to measures adopted pursuant to Article 95 in the context of the completion of the internal market or measures which support, supplement and monitor the policy pursued by the Member States.¹⁸ Only one significant piece of consumer legislation has been based on Article 153: the Directive on price indications.¹⁹

There have been mutterings from time to time that the consumer protection directives go too far and are not sufficiently related to the internal market project. However, for the most part there has been an assumption that the powers needed to create the internal market extend beyond merely removing barriers to trade. In the consumer context a useful slogan has been that of assuring consumers are confident in the legal environment in other Member States so that they will shop there. This argument can be overstated, for in reality consumers' willingness to shop overseas is likely to have less to do with their substantive rights and be more connected to convenience, language and practical questions of complaining about faulty goods and services and access to justice.²⁰

16 *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 47/7/EC, 98/27/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive)* [2005] OJ 2005 L 149/22 (hereafter *Unfair Commercial Practices Directive*).

17 See COM (2001) 546 and revised proposal at COM (2002) 585. This is now likely to be abandoned: see Commission Communication, *Outcome of the Screening of Legislative Proposals Pending before the Legislator* COM (2005) 462.

18 See Hans-W Micklitz, Norbert Reich & Stephen Weatherill, 'EU Treaty Revision and Consumer Protection' (2004) 27 *Journal of Consumer Policy* 367.

19 *Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices offered to consumers* [1998] OJ L 80/27.

Nevertheless, the internal market project can also be viewed as involving the establishment of a modern framework of consumer laws. Support for this can be found in Article 95(3) which states that the Commission, in its proposals concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection and Article 3(1)(t) which lists one of the Community's activities as being a contribution to the strengthening of consumer protection. It is clear that the creation of the internal market requires the Community to establish some consumer policy. However, it is a major jump from arguing that the Community has some powers to regulate a matter, to suggesting that all the competence to regulate that matter should vest with the Community and Member States should be denied the opportunity to take additional measures they feel are necessary to protect their consumers. Whether or not this can be supported requires an analysis of the broader justifications for maximal harmonisation and country of origin controls, which relate to the impact of legal rules on competitiveness. Indeed the same issues that must be established to allow the Community any competence to legislate for the internal market are also relevant for determining the desired extent of the harmonisation. It is all a matter of degree.

C. Community Competence to Legislate for the Internal Market

First, it is necessary to go back to the landmark decision of the European Court of Justice on the freedom Article 95 gives for regulatory intervention at the EC level. It came in litigation over the Tobacco Advertising Directive. The Court annulled the Directive arguing in effect that it cannot be of assistance to the development of a European market in services for tobacco advertising to (virtually) abolish that market. Although some prohibitions could promote internal market objectives, this particular prohibition did not.²¹ The Court's judgment on the scope of Article 95 is important; notwithstanding that, the case should be read in the light of a couple of caveats. It concerned the politically charged topic of tobacco and the Court was responding to pressure from the German Constitutional Court to monitor the limits of the Treaty powers.²² The Tobacco Advertising Directive was an easy target for the Court to demonstrate its vigilance, as it could readily be seen that it was more motivated by public health than internal market considerations.

Nevertheless, in *Germany v Parliament*²³ the European Court of Justice was clearly unwilling to accept that the Community had a general regulatory power. Measures under Article 95 must first be justified in terms of the internal market. This requires a demonstration that the harmonised rule was necessary to promote

20 Thomas Wilhelmsson, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 *Journal of Consumer Policy* 317; Thomas Wilhelmsson, 'European Consumer Law: Theses on the Task of the Member States' in Hans-W Micklitz (ed), *Stand und Perspektiven des Verbraucherrechts in Deutschland, Nomos-Baden* (2006).

21 *Swedish Match v Secretary of State for Health* (C210/03) [2004] ECR I-11893 where a ban on oral tobacco was upheld.

22 *Brunner v European Union Treaty 1 CMLR* [1994] 57.

23 *Germany v European Parliament and Council of European Union* (C-376/98) [2000] ECR I-8419; *R v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and others* (C-74/99) [2000] ECR I-8599.

the four freedoms (free movement of goods, services, persons and capital) by eliminating barriers to trade or to prevent distortions of competition. It is also possible to act to prevent possible future obstacles to trade resulting from disparate responses emerging from the Member States. The Court also accepted that once the internal market justification was established, the Community had a degree of freedom over which level of protection to adopt and indeed should be guided by the principle that a high standard of consumer protection should be achieved.

D. Consumer Rules as Barriers to Trade

Some consumer protection rules can readily be seen to create barriers to trade. This is true of rules which require products to be made to particular standards and explains the total harmonisation nature of new approach technical harmonisation directives.²⁴ Other rules can have similar effects. For example, labelling requirements that might mean products have to be repackaged for different markets can have a detrimental impact on cross-border sales. This is why, in relation to challenges to tobacco standards and labelling rules, the European Court was reassured by an article guaranteeing free circulation to products complying with its requirements.²⁵ Indeed any rules requiring particular formalities to be used or requiring specified warnings could potentially be viewed as barriers to trade. One might still, however, want to argue that for these types of rules, any continuing national rules would still be better assessed under the justifications represented in Article 30 and the rule of reason in *Cassis de Dijon*, rather than automatically excluded by a maximal harmonisation approach. That is, however, a side argument from our central concern in this paper, which is with respect to whether maximal harmonisation is needed for general liability rules that do not require any particular form of conduct, but simply punish traders for failing to meet minimum standards. It is hard to see how these can be categorised as direct barriers to trade.

E. General Liability Rules as Distortions of Competition

The type of general liability rules referred to here include private law liability rules such as product liability and contract rules such as sales of goods law. Also included would be general clauses like that found in the Unfair Commercial Practices Directive that prohibits conduct falling below a certain level, but does not specify any specific conduct that is required. For harmonisation of such rules to be justified the impact of different national rules must be such as to distort competition.

Wagner has argued that the distortion of competition argument is unsustainable for contract law since the same contract rules apply to all products on the market.²⁶

24 See *Council Resolution of 7 May 1985 on a New Approach to Technical Harmonization and Standards* [1985] OJ C 136/1.

25 *R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453.

26 Gerhard Wagner, 'The Economics of Harmonization: the Case of Contract Law' (2002) 39 *Common Market L Rev* 995 at 1004-5.

As a general starting point this has a lot of sense and is a good reality check on whether legislation is really needed. However, at least two counter arguments should be noted.

First, producers can be expected to produce products whose quality corresponds to their expected liability.²⁷ In states with low levels of consumer protection traders will have fewer incentives to make products of very high quality as they are less concerned about avoiding liability. By contrast traders in states with demanding liability laws will have incentives to invest to produce better products in order to avoid the potentially higher costs of breaching liability laws. A trader in a low liability state may be producing products of lower quality in an economically rational manner, but yet may be overwhelmed by the potential liability when exporting to a state with higher standards. Thus differences in general liability laws do have the potential to affect cross-border trade as they can affect decisions about what design of product to produce or the conditions of their marketing.

Furthermore, it is not true that the same rules apply to all products on the same market. If the purchaser is a consumer — in the special sense in which the Rome Convention on the Law Applicable to Contractual Obligations 1980 defines consumer, ie, a consumer who is targeted by a trader in another state²⁸ — then the consumer will benefit from his own state's mandatory consumer laws. If the consumer comes from a state with a higher level of protection than that offered in the trader's state this may again overburden the trader and discourage the trader from seeking to attract consumers from those states.²⁹

A similar kind of analysis can be applied to fair trading rules as to general private law liability rules. Thus there are situations when differences in the general liability rules can have an impact on the internal market. The questions are whether and to what extent harmonisation of such rules is necessary to promote the establishment and functioning of the internal market. In particular this paper poses the question of whether, accepting that it should have competence in these areas, the EC needs to have exclusive competence. Could the internal market not cope with shared competence as under the minimum harmonisation model? After all it seems a bold gesture to claim the Community should be the only legislator in consumer matters, when it has for the most part only gained competence in consumer matters indirectly through the internal market provisions in the EC Treaty. Surely, it is only when the differences caused by general liability rules are so great that they affect decisions about how to produce, label, package, and (possibly in some situations) market the product that the internal market effects are

27 George Akerloff, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488.

28 See now [1998] OJ C 27/34.

29 See Joseph Drexel, 'Continuing Contract Law Harmonization under the White Paper of 1985? – Between Minimum Harmonization, Mutual Recognition, Conflict of Laws, and Uniform Law' in Stefan Grundmann & Jules Stuyck (eds), *An Academic Green Paper on European Contract Law* (2002), Drexel argues for reform of art 5(2) to permit the free choice principle in areas covered by harmonised European law and in the internet context.

felt. If the only impact is small differences in exposure levels then this can be accommodated by the pricing mechanism in the various markets.

The Commission seems to adopt a different approach.³⁰ Having used the image of the confident consumer to gain jurisdiction over consumer matters, it now turns to the image of the under-confident businessman to justify maximal harmonisation. It considers businesses will be reluctant to risk doing business in other states if the legal regimes are not identical. Better still it would prefer to use the country of origin principle to reassure traders that they need only be concerned with the rules of the state they are established in and their relationships with their own regulators and courts. The Commission seems to be abusing the image of the under confident businessman just as much as it abused the image of the confident consumer.

The Commission's analysis has several flaws. First, the essential problem is one of increased transaction costs arising from lack of information about which rules apply in cross-border transactions, the content of the applicable law and uncertainty about enforceability.³¹ But big businesses that tend to dominate cross border trade have the expertise to overcome these legal information gaps. Indeed they often seek out the highest levels of protection so as to be able to adopt a common approach. There might be more validity in the Commission's analysis with respect to small and medium sized enterprises, which should be encouraged to participate more in the internal market, but again experience suggests entrepreneurs are more concerned with finding new markets than with the intricacies of consumer protection laws.

Moreover, there are relatively few differences between the laws of the Member States thanks to the large amount of harmonizing legislation. Certainly comparison with other federal systems like Australia and the United States suggests that whilst harmonisation is desirable, trade does not dry up just because some differences persist.³² Interestingly, and perhaps perversely, in areas where maximal harmonisation has occurred like product liability, the legislation has left some matters which have a great impact on liability exposure (such as damages for non-material loss) to the Member States. There has been no suggestion that these differences have hampered cross-border trade.³³

Therefore the notion that businesses need complete uniformity seems to be going too far. It poses unnecessary dangers for consumers if, without good reason, it is used to undermine familiar national instruments of consumer protection. What

30 This came through very clearly in the former Commissioner David Byrne's insistence that any reform of the Consumer Credit Directive should lead to maximum harmonisation. It is hard to imagine in practice that the detail of consumer credit law could be fully harmonised.

31 Andreas Schwartz, 'Design for an Empirical Data Investigation into the Existing Contract Law Harmonisation under the White Paper of 1985' in Grundmann & Stuyck, above n29.

32 It is very difficult to quantify the effects harmonizing general liability rules on interstate trade: for an attempt to model a study in the context of contract law see Schwartz in Grundmann & Stuyck, above n29.

33 Lovells, *Product Liability in the European Union: A Report for the European Commission* (2003).

businesses might legitimately object to are national rules which catch them by surprise.³⁴ There might be a case for harmonizing any provisions capable of causing such concerns. There can also be a valid case made out for bringing laws into a similar structure, as with the adoption of a general fair trading clause under the Unfair Commercial Practices Directive. This can assist with the promotion of a common legal and trading culture.³⁵ However, Europe can help national laws evolve in a similar direction without requiring uniformity. It is important to reflect on the difference between uniformity and harmonisation. Harmonisation can have various meanings, but does not require that the laws are identical, merely that they are brought closer together.³⁶ The task in each context is to determine how close the laws of the Member States need to be.

In any event complete harmonisation is difficult to achieve given the present state of EU law. The very use of the instrument of a Directive, that has to be implemented into national law, creates opportunities for differences to emerge between the Member States. Admittedly directives are increasingly being treated both by the Commission and the European Court of Justice as leaving little room for the Member States to exercise such discretion. Equally there are signs that regulators are appreciating that what they should be enacting are directly applicable regulations, even if this is sometimes not politically practical.

However, even if the same words are enacted across Europe they may be interpreted differently by the national regulators and courts that have to work with them. This may not merely be because they choose to apply the rules with varying degrees of intensity. The application will have to be made taking the local context into account, which might include matters such as the environment and national traditions. Products may, for instance, be used in different ways by consumers in different parts of Europe. An example of a product often cited as being difficult to develop harmonised standards for is the baby's high chair. One reason is that attitudes vary between states as to the desirability of restraining the baby with a safety harness. Some view it as a safety feature, others as an undue restraint on the child. Products may also need different features depending on whether they are to be used in the warm, dry south or cold, wet north of Europe.

The legal culture of consumer protection is also important. Wilhelmsson has used empirical consumer surveys³⁷ and the work of Volkmar Gessner³⁸ to suggest that signs of a homogenous European consumer protection culture are still fledgling. Northern European consumers still predominantly rely on institutions

34 See Hugh Beale, 'Finding the Remaining Traps instead of Unifying Contract Law' in Grundmann & Stuyck, above n29.

35 Geraint Howells, 'General Clauses in European Consumer Law' in Micklitz, above n20.

36 On the different meaning of harmonisation see Piet Jan Slot, 'Harmonization' (1996) 21 *European LR* 378; indeed article 95(3) talks of approximation of laws.

37 Consumers Survey 2002, found that 82% of the Finns considered themselves to be well protected, but only 21% of the Greeks and Portuguese.

38 Volkmar Gessner, 'Europas Holprige Rechtswege – die rechtskulturellen Schranken der Rechtsverfolgung im Binnenmarkt' in Ludwig Krämer, Hans-W Micklitz & Klaus Tonner (eds), *Law and Diffuse Interests in the European Legal Order* (1997).

for protection. In Southern Europe personal relations are more important. These differences have even been recognized by the European Court of Justice, which has argued, for instance, that when assessing whether 'lifting' as a description of a face cream could mislead consumers to conclude it had the same effect as a surgical operation:

it must be determined whether social, cultural or linguistic factors may justify the term "lifting", used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States.³⁹

Legal practices may also affect the way the law is applied. In the context of product liability it has been suggested that differences in judicial role between civil and common law traditions might lead to different results. Continental judges may be more willing to imply a defect without having to justify the exact nature of the defect.⁴⁰

F. Assessment

In conclusion, with respect to general liability rules maximal harmonisation seems neither to be necessary, desirable nor capable of delivering all the benefits its advocates suggest. However, the exact degree and nature to which maximal harmonisation is required must be understood in the context of each piece of EC legislation. Such an analysis is now made for the Product Liability and Unfair Commercial Practices Directives. The criteria of necessity, desirability and feasibility seem good yardsticks to measure the validity of the maximum harmonisation principle in each context.

3. Product Liability

A. Maximal Harmonisation and the Directive

Many of the early contact law directives made it clear that they only required minimal harmonisation. Recent directives have often been explicit in preventing Member States going beyond the rules laid down in the directive and/or introducing the country of origin principle. By contrast the Product Liability Directive, which introduced strict product liability,⁴¹ was more opaque with regard to the extent to which it required maximal harmonisation. The policy had to be gleaned from a textual reading of the Directive.

Article 13 of the Product Liability Directive provides that:

39 *Estée Lauder Cosmetics GmbH v Lancaster Group GmbH* (C-220/98) [2000] ECR I-117 at [29].

40 See below at 79 and Geraint Howells 'Defect in English Law – Lessons for the Harmonization of European Product Liability' in Duncan Fairgrieve (ed), *Product Liability in Comparative Perspective* (2005).

41 And serves as a model for reform of the Australian law, see *Trade Practices Act 1974* (Cth) Part VA; see David Harland, 'Reform of the Law of Product Liability in Australia' (1992) 15 *Journal of Consumer Policy* 191.

This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.

By safeguarding these rules it seemed to imply that rights under any other rules (we shall see the European Court of Justice found there was a third category of rules not protected by Article 13, which were those establishing a general strict product liability regime) and those rules that did not exist at the time the Directive was notified were affected. Moreover, the fact the Directive left some explicit options to Member States has been taken to imply that Member States had no such freedom with respect to other matters. This led most commentators to conclude that the Directive was a maximal harmonisation directive.⁴² For a while it was possible to attempt to argue this was unclear or at least inconsistent with Article 13's preservation of existing rules, which must surely allow those rules to evolve over time.⁴³ The European Court of Justice has now, however, clearly confirmed the maximal harmonisation character of the Directive. This leads to the ridiculous outcome that minor matters have to be completely harmonised, whilst some significant matters are left expressly to national law. For instance, the European Court of Justice has condemned states for allowing consumers to recover the first 500 Euro of property damage and yet the Directive leaves recovery for non-material damages to national law. Differential pain and suffering damages are far more likely to impact on the internal market than 500 Euros here and there.

B. Maximal Harmonisation and the Court of Justice

Three recent decisions of the European Court of Justice have confirmed the maximal harmonisation nature of the Directive. That argument is lost. But criticism can still be made of the policy. Furthermore, problems with the Court's interpretation of Article 13 can be highlighted.

In *Commission v France*,⁴⁴ the French implementing law was condemned for allowing recovery of the first 500 Euro; for making suppliers liable on the same basis as producers; and, for imposing the extra condition that producers must prove that they took appropriate steps to avert the consequences of a defective product in order to invoke the defences of compliance with mandatory requirements and the development risks defence. As regards the last point the Court held that whilst states could choose whether to include the defence or not, they could not alter the conditions under which the defence applied.⁴⁵ Greece was likewise condemned for not introducing the 500 Euro threshold.⁴⁶ In *González Sanchez v Medicina Asturiana SA*⁴⁷ a victim of infected blood was not allowed to continue to rely on

42 Thomas Wilhelmsson, 'Products Liability in Finland – A Maximalist Version of the Products Liability Directive' (1991) 14 *Journal of Consumer Policy* 15.

43 Geraint Howells, *Comparative Product Liability* (1993) at 197–8.

44 (C–52/00) [2002] ECR I–3827.

45 Proceedings had been brought to impose a fine on France for failing to react to this decision, but are likely to be abandoned now the French law has been revised: article 29 of Loi 2004–1343 of 9 Dec 2004 and decret n2005–113 of 11 Feb 2005.

46 *Commission v Greece* (C–154/00) [2002] ECR I–3879.

an earlier Spanish law that was more favourable to consumers, but which had been repealed when the Directive was implemented.

In *Commission v France* the Court stated that Article 13 does not allow Member States to maintain a general system of product liability different from that provided for in the Directive. The special liability scheme exception is restricted to specific schemes limited to a given sector of production. Nevertheless, contractual and non-contractual liability can exist on grounds such as fault or a warranty for latent defects. Accepting the maximal harmonisation nature of the Directive, the Court's decision can be justified because the implementing law increased the protection beyond the permitted maximum levels by rules introduced after the notification of the Directive. It is possible to accept this and still disagree with the Court's view that Article 13 does not give Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.

The Court distinguishes special sector specific liability systems and general contractual and non-contractual rules which Member States are allowed to retain from a general product liability regime, which must only be regulated to the extent permitted by the Directive. But is it possible to create this intermediate category of general product liability rules? At least from a common law perspective this seems strange. The existing regimes were forms of contractual or non-contractual liability. The French system of contractual and tortious liability had developed to an extent where its protection probably surpassed that of the Directive. If this is what is meant by a general system, then surely it should have still been protected by Article 13, for it was simply the application of contractual and non-contractual rules in the Civil Code. Some French commentators now interpret this decision as meaning that the existing liability system must be reinterpreted so as not to exceed the protection of the Directive.⁴⁸ This would be remarkable and unwarranted. The French system might be labeled by jurists as a special liability system, but it is really only the accumulation of a set of contractual and non-contractual rules, whose continued validity had seemingly been expressly preserved by Article 13. Article 13 might put a brake on the future interpretation of those rules in the product liability context by the courts, but it should not affect existing jurisprudence. Moreover one might question whether national courts should have to change their interpretation of laws, which only incidentally provide liability for defective products. Does the European Court of Justice seriously intend that, for instance, English sales of goods law might need to be reformed or its development modified because of its incidental consequences for product liability? What the Court seems to have failed to appreciate is that product liability is not a simple topic that can be boxed off and delimited to accommodate the scope of a Directive.

Similarly the result in *Sanchez* can be accepted, but the Court's reasoning questioned. *Sanchez* was in effect complaining that Spain had implemented the Directive by repealing the more protective rules in its 1984 law. It seems perfectly

47 (C-183/00) [2002] ECR I-3901 (*Sanchez*).

48 See Note by Christian Larroument, (2002) 31 *Dalloz* 2464 at 2465.

permissible to argue that Article 13 permits Member States to maintain existing systems of liability in place, but does not require them to do so. Spain should be free to decide to repeal existing rules in favour of the Directive's standard. The point is it should not be forced to change their existing standard. However, the Court seems to have gone further and indicated that the Spanish Government would not have been able to maintain its 1984 rules in place if it had wanted to do so. It states that the special liability system is limited to specific sectors and continues to argue that:

a system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production does not come within any of the systems of liability referred to in Article 13 of the Directive. That provision cannot therefore be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive.⁴⁹

Whilst the special liability system was clearly intended to cover cases like the German pharmaceutical regime, it is baffling how the existing Spanish system could fail to be anything other than a species of non-contractual liability whose continued existence was specifically provided for by Article 13. It would be an elementary mistake to define as non-contractual liability only liability based on civil codes or the common law. Thus whilst the decision can be justified as defending the right of Spain to choose not to maintain its existing law, the Court should have accepted that Spain could have legitimately left it in place.

These decisions are pushing towards a more complete harmonisation of European product liability laws. Yet it makes little sense when Article 13 still permits contractual, non-contractual and special liability regimes to exist. One of the most serious aspects is that a directive that was only intended to deal with producer liability is seemingly being interpreted to cover supplier liability as well, although this was hardly at the forefront of people's minds when the Directive was being adopted. This was one of the most concerning aspects of the *Commission v France* decision which provoked another preliminary reference from Denmark where suppliers are traditionally given similar liabilities to producers.⁵⁰ The European Court of Justice has very recently underlined that the maximal harmonisation nature of the Directive excludes any joint liability.⁵¹

C. Moving Towards the Directive as the Sole Source of Rights?

There are clearly advantages in terms of coherency in the product liability regime covering both producer and supplier liability. The Directive however focused on producer liability. Supplier's liability was not really discussed other than to provide a subsidiary form of liability where the supplier could not identify the producer, importer or their own supplier. By sleight of hand the Member States have seemingly had their freedom to regulate supplier's liability removed.

⁴⁹ *Sanchez*, above n47 at [33].

⁵⁰ Law 370 7 June 1989, arts 10–11.

⁵¹ *Bilka Lavprisvarehus v Mikkelsen and Nielsen* (C–402/03), Decision of 10/01/06.

Making rights emanating from the Directive's strict liability regime the sole source of protection even with respect to suppliers was attempted by a French Commission presided over by Prof Ghestin.⁵² The controversy and complexity that proposal gave rise to was one reason why the French delayed implementing for so long. We know now it would have been a wasted effort for that tidying up of the law would have breached the maximal harmonisation principle. It is also doubtful whether such a rationalisation is desirable or even possible. The City law firm, Lovells had been specifically asked by the European Commission to look into attitudes to abolishing Article 13 and making the Directive the sole system of liability for defective products. They concluded there was not a great deal of support for this suggestion.⁵³ Moreover the contractual rules usually apply more generally than just in product liability situations. The push to create greater uniformity in the law once again underestimates the complexity of law and the difficulty of boxing off a particular issue and dealing with it in isolation.

D. Assessment

Maximal harmonisation is clearly being accepted as a guiding principle of the Product Liability Directive. What is so bewildering is that such effort is placed in defending this concept and yet some of the matters that could really affect product innovation and design (like the development risks defence) or the decision to market in other states (like damage levels, especially the availability and size of damages for non-material damage) are expressly left to national law. The fact that such issues are not apparently causing problems supports the notion that for general liability rules in the field of product liability, maximal harmonisation is not necessary. One only has to look to the United States to see a well functioning common market with significant different levels of product liability exposure from state to state.

Possibly it would be desirable for a common approach to be developed to some more aspects of the Directive, such as the development risks defence. Establishing more harmony between damage levels or adopting a common approach to causation may be desirable, but seem rather impracticable for the time being. It also seems that total harmonisation is not desirable, at least if this means bringing within the fold of the Directive other routes to recovery such as contract law. The Directive has some 'defects' as a legislative instrument. In part these have not come to the fore because consumer advocates simply accept this as an additional remedy to traditional contractual (sale of goods) and tortious remedies. One of the most worrying aspects of the *Commission v France* decision is the way it puts in jeopardy the advances in French case law under the Civil Code.

Creating an identical product liability law across Europe is not feasible. We have already commented that large topics such as causation and damages levels are simply not yet practical to harmonise. Moreover, it is not possible to box off strict product liability. Its interconnections with contract and tort law have already been

⁵² Discussed in Howells, above n43 at 114.

⁵³ Lovells, above n33 at 45. The author was a consultant on that project.

commented on; but there are other links with topics such as environmental liability which mean that overlap is very difficult to avoid. The European Court of Justice has attempted to define a separate system of 'general product liability rules' to limit the impact of Article 13. This systemisation may be attractive to civil law scholars, but to the common law mind it is problematic as pre-existing liability would have formed part of the contractual or non-contractual liability which ought to have been preserved. Whilst the new regime of strict liability might be viewed as a form of *sui generis* liability, its predecessors in the Member States all evolved from the existing general private law. Spain is possibly a slight exception, but even here the statutory rules provided for a form of non-contractual liability.

Even when common standards are applied, courts may have different approaches to their application. In continental Europe courts seem more willing to condemn a product as defective simply because the product behaved differently than expected without any explanation. Examples include French cases involving an exploding tyre⁵⁴ and the glass window of a fire exploding⁵⁵ and a Belgian case in which a bottle of carbonated water exploded.⁵⁶ The common law tradition requires the judge to explain his or her reasons for finding a defect more fully and this may make it harder to come to such conclusions.⁵⁷ In addition to the different approaches of common law and civil law courts to the assessment of defect, it is also possible that courts in different societies may well take different views on risk and consumer expectations.

This is not to say that the Product Liability Directive should not have been adopted. It has introduced a common legal regime into each Member State and lawyers in all Member States can communicate about product liability with a common terminology. Whereas, prior to the Directive, Member States were all starting to address the product liability problem with different solutions, now there is a common starting point. Perhaps the most important comment for this paper is that despite the rhetoric of maximal harmonisation, taken in broader perspective, the Product Liability Directive merely introduces a common floor of rights. The Directive itself leaves many issues untouched or for the Member States and many other legal rules remain relevant to product liability disputes. There seem to be no harmful side effects from this. The Directive has usefully promoted the internal market by bringing the legal systems closer together. Demands that the rules be completely harmonised seem more related to European legal politics than the actual needs of business and consumers. Total harmonisation, even beyond the extent already achieved by the Directive, seems to be neither necessary nor desirable and is in any event unlikely to be feasible.

54 Court of Appeal of Toulouse, Decision of 7 November 2000.

55 Tribunal de Grande Instance in Aix-en-Provence, Decision of 2 October 2001.

56 Civ Namur, 21 November 1996, JLMB 1997 104.

57 See detailed reasoning in *A v National Blood Authority* [2001] 3 All ER 289 and the probably too demanding search for an explanation of the defect in *Foster v Biosil* (2000) 59 BMLR 178.

4. *Unfair Commercial Practices*

A. *Policy Debates on Maximal Harmonisation*

The maximal harmonisation character of the Product Liability Directive and in particular the impact of this legal policy was only revealed over time. By contrast, when the Unfair Commercial Practices Directive was being adopted one of the central debating points was the Commission's determination to make it a maximal harmonisation directive. The objective of the Directive was to introduce a European wide prohibition on unfair commercial practices. This was a novelty for the United Kingdom which had not gone down the Australian route of including a broad prohibition misleading and deceptive conduct.⁵⁸ Indeed the prospect of such a principle was tantalising for the consumer movement which was being offered one of their long cherished aspirations — a European wide ban on unfair commercial practices. This was, of course, particularly attractive for the United Kingdom given its failure to adopt such a general principle at the national level. The lack of such a principle had been identified by the United Kingdom government as one barrier to it having a world class consumer protection regime.⁵⁹ The sting in the tail of the European reforms was the maximum harmonisation provision. It was at first difficult to appreciate the impact of this, but eventually the consumer movement protested,⁶⁰ to little avail.

In favour of maximal harmonisation, the Commission invoked the arguments discussed above about businesses needing confidence that they would not be confronted with more protective national laws in order to encourage them to truly trade on a European wide basis. Moreover they argued that any objections were irrational as all unfair practices would be caught by the general clause. However at least two counter arguments can be made to this stance. First, substantively the Directive's standard may not cover all unfair practices; only those practices defined as unfair by the Directive are prohibited. Second, it underplays the value of laws providing for specific controls.

B. *Unfair Practices are What You Say They Are*

It is misleading to suggest that all unfair practices are caught by the Directive. At least, if by that one means all conceivable unfair practices. The Directive uses a very specific conception of unfairness. Practices are unfair if contrary to the requirements of professional diligence they materially distort the economic behaviour of the average consumer.⁶¹ This is further refined to include misleading actions⁶² and omissions⁶³ as well as aggressive practices.⁶⁴

58 *Trade Practices Act 1975* (Cth) s52.

59 Department of Trade and Industry, United Kingdom, *Comparative Report on Consumer Policy Regimes* (2003) at 33.

60 National Consumer Council, United Kingdom, *Unfair Commercial Practices: Response to DTI Consultation on the Draft EU Directive* (2003); European Consumer Law Group, *The Proposed Directive on Unfair Commercial Practices* (2004)

61 *Unfair Commercial Practices Directive* art 5.

62 *Id* at art 6.

At least three elements risk making this a restrictive conception of unfairness. First, part of the definition of professional diligence in article 2(h) refers to ‘honest market practices.’ There has been some, probably unwarranted concern, that this might allow traders to point to simple compliance with common industry practices as a defence. In any event this requirement is presumed to be satisfied for misleading and aggressive practices that will make up the bulk of unfair commercial practices. Second, the unfairness definition builds upon European Court of Justice jurisprudence⁶⁵ and uses an average consumer standard. However, the conception of the average consumer used by the Directive assumes that this hypothetical person has abilities and ways of conducting themselves which seem superior to how the ordinary consumer actually is. Recital 18 echoes European Court of Justice jurisprudence by referring to the average consumer as someone who is ‘reasonably well-informed and reasonably observant and circumspect.’ Thankfully the other strand of European Court of Justice jurisprudence was also eventually included to allow courts when making the assessment to take ‘into account social, cultural and linguistic factors.’ Third, unfairness is limited to economic unfairness. The practice must have caused the consumer to make a transactional decision he or she would not have otherwise taken. This transactional decision test is an express part of the misleading and aggressive practices standard and is found in the general unfairness test as part of the definition of material distortion of the consumer’s economic behavior.⁶⁶ It is unclear how strict a causal test this will be. Although one could imagine courts taking fine points on this, the working assumption is that this will be a fairly easy threshold to pass. However, it does cause problems when the unfair practice occurs post contractually and the consumer does not have to make a transactional decision, such as when a post sales advice service is withdrawn. Furthermore it is hard to apply to aggressive practices that do not affect the average consumer. For instance, most consumers simply ignore spam e-mail, but that does not mean it should not be prohibited.⁶⁷

C. *Value of Specific Regulation*

In most legal systems there is usually a mass of detailed rules regulating particular practices. This is certainly the case for common law countries which have relied on the punctual specific regulation of trade practices.⁶⁸ But such detailed rules exist even in systems with general fair trading clauses. They can be valuable in targeting particular practices and providing clear guidance on what is acceptable.

63 Id at art 7.

64 Id at arts 8–9.

65 See *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC Estée Lauder Cosmetics GmbH* (C–315/1992) [1994] ECR I–317; *Gut Springenheide GmbH and RudolfTusky v Oberkreisdirektyo des Kreises Steinfurt – Amt für Lebensmittelüberwachung* (C–210/96) [1998] ECR I–4657.

66 See *Unfair Commercial Practices Directive* art 2(e).

67 See *Unfair Commercial Practices Directive* Annex I item 26.

68 Christian Twigg-Flenser, Deborah Parry, Geraint Howells & Annette Nordhausen, *An Analysis of the Application and Scope of the UCP Directive* (2005): <http://www.dti.gov.uk/ccp/consultpdf/final_report180505.pdf>.

Ideally one senses that the drafters of the Directives would like these swept away. That seems inconceivable, but they will all have to be reviewed to be brought into line with the directive's standard. Some may be repealed, but most will probably be modified and in the process a layer of complication will be added to national laws.

Therefore the maximal harmonisation approach of the Unfair Commercial Practices Directive gives rise to two sets of concerns. First, consumers might be left vulnerable to some unfair practices that Member States might wish to control. Second, a technical set of problems arises requiring the revision of numerous specific forms of regulation and possibly the removal of some traditional forms of protection.

D. Internal Market Clause

Article 4 of the Directive is the internal market clause. It simply 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.

The original proposal had preceded this with a clause providing that traders shall only comply with the national provisions, falling within the field approximated by this Directive, of the Member States in which they are established. Member States in which the trader was established were to ensure such compliance. This was even more upfront in its intentions than previous consumer directives which had invoked a country of origin principle, such as the 'Television Without Frontiers' Directive⁶⁹ and the E-Commerce Directive.⁷⁰ These had simply preceded a clause similar to the one now found in Article 4, by a clause about Member States obligations to ensure compliance by businesses established in their territory or jurisdiction. The effect was, of course, under all versions, that traders only had to comply with the rules of the state where they are established. The Unfair Commercial Practices Directive was simply more transparent in its original wording in making it clear to traders that they only had to concern themselves with one set of national rules.

The country of origin principle found in the first paragraph in Article 4 of the proposal on Unfair Commercial Practices was removed, apparently as a

69 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23 as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1987 amending Council Directive 84/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202/60.

70 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'): [2000] OJ L178/1 (hereafter *E-Commerce Directive*).

concession to those with concerns about the maximal harmonisation approach. However, this was a rather pyrrhic victory, for it was only removed on the understanding that it was not needed to achieve maximal harmonisation. Nevertheless, it does leave the receiving state as the state responsible for control.⁷¹ This can be very important for, due to limited resources, home state regulatory authorities may be tempted to give low priority to protection of consumers in other states. It is unclear as to what control the receiving state can exercise. Can it only apply the rules of the Directive or, as has been suggested by at least one state, does Article 4 now permit them to continue to rely on the mandatory requirements set out in *Cassis de Dijon*?⁷² It would be surprising, at least to the Commission, if Article 4 could serve as a safeguard clause in disguise. It would run counter to their whole line of argument and their reluctant acceptance of the removal of the country of origin clause, but only on the basis that it was not needed to achieve maximal harmonisation.

E. No Safeguard Clause

The Commission refused to debate the maximal harmonisation principle during the implementation process. To do so risked being considered a wrecker who wanted to go over old ground, rather than assist in fine tuning the Commission's proposals. What is particularly surprising is the Commission's refusal to even consider introducing a safeguard clause that would allow Member States to react to practices that might develop outside the control of the Directive. Traders employ legions of lawyers and consultants and have every incentive to steal a march on their competitors by pushing legal rules to the limits.⁷³ It seems rash of the EC to place such faith in its general clause, especially before it has been interpreted by the courts. A parachute to safety in terms of a safeguard clause, as provided for in the General Product Safety Directive⁷⁴ and the E-Commerce Directive,⁷⁵ would have seemed a sensible precaution; at least in the early years of the Directive's existence. Even though such safeguard clauses build in close supervision of Member States' exercise of their discretion, the Commission was having none of it. It is confident its law can cover all eventualities.

F. Some Exceptions and Derogations

The Commission's efforts to establish maximal harmonisation of all aspects covered by its directives are becoming a familiar feature of legislative procedures at the European level. Although it is winning many battles, the principle still meets

71 Hans-W Micklitz suggests that Germany views Article 4 as mirroring *Cassis de Dijon* and therefore allowing national rules to be justified on the basis of mandatory requirements: see Geraint Howells, Hans-W Micklitz & Thomas Wilhelmsson, *European Fair Trading Law – The Unfair Commercial Practices Directive* (forthcoming).

72 European Consumer Law Group, above n60.

73 Jon Hanson & Douglas Kysar, 'Taking Behaviouralism Seriously: The Problem of Market Manipulation' (1999) 74 *NYULR* 630.

74 *Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance)* [2002] OJ L 11/4.

75 Above n70, *E-Commerce Directive*.

some resistance and this often leads to exceptions and derogations being slipped into the legislation. Even the Directive on the Distance Marketing of Consumer Financial Services⁷⁶ that strove so hard for maximal harmonisation, in the end and despite the long list of information requirements included in the Directive, reserved to Member States the right (pending further harmonisation) to add additional information requirements.

The Unfair Commercial Practices Directive includes its own limitations on the maximal harmonisation principle. A major limitation on the scope of the harmonised rules is that they only apply to business-to-consumer commercial practices.⁷⁷ Business-to-business and even consumer-to-consumer practices are excluded; although, it is hard to imagine these should logically be more protective than business-to-consumer rules. Rules concerning the certification and indication of the standard of fineness of articles of precious metal are also excluded.⁷⁸

Financial services are within the scope of the Directive, but as is customary in EC consumer law, receive special treatment. Member States remain free to impose more restrictive or prescriptive requirements with respect to financial services.⁷⁹ The same applies to immovables. A major concession was the introduction of a six year stay of execution for rules more protective than the Directive which were introduced when implementing directives with minimal harmonisation clauses.⁸⁰ This concession in itself concedes that the Commission must foresee some recently enacted consumer protection rules might need to be repealed or modified because of the maximal character of the Directive.

The Directive is said to be without prejudice to rules on contract law,⁸¹ health and safety,⁸² rules determining jurisdiction⁸³ and rules relating to the integrity of the regulated professions.⁸⁴ Furthermore recital 7 makes it clear that the Directive does not address legal requirements related to taste and decency and Member States can continue to ban practices for such grounds even if they do not limit consumers' freedom of choice. The exact scope of this exception is unclear for the recital gives the example of banning commercial solicitations in the street, which suggests a broader understanding of taste and decency than usual.

G Assessment

Commercial practices cover a broad spectrum. Some clearly need to be harmonised or they will affect the ability to trade across borders. For example, a national rule which requires a particular warning in an advertisement might

⁷⁶ *Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EC and Directives 97/7/EC and 98/27/EC* [2002] OJ L271/16.

⁷⁷ *Unfair Commercial Practices Directive* art 3(1).

⁷⁸ *Id* at art 3(10).

⁷⁹ *Id* at art 3(9).

⁸⁰ *Id* at art 3(5).

⁸¹ *Id* at art 3(2).

⁸² *Id* at art 3(3).

⁸³ *Id* at art 3(7).

⁸⁴ *Id* at art 3(8).

impede the ability of a company to have a pan-European advertising campaign. The difficulty of ascertaining which rules impede market access lies at the heart of the *Keck* decision,⁸⁵ and the problems in determining whether selling arrangements in practice impede imports are obvious from the subsequent case law.⁸⁶

It is not possible in the space available to analyse all commercial practices. But, let us take the example used in recital 7 of bans on solicitations in the street and perhaps extend it to cover bans on doorstep selling. This seems a very localised activity which affects both domestic traders and those from other states equally. Access to the market is not impeded as there are plenty of other means of reaching consumers in the domestic market. However, if a company has developed a marketing strategy that relies on street or doorstep solicitations then they will be disadvantaged by such a ban. If they want to enter that national market they will have to rethink their entire marketing strategy; they may simply opt not to make that investment. Does this require total harmonisation? It may require an assessment of the extent to which such national rules really impact on the development of the internal market, balancing this against whether the removal of such restriction will really harm consumer protection. But such an assessment seems best taken in context, rather than based on a general clause.

From an internal market perspective one can see that harmonisation of some commercial practices is necessary and that for many commercial practices harmonisation will be desirable. However, this needs to be weighed against the undesirability of removing traditional national protection in favour of the Directive's general clause. Although most of the non-common law Member States had general clauses prior to the enactment of the Directive, they varied in content and also there were many specific legal controls in all Member States.⁸⁷ The United Kingdom and Ireland, of course, did not have a general clause. Moreover, the substance of trade practices controls still seems very bound to national cultures. Germany (because of the controls by competitors) and the Nordic states (because

85 Stephen Weatherill, 'After Keck: Some Thoughts on how to Clarify the Clarification' (1996) 33 *Common Market LR* 885.

86 See for example, *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* (C-368/95) [1997] ECR I-3689; *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB* (Joined cases C-34/95, C-35/95 & C-36/95) [1997] ECR I-3843; *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (C-254/98) [2000] ECR I-151; *Deutscher Apothekerverband eV v 0800 Doc Morris NV and Jacques Waterval* (C-322/01) [2003] ECR I-14887.

87 See VIEW, *The Feasibility of a General Legislative Framework on Fair Trading*: <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/sur21_sum_en.pdf>; Reiner Schulze & Hans Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*: <http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf>. A study of the new member states was carried out by British Institute of International and Comparative Law, *Unfair Commercial Practices — An Analysis of the Existing National Rules, including Case Law, on Unfair Commercial Practices between Business and Consumers in the New Member States and the Possible Resulting Internal Market Barrier*. See also Howells, Micklitz & Wilhelmsson, above n71.

of the supervision of the Ombudsmen) have traditionally been very protective of consumers. By contrast the United Kingdom has been more liberal especially as regards advertising, specifically comparative advertising⁸⁸ and sales promotions.⁸⁹ The Directive actually adopts the form of the continental general clauses, but has the policy perspective of the United Kingdom. European jurisprudence under the Misleading Advertising Directive had already been moving in this direction.⁹⁰ But differences in culture persist as to what are acceptable commercial practices. In sum, it seems far too early for Europe to move towards a harmonised regime. The Directive would have been better advised creating a common framework so that the legal regimes evolved towards a common conceptualisation of fairness.

Again one perceives maximal harmonisation is more of a political than legal necessity. This becomes even more apparent when attention is focused on the possibility of harmonisation being brought about in practice. Leaving to one side the very real differences in enforcement apparatus, one can predict that the goal of simply being able to follow one set of rules and then happily marketing in all states will be illusory. The implementation process may well give rise to some problems. States with general clauses may be tempted to keep with their own formula rather than moving over to the Directive's standard. Assuming the United Kingdom tries to retain its specific regulations alongside the new general clause, it will be a mammoth task to trawl through the mass of relevant legislation and modify it⁹¹ and an even more difficult task for the Commission to check this has been done properly. The best that can be expected is a good effort. When it comes to applying the general standard, national traditions and social understandings or fairness are bound to come to the fore. The European Court of Justice has already, in the context of unfair terms, backed off imposing a European application of the general test and indicated it is for national courts to decide.⁹² This is perhaps inevitable given that on a preliminary reference the European Court of Justice can interpret European law, but cannot apply it to the facts of the case. That is the function of national courts. Of course the European Court of Justice can give fairly detailed interpretations, which can sometimes seem to leave little room for national courts' discretion. Even when detailed instructions are given, it seems that on occasions national courts are willing to use their ingenuity to deviate from the sometimes pretty strong hints from the European Court of Justice.⁹³

288 *Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising* [1970] OJ 1997 L 290/18.

289 As noted above n17, a European Regulation on Sales Promotions has been proposed but no agreement can be reached on it, underlining the different traditions in this area.

290 *Criminal proceedings against X ('Nissan')* (C-373/90) [1992] ECR I-131; *Toshiba Europe GmbH v Katun Germany GmbH* (C-112/99) [2001] ECR I-7945; *Pippig Augenoptik GmbH v Hartlauer Handelsgesellschaft mbH* (C-44/01) [2003] ECR I-3095.

291 See Twigg-Flesner, Parry, Howells & Nordhausen, above n68.

292 *Freiburger Kommunalbauten v Hofstetter* (C-237/02) [2004] 2 CMLR 13.

293 This is hard to establish as national follow-up judgments are often less well reported outside the state concerned.

Maximal harmonisation of some commercial practices law might be necessary or at least in many cases desirable, but complete harmonisation of the whole field has come too soon. The introduction of a common general clause on fair trading is to be welcomed as creating a common base level of protection and being a mechanism for the creation of a European conception of fair trading. However, the field is too broad and complex for all problems to be resolved by a simple general clause. Complete uniformity does appear to be an unobtainable objective for now. The future, at least in the short to medium term, is likely to be one of increased legal complexity rather than the simplification that Brussels was trying to introduce. It is hard to find simple solutions to complex problems.

5. *Improving the Quality of the Acquis*

You only have to read most EC laws to appreciate that they are badly drafted. It is hard to believe they have all been approved by a native lawyer-linguist. When you look closer at the substance you see that many of them show the signs of political compromise and that their starting point was internal market justifications and not consumer protection. Thus one could hardly expect them to be perfect legal specimens. So long as they were minimum harmonizing directives this could be accepted. Member States only had to ensure their laws satisfied the minimum standards guaranteed by the directives and could retain their superior laws. The move to maximum harmonisation changes this.⁹⁴ Now the quality of EC laws really matters.

As regards the two directives we are concerned with, this is less of a problem for the Product Liability Directive than for the Unfair Commercial Practices Directive. This is not because the Product Liability Directive is particularly well drafted. Despite being adopted as a model for reform far beyond Europe,⁹⁵ there are many problems with this Directive including core issues about the definition of defect which has been accused (correctly) of circularity⁹⁶ and the lack of clarity on the interpretation of the development risks defence.⁹⁷ Indeed the optional inclusion of the development risks demonstrates a fault line running through the theoretical base of the Directive. However, the Directive provided an additional weapon in the consumer's armoury and is at least as protective in its substantive rules as most private law regime alternatives currently available.⁹⁸

94 Geraint Howells & Thomas Wilhelmsson, 'EC Consumer Law — Has it Come of Age?' (2003) 28 *European LR* 370.

95 See Jocelyn Kellam (ed), *Product Liability in the Asia-Pacific* (2nd ed, 1999).

96 Jane Stapleton, *Product Liability* (1994) at 234.

97 *Commission v United Kingdom* (C-300/95) [1997] ECR I-2649; see Geraint Howells & Mark Mildred, 'Development Risks: Unanswered Questions' (1998) 61 *Mod LR* 570.

98 Arguably the French domestic law was more protective, but even then the differences were fairly marginal: see, Howells, above n43 at 101-121. For comparison with the US system see Geraint Howells & Mark Mildred, 'Is European Product Liability More Protective than the Restatement (Third) of Torts: Product Liability?' (1998) 65 *Tennessee LR* 985. Of course New Zealand adopts a no fault alternative.

The Unfair Commercial Practices Directive poses a threat of a different order and the quality of its drafting needs to be scrutinised more closely, for it seeks to replace (or at least place a cap on) the protection offered by traditional forms of consumer protection. This is not the place to go into all the details and point out all the problems with this Directive,⁹⁹ but focusing on the lack of clarity with the central concept of the 'average consumer' should illustrate the point.

The Directive's standard of fairness is linked to the European Court of Justice's concept of the average consumer. There was an appreciation however that this could expose vulnerable consumers to undue pressure and so various modifications were included to accommodate this. We have already seen how the Court's reference to 'social, cultural and linguistic' factors was included in recital 18. Where a practice is directed at a group, the practice is judged by reference to the impact on the average member of that group. However, it was still recognised that practices aimed at the general public could impact unfairly on the vulnerable, so Article 5(3) provides:

Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.

The inclusion of credulity, especially in that list of vulnerable characteristics, risks undermining the very rationale for the average consumer standard. It will require very careful construction of criteria like 'clearly identifiable group' and 'foreseeability' to prevent the basic principle being undermined. This is also likely to be a source of differential application by national courts. Indeed it is not even clear whether the variation of the average consumer standard only applies to the Article 5 general fairness test or to Articles 6-9 as well.

6. *Conclusion*

In conclusion, maximal harmonisation is needed in some areas. In others diversity can be allowed with harmonisation at a basic level helping legal systems evolve towards a common approach. This essay has steered away from contract law as that is covered by Norbert Reich's paper. But maximal harmonisation is emerging as a major theme in that context as the Commission reviews its current acquis.¹⁰⁰ Some contractual matters can no doubt usefully be harmonised, such as common cooling-off periods. But to hope to replace the volumes (at least in the United Kingdom) of national laws on consumer credit, for example, with a slim Directive seems hopelessly optimistic.¹⁰¹

⁹⁹ See Howells, Micklitz & Wilhelmsson, above n7.

¹⁰⁰ A study is being undertaken under the supervision of Prof Hans Schulte-Nölke.

¹⁰¹ For the latest revised proposal on consumer credit see COM (2005) 483 final.

Drafting model laws from Brussels may seem as easy task when one starts from scratch addressing a topic. Most of us could create our ideal solutions. However, European laws cannot ignore the complex tapestry of national consumer laws that already exist. Furthermore the reality of commercial practice continues to throw up many more problems that law drafters did not contemplate. The Brussels bureaucrats have been remarkably successful in adopting consumer laws with limited resources and have coped well with the challenge of finding compromises between twenty-five different traditions. However, they should be circumspect. They should respect national traditions and experience and not believe they can wave a magic wand and in a few months can come up with ideal solutions for every legal system. Europe has an important role to play in totally harmonizing those issues that need that approach for the internal market to function. Beyond that the Commission's objectives should be establishing minimum standards complementing national approaches, removing excesses in national law and embedding common terminology and values.

Europe has competence for the internal market and very little scope for adopting consumer protection rules *per se*. Until the political decision is made to adopt a truly European consumer protection policy, Europe should restrict itself to what is essential for the internal market.