

Chapter 1

UK Implementation of the Unfair Commercial Practices Directive¹

Marios Koutsias and Chris Willett

1. Introduction

This chapter considers how the Unfair Commercial Practices Directive² (UCPD) has been implemented in the United Kingdom. We show that the United Kingdom has used a blend of preventive and traditional UK criminal enforcement techniques, while these techniques have been ‘Europeanized’ by the open-textured nature and breadth of application of the UCPD unfairness concepts. In addition, although the UCPD does not require Member States to grant private law enforcement rights, we also argue that UK *private* law may nevertheless be Europeanized by the UCPD in more ‘spontaneous’ ways, as a result of the planned introduction of private law remedies for some violations of the (distinctly European) UCPD concepts of fairness.

Nevertheless, we also show that there are limits to this Europeanizing effect. First of all, in the important area of financial services, the ‘home grown’ regime is likely to remain dominant; because it operates within a well-established institutional structure and may well set higher standards of protection than those in the UCPD (permitted by article 3[9] of the UCPD, which exempts financial services from the full harmonization principle that applies generally under the UCPD).

Secondly, there is a possibility that *judges* may limit the extent of Europeanization. In contrast to the particular position in relation to financial services, the UCPD’s European concepts of fairness often have the potential to increase standards of protection relative to pre-existing UK law. However, these European concepts are sufficiently open textured as to run the risk of being interpreted in non-protective ways, based on underlying UK judicial ethics of self-interest and self-reliance that have shown themselves in the past. So far,

1 Subject to some amendments and updating, this chapter has already been published in (2012) *Erasmus Law Review* (5)4.

2 2005/29/EC; G Howells, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law* (Ashgate, 2006); S Weatherill and U Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart, 2007); C Willett, ‘Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive’ (2010) 33 *JCP* 247.

courts have taken a relatively protective approach to interpretation of the UCPD concepts. However, we will only really have a clear picture as to the impact of European fairness standards in the United Kingdom when we hear the views of the Supreme Court; and, in particular, see what the response is to the recent, and any future, ECJ interpretation of the unfairness concept.

2. UK Implementation: Techniques and Europeanization

2.1 UCPD Unfairness Concepts and Requirements

As is well known, the UCPD contains general clauses on ‘misleading practices’ (divided into ‘misleading actions’ and ‘misleading omissions’) and ‘aggressive practices’ (the main operative provisions in practice); as well as an overriding general clause, catching practices that are ‘contrary to the requirements of professional diligence’.³ It seems that this ‘professional diligence’ clause is intended to encapsulate, but possibly sometimes extend beyond, what would be caught by the general clauses on misleading practices and on aggressive practices.⁴ There is also a list of 31 practices that are in all circumstances considered to be unfair, i.e., without application of the above general clauses on misleading and aggressive practices.⁵

The UCPD requires Member States to ensure that there are adequate and effective means to combat the use of practices that are unfair in one of the above ways; including means by which persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices may take legal or administrative action against such practices.⁶

2.2 Preventive Control

The UCPD was implemented by the Consumer Protection from Unfair Trading Regulations (CPUTR) 2008.⁷ These introduce an injunctive or ‘cease and desist’

3 Arts 5–9.

4 See Micklitz, in G Howells, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law*, above, n 2 at 121.

5 UCPD, Annex 1.

6 UCPD art 11.

7 2008/SI/1277. For the full background to implementation of the Directive see <http://www.berr.gov.uk/consultations/page39674.html>. See also G Howells, ‘The End of an Era – Implementing the Unfair Commercial Practices Directive in the United Kingdom: Punctual Criminal Law Gives Way to a General Criminal/Civil Law Standard’ (2009) *Journal of Business Law* 183; H Collins, ‘Harmonisation by Example: European Laws Against Unfair Commercial Practices’ (2010) 73(1) *MLR* 89; C Willett, ‘Unfairness under the Consumer Protection from Unfair Trading Regulations’, in J Devenney, L Fox O’Mahony and M Kenny (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press, 2010) 350; J Williams, C Hare ‘Early Experiences of the Enforcement of

form of preventive control known as an ‘enforcement order’. They provide that where a practice is unfair (following the definitions in the UCPD itself), it amounts to a ‘Community infringement’ under the Enterprise Act (EA) 2002; thereby allowing enforcement authorities to ask a court to issue an ‘enforcement order’ against the continued use of the practice.

Enforcement orders can be obtained against a trader carrying out the practice or likely to carry out the practice.⁸ Under EA, s. 213, enforcement orders can be sought by the Office of Fair Trading (OFT), local trading standards authorities and the Department of Enterprise, Trade and Investment in Northern Ireland (all deemed ‘general enforcers’). They can also be sought by those designated as enforcers by the Secretary of State (thus far the Civil Aviation Authority, the Information Commissioner, the Rail Regulator, the Gas and Electricity Markets Authority and the Director Generals of Telecommunications, Water, Gas and Electricity for Northern Ireland).⁹ Enforcement orders can also be sought by those ‘Community enforcers’ listed in the Official Journal under Article 4.3 of the Injunctions Directive.¹⁰ Finally, they can be sought by Consumer Protection Co-operation Enforcers, such as the Civil Aviation Authority, the Financial Conduct Authority, Ofcom, ICSTIS and the general enforcers mentioned above.¹¹

Enforcement is coordinated by the OFT. The enforcer must consult the trader and the OFT to seek to ensure cessation of the practice.¹² Normally this consultation period is 14 days, but 7 days is sufficient for an interim order; and, if the OFT considers it necessary, consultation can be dispensed with altogether. An enforcer may accept an ‘undertaking’ that the practice will cease (and, therefore, not proceed to seek an enforcement order).¹³

The OFT issued guidance on the new concepts of unfairness when the law was first passed.¹⁴ Of course, it must be emphasized that this guidance represents

the Unfair Commercial Practices Directive in Scotland’ (2010) 33 *JCP* 377; P Cartwright, ‘Under Pressure: Regulating Aggressive Practices in the UK’ (2011) *LMCLQ* 123; and C Willett and M Morgan-Taylor, ‘Consumer Protection’, in J Chuah and M Furmston (eds), *Commercial and Consumer Law* (Longman, 2nd edn, 2013), 7.8.

8 The relevant courts are the High Court or county court in England, Wales or Northern Ireland or the Court of Session or Sheriff Court in Scotland. See EA, s. 212 and 217 and CPUTR, reg. 26; and C Willett and M Morgan-Taylor, ‘Consumer Protection’.

9 SI 2003/1399.

10 98/27/EC. ‘Community enforcers’ refers to bodies from other Member States, this being intended to facilitate cross-border co-operation in enforcement.

11 EA, s. 215(5A), added by the Enterprise Act 2002 (Amendment) Regulations 2006 (SI2006/3363) in order to implement the EC Regulation on Consumer Protection Cooperation (Reg. [EC] No 2006/2004, as amended by the UCPD). Note also that the Financial Services Act 2012 introduced the new Financial Conduct Authority, replacing the old Financial Services Authority.

12 EA, s. 214.

13 EA, s. 219(4)

14 OFT/BERR (2008) *Guidance on the Consumer Protection from Unfair Trading regulations*, London, OFT/BERR, available at http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf.

the OFT view as to how the concepts of unfairness should be understood; it being open to the courts (when cases come before them) to take a different view.

This 'enforcement order' regime for UCPD-based unfair practices fits within a broader regime of preventive control in UK consumer protection. Enforcement orders can also be obtained against other 'Community infringements', that is, actions that represent breaches of standards contained in various other EU directives.¹⁵ This would cover, for example, failure to abide by the various information obligations and cancellation rights that are provided for in doorstep and distance selling directives and the replacement provisions in the new Consumer Rights Directive.¹⁶ It also covers selling goods that do not meet the conformity standards in the Consumer Sales Directive (or failing to provide the remedies in the Consumer Sales Directive);¹⁷ the use of terms that are unfair under the Unfair Contract Terms Directive;¹⁸ and breaches of the provisions of the Timeshare, Electronic Commerce and Television Broadcasting Directives.¹⁹

Enforcement orders can also be obtained against so called 'domestic infringements'. Essentially, 'domestic infringement' covers a variety of actions that represent breaches of contract, statutory duties, criminal offences and torts that harm 'the collective interests of consumers'.²⁰ The label 'domestic' infringement is used to indicate that the actions in question represent breaches of standards that have been set by domestic law, that is, they have not come from EU law. So, it would cover, for example, practices that amount to the criminal offence of harassment of debtors under the Administration of Justice Act (AJA), section 40; and breaking contracts by not delivering promised goods or services.²¹ So, quite apart from harassment representing a criminal offence and failure to deliver goods or services giving consumers the right to seek private law remedies for breach of contract, an enforcement order can be issued requiring such conduct to cease in future.

2.3 Europeanization of Preventive Enforcement through the 'General Clause'

So, we can see that tools for preventive control of unfairness as defined by the UCPD have been 'slotted in' to a pre-existing national regime of preventive

15 EA, s. 212, Sch. 13.

16 Directives 85/577/EEC, 97/7/EC and 2011/83/EU respectively.

17 99/44/EC.

18 93/13/EEC.

19 Directives 94/47/EC, 2000/31/EC and 89/552/EEC (as amended by 97/36/EC) respectively.

20 EA, s. 211, 213(1)–(2) and 217(6); and C Willett and M Morgan-Taylor, 'Consumer Protection', above, n 7.

21 See EA, s. 211(a)–(b) and see the Enterprise Act 2002 (Domestic Infringements) Order 2003, SI 1593; and note that the Protection from Harassment Act is also solely of domestic origin, as is the general common law rule that failure to deliver goods or services promised under a contract represents a breach of contract.

consumer protection. However, it is our contention that this is more than a mere technical extension of such preventive consumer protection powers. The pre-existing ‘domestic’ and ‘Community’ infringements all tend to involve relatively narrow and specific issues (often only in particular sectors): e.g., failure to provide specific types of information in doorstep and distance sales; supply of defective goods; use of unfair contract terms; harassment of debtors etc.

In contrast, the UCPD concepts of unfairness, which can now form the basis of preventive action, are much broader in their scope. The various ‘general clauses’ – ‘misleading actions’, ‘misleading omissions’, ‘aggressive practices’, violation of ‘professional diligence’ – are ‘general’ partly because they are themselves very open textured.²² In addition, they can be called ‘general’ because they cover such vast ground. They cover practices²³ ‘before, during or after’ any ‘commercial transaction’²⁴ (there being no restriction to particular types of transaction or sector). So, in relation to almost all conceivable goods or services, there is a ‘cradle-to-grave’ regime covering practices such as advertising, persuasion and negotiation at the pre-contractual stage; post-contractual alterations or variations; performance, delivery etc. by the trader; performance, payment etc. by the consumer; complaint handling; after sales service; and enforcement by either party.

In short, UCPD implementation has brought a very significant expansion of the use of the ‘general clause’, a very significant ‘Europeanization’ of the UK preventive consumer protection regime.²⁵ (It is worth emphasizing that use of an open-textured general clause that covers considerable ground is not only ‘European’ in the sense that it comes from a European Union directive. It is also ‘European’ – and here, ‘continental’ European is the more precisely accurate term – in that this tradition of open-textured, broadly applicable general clauses is a

22 See, on this, C Willett, ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71(2) *CLJ* 412; and C Willett, ‘Fairness and Consumer Decision Making’, above, n 2.

23 Any ‘act, omission, course of conduct or representation’ (UCPD art 2[d]/CPUTR, reg 2 [1]).

24 UCPD, art 3(1)/CPUTR, reg 2(1).

25 On Europeanization see C Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge, 2008); C Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010); R Brownsword, H-W Micklitz, L Niglia and S Weatherill, *The Foundations of European Private Law* (Hart, 2011); and C Willett, ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’, above n 22. Of course, ‘Europeanization’ more generally covers more than the use of concepts such as general clauses that derive from continental, civil law traditions than the common law tradition. It also covers, e.g., the way in these and other concepts are interpreted in an ‘autonomous’ European manner by the European Court of Justice; the ‘spillover’ or ‘spontaneous’ Europeanization that may take place in areas not directly covered by a Directive (e.g., in private law, on which see below); and, indeed, the impact of barrier to trade rules on national contract and trade law (see C Twigg-Flesner, *The Europeanisation of Contract Law*, ch. 3).

tradition that is deeply embedded in the civil law legal tradition of continental Europe, and not the common law UK tradition.)²⁶

2.4 Criminal Sanctions: Tradition, Rationales, Policies and Operation

Criminal sanctions have been a core part of public enforcement of consumer law in the United Kingdom for centuries. There is plenty of scope for debate as to the rationales for using the criminal law in the consumer protection sphere.²⁷ Certainly, criminal sanctions can be viewed as having important deterrent effects that might be missing in the case of the preventive sanctions discussed above. More generally, the OFT have said that criminal enforcement should be used where:

civil enforcement is unlikely to be effective in achieving a change in behaviour and/or the breach is sufficiently serious that the conviction and punishment of offenders ought to be pursued, for example to protect the public and to provide wider deterrence.²⁸

The OFT elaborate on this by saying that they are likely to consider beginning a criminal investigation:

- where traders deliberately or recklessly use deceptive, misleading or fraudulent practices;
- where traders deliberately or recklessly use aggressive, intimidating or coercive practices;
- where flagrant and/or persistent offending by a trader or group of associated traders has occurred or is occurring;
- where a particular unlawful practice is widespread, or there is a risk determined that criminal enforcement is likely to be the most effective means by which to set a precedent for future action; or
- where false statements are made or false documents provided in the course of dealings with the OFT or another enforcement body or where the investigation is otherwise obstructed.²⁹

²⁶ Generally see G Howells, 'General Clauses in European Consumer Law', in HW Micklitz (ed.), *Verbraucherrecht in Deutschland* (Nomos, 2005); and S Grundman and D Mazeaud, *General Clauses and Standards in European Contract Law* (Kluwer International, 2005).

²⁷ For an excellent and exhaustive review of rationales, see P Cartwright, *Consumer Protection and the Criminal Law* (Cambridge University Press, 2001).

²⁸ OFT, *Criminal Enforcement of the Consumer Protection from Unfair Trading Regulations*, OFT, London, 2010, para 2.1, available at http://www.of.gov.uk/shared_of/policy/OFT1273.pdf.

²⁹ *Ibid*, at 2.2

Criminal sanctions have been, and continue to be used, for instance, in relation to food labelling, quality and safety,³⁰ and general product safety.³¹ They were used against ‘false trade descriptions’ (Trade Descriptions Act [TDA] 1968) (covering basically misleading statements about goods and services) and ‘misleading pricing’ (Consumer Protection Act 1987 Part III) until the implementation of the UCPD. These provisions were repealed by the CPUTR³² and replaced by offences based on the UCPD concepts. So, a trader now commits an offence if he carries out a misleading act or omission or an aggressive practice (the definitions reflecting those in the UCPD).³³ These are all strict liability offences, there being no *mens rea* requirement (i.e., no need to prove that the trader acted intentionally, recklessly or negligently). A trader also commits an offence if he contravenes the requirement of professional diligence.³⁴ However, for the trader to be criminally liable for violation of the professional diligence standard, there is a *mens rea* requirement. The trader is only guilty of an offence if he ‘knowingly or recklessly [engages] in conduct that is contrary to professional diligence and materially distorts or is likely to materially distort consumer behaviour’.³⁵ It is important to stress here that the trader need only be ‘knowing or reckless’ as to his own behaviour. There is no need for him to know of (or be reckless as to) its actual or likely effects on consumers.

Finally, a trader also commits an offence if he engages in any practice set out in paras 1–10, 12–27 and 29–31 of the Schedule of practices that are always regarded as unfair.³⁶

In the case of the misleading action and omission offences, the aggressive practice offence and the practices in Sch. 1, there are defences available.³⁷ The defences are those that have long been used for ‘consumer protection’ offences in the United Kingdom, so that earlier case law under the TDA and other legislation may still prove helpful.

One set of defences are those available under s. 17. Here the defendant must first prove that the commission of the offence is due to:

- a mistake; which must be a mistake by the person charged, rather than one of their employees;³⁸ or

30 B Atwood, K Thompson and C Willett, *Food Law* (Tottel, 2009).

31 G Howells, ‘The End of an Era – Implementing the Unfair Commercial Practices Directive in the United Kingdom’, above, n 7.

32 CPUTR, Schedule 4.

33 Regulations 9–11; and see regs 13 and 14 on penalties and time limits respectively.

34 Regulation 8.

35 Regulation 8(1)(a).

36 Regulation 12.

37 The defences are not available in the case of the ‘violation of professional diligence’ offence: if the trader has been ‘knowing or reckless’ (the required *mens rea*) then it is hard to see how he can have exercised ‘reasonable precautions/due diligence’ (s. 17 defence) or ‘innocently’ published an advertisement (s. 18 defence).

38 *Birkenhead Co-operative Society v Roberts* [1970] 1 WLR 1497.

- reliance on information supplied to him by another person (who the defendant must identify to the prosecution),³⁹ for example, information as to mileage from previous owners of a vehicle⁴⁰ or information on a product label placed there by the producer (and relied on by the retailer);⁴¹ or
- the act or default of another person (who the defendant must identify to the prosecution)⁴² who can be a party such as a sub-contractor or other party that is responsible for the activity in question, but can even be an employee,⁴³ for example, as in *Tesco v Natrass*⁴⁴ where a supermarket manager who wrongly labelled washing powder counted as ‘another person’ for the purposes of the supermarket’s defence; or
- an accident or another cause beyond his control, which may cover computer errors.⁴⁵

Having established one of the above criteria, the defendant must then establish that he took all reasonable precautions *and* exercised all due diligence to avoid the commission of the offence by himself or any person under his control. Whether there have been ‘reasonable precautions’ is a question of fact which will be affected by the circumstances of each particular case. Different precautions may be necessary according to whether the defendant is a manufacturer, a retailer or a supplier of services; and what is required may well also vary according to whether the defendant is a large enterprise or a small corner shop.⁴⁶ In general, the key is that an appropriate system must be in place to prevent the practice taking place, for example, devising an adequate training programme for employees;⁴⁷ testing products (for example, to see if they comply with information on labels);⁴⁸ or (in the case of false mileage readings on cars), checking the history, for example, through the registration document and obtaining statements from previous owners.⁴⁹

39 Regulation 17(2).

40 See *Simmons v Potter* [1975] RTR 347 and *Ealing LBC v Taylor* [1995] CLR 156.

41 *Hurley v Martinez* [1991] CCLR 1.

42 Regulation 17(2).

43 So long as they are not so senior as to be an ‘alter ego’ of the company (e.g., members of the Board of Directors, managing director and other senior officers) (see *Tesco v Natrass* [1971] 2 All ER 127).

44 *Ibid.*

45 See *Berkshire CC v Olympic Holidays Ltd* (1994) 13 Trading LR 251.

46 See *Garrett v Boots the Chemist* (1980).

47 See *Tesco v Natrass*, above n 43.

48 *Amos v Melcom (Frozen Foods)* (1985) 149 JP 712, DC (insufficient evidence of sampling to check if meat labelled ‘rump steak’ was actually thus).

49 See *Richmond upon Thames LBC v Motor Sales (Hounslow) Ltd* [1971] RTR 116; *Wandsworth LBC v Bentley* [1980] RTR 429 DC; and *Ealing LBC v Taylor* [1995] above, n 40. Even with some such checks, it has also been held that not enough had been done, and that a statement disclaiming knowledge as to whether the mileage was correct

Whether there has been ‘due diligence’ turns on whether the system of reasonable precautions has actually been used in practice. If it has not, then there will be no due diligence and the defence will fail.⁵⁰

A further defence is provided by reg. 18. There is a defence if the defendant can establish that it is his business to publish (or arrange for publication) of advertisements; he received the advertisement for publication in the ordinary course of business; and he did not know, and had no reason to suspect, that its publication would amount to an offence. This covers those (such as newspapers and magazines) who publish advertisements, as well as those (such as advertising agencies) who arrange for publication.

These defences are available partly because the offences are strict liability and it is thought that some form of escape route from strict *criminal* liability should be available where blame is minimal. The ‘reasonable precautions and due diligence’ requirement can also be viewed as a way of incentivizing traders to manage their affairs so as to avoid the behaviour in question. We would suggest that this is why, as we saw above, it is key to successful use of this defence to establish that an effective system was in place to prevent the practice taking place; and that this system was operating properly in the circumstances in question.

2.5 Europeanization of Criminal Enforcement Through the ‘General Clause’

So, we can see that the United Kingdom has chosen to back up preventive control of (UCPD-defined) unfair practices with traditional UK criminal sanctions. However, again, although the United Kingdom may be using traditional, ‘home-grown’ enforcement tools to enforce the European standards of fairness; we would suggest that these standards of fairness are, themselves, Europeanizing the home-grown enforcement tools. The point, again, is the general clause, and the very broad application of fairness that it has introduced to UK criminal law.

To take one example, the pre-existing criminal rules tended not to cover statements made during the performance or enforcement of a contract. The TDA, for instance, was focused on statements about the goods or services themselves; tending to mean that the focus was on statements made at or around when the contract is first made.⁵¹ However, statements made in the context of performance or enforcement *are* covered by the new (Europeanized) regime. We noted above that the UCPD concept applies to practices ‘before, during or after’ any ‘commercial transaction.’⁵² So the reach of criminal consumer protection law

was required as a ‘reasonable precaution’ against customers being misled (*Simmons v Potter* above, n 40).

⁵⁰ See *Turtington v United Co-operative Ltd* [1993] Crim LR 376; and see the judgment of Lord Diplock in the *Tesco v Natrass* case (above n 43) for guidance on due diligence.

⁵¹ See TDA, ss 1–5 and 14; and C Willett and M Morgan-Taylor, ‘Consumer Protection’, above, n 7, at 7.8.3.1.

⁵² UCPD, art 3(1)/CPUTR, reg 2(1).

has been significantly extended by this European general clause. It will cover, for example, statements as to the rights of consumers, which might influence their decisions as to whether 'to exercise a contractual right'⁵³ (possibly covering statements that deceive consumers as to their rights and which are therefore being likely to cause them to make the decision not to enforce these rights).

3. Spontaneous Europeanization of Private Law

The consumer contract laws of England and Scotland have certainly been significantly Europeanized over the past two or three decades.⁵⁴ Most notably, we can speak of:

- the European information and cancellation rights from the doorstep and distance selling directives;⁵⁵
- the European concept of fairness and preventive enforcement that applies to most standard terms;⁵⁶
- the European conformity standard applicable to sale and supply of consumer goods and the European 'cure' remedies of repair and replacement from the Consumer Sales Directive.⁵⁷

The UCPD's general clauses on practices do not apply in private law as such. As is well known, UCPD Article 3(2) provides that the directive is 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'. In other words, there is no direct obligation on Member States to provide consumers with private law remedies where contracts are negotiated, concluded, performed or enforced in ways that are unfair within the meaning of the general clauses on misleading actions or omissions; aggressive practices; or professional diligence.

53 For a misleading practice under the CPUTR/UCPD, the information must be false or be likely to deceive the average consumer and it must cause or be likely to cause the average consumer to take a transactional decision he would not have taken otherwise (UCPD, art 6[1]/CPUTR, Reg. 5[2] [a]–[b]); and 'transactional decision' includes a decision as to whether to exercise a contractual right (UCPD, art 2[k]/CPUTR, Reg. 2 [1]).

54 See C Twigg-Flesner, *The Europeanisation of Contract Law*, above, n 25.

55 Above, n 16; implemented in the United Kingdom by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334; and Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288. See now the expansion of European information obligations contained in the Consumer Rights Directive (2011/83/EU).

56 Above, n 18; implemented in the United Kingdom by Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; and see C Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate, 2007).

57 Above, n 17, implemented by Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045.

Of course, there are pre-existing private law remedies in the United Kingdom for practices such as misrepresentation (rescission and damages); and duress and undue influence (rescission). (It should be emphasized here that action to rescind the contract must be taken by the party – here the consumer – affected by the practice, i.e., the contract is voidable, not void). These concepts obviously cover a fair amount of the same ground as is covered by the misleading and aggressive practice concepts from the UCPD. At the same time, they are not necessarily always as protective as the UCPD concepts.⁵⁸ Nevertheless, when the Directive was first implemented, the United Kingdom chose not to extend the availability of private law remedies to cover cases of unfairness as defined by the UCPD general clauses.⁵⁹

However, it was always likely that private law would be Europeanized in less direct ways by the UCPD concepts of fairness. Such ‘spontaneous’ or ‘spillover’ Europeanization might occur in the following ways.⁶⁰ First of all, even if compliance with the standards set by the general clauses cannot be enforced through private law action as such, these standards inevitably affect contracting *practice*. As we have noted above, the UCPD general clauses apply ‘before, during or after’ any ‘commercial transaction’.⁶¹ So the European standards of fairness set by these general clauses determine how traders must behave towards consumers while seeking to persuade them to enter *contracts*; negotiating *contracts*; and during the performance and enforcement of *contracts*.

Second, there is always the possibility that the courts may develop pre-existing domestic concepts (e.g., misrepresentation, duress, undue influence) incrementally in ways that reflect the UCPD general clauses.

Finally, based on work by the Law Commissions, the Draft Consumer Protection from Unfair Trading (Amendment) Regulations 2013 contain some

58 See generally C Willett, ‘Fairness and Consumer Decision Making’, above, n 2; and C Willett, ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’, above, n 22.

59 The idea was that the Law Commissions should investigate more fully the way in which the UCPD concepts could interact with the traditional UK concepts. See now Law Commission, *A Private Right of Redress for Commercial Practices* (2008); Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (2011) LCCP 199; and Law Commissions, *Consumer Redress for Misleading and Aggressive Practices* (2012) Law Com 332, Scot Law Com 226.

60 Generally on such forms of harmonization, see W. van Gerven, ‘A Common Law for Europe: The Future Meeting the Past?’ (2001) 4 *ERPL* 485 and MBM Loos, ‘The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization’ (2007) 4 *ERPL* 515. For an excellent early analysis of the issue in relation to the UCPD see S. Whittaker, ‘The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws’, in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices*, above, n 2. Also, see C Willett, ‘Fairness and Consumer Decision Making’, above, n 2; and C Willett, ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’, above, n 22.

61 UCPD, art 3(1)/CPUTR, reg 2(1).

statutory private law remedies for at least certain violations of the UCPD general clauses.⁶² In brief, the idea is that there would be rescission and price reduction remedies on a ‘strict liability’ basis; while traders would be able to avoid damages liability by establishing that they had exercised ‘due diligence’ in seeking to avoid carrying out the practice in question. The remedies would not be available for misleading omissions or violation of professional diligence. This does mark a serious restriction on the degree of Europeanization; given that these are two key ‘European’ concepts that have not played a significant role in UK private law before now.

Nevertheless, the new remedies *would* be available for misleading actions and aggressive practices. The misleading action concept is perhaps not sufficiently different from domestic misrepresentation for us to say that the introduction of private law remedies in relation to it involves a significant Europeanization.⁶³ However, the aggressive practice concept has the potential to be understood in a significantly different and more protective way than the domestic duress and undue influence concepts.⁶⁴ As such, introducing private law remedies for breach of this might significantly Europeanize this branch of consumer private law. Further, this is a potentially important area in practice; as it is where consumers must look for private law remedies against high-pressure selling and debt collection by traders.

4. Full Harmonization, Minimum Harmonization and Limits to Europeanization: Financial Services

4.1 Full Harmonization

We have already seen that the CPUTR repealed key generally applicable rules on trade descriptions and misleading pricing. It also repealed a very large number of rules dealing with more specific types of practice.⁶⁵ One reason for all of these repeals was to foster simplicity, i.e., to avoid having complicated overlap and duplication as between the main piece of legislation (the CPUTR) and large numbers of pre-existing rules. However, another key reason for repealing as much as possible of the old law was the full harmonization clause in Article 4, which provides that ‘Member States shall neither restrict the freedom to provide

⁶² See above, n 59; Department of Business, Innovation and Skill, BIS/13/1112; available at <https://www.gov.uk/government/publications/misleading-and-aggressive-commercial-practices-the-draft-consumer-protection-from-unfair-trading-amendment-regulations-2013>.

⁶³ Although the price reduction remedy (referred to as a ‘discount’ in the draft law) would be a useful one that does not exist currently for common law misrepresentation.

⁶⁴ See C Willett, ‘Fairness and Consumer Decision Making’, above, n 2; C Willett, ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’, above, n 22; and see further below at notes 85–88 and related text.

⁶⁵ CPUTR, Schedule 4.

services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.’

The final section (below) will suggest that the UCPD concepts often offer the potential to provide greater protection than was provided by pre-existing law. Nevertheless, the more pre-existing law remaining on the statute book, the greater the risk that some of it might, in some or other way, exceed the level of protection offered by the UCPD concepts. So, in order to avoid this risk of offending against the full harmonization principle in Article 4, vast swathes of pre-existing law were repealed; this further reinforces the Europeanization process that has been the key narrative of this article so far.

4.2 Minimum Harmonization and the Limits of Europeanization: The Case of Financial Services

Notwithstanding the significant Europeanizing effect of the UCPD explained above, ‘home grown’ UK rules may continue to play the main regulatory role in the areas of financial services and immovable property; which are exempted by Article 3(9) from the full harmonization principle that applies generally under the UCPD. In these sectors, there is, in effect, the *minimum* harmonization that has generally applied in the past to consumer protection directives.⁶⁶

We will focus here on financial services as it is such an important element of the consumer economy. The ‘home grown’ regime here operates within a well-established institutional structure and (and, as is permitted by Article 3[9]) may well set higher standards of protection than those in the UCPD.⁶⁷

We will concentrate on the regime regulating *secured* credit.⁶⁸ Secured credit and other financial services are regulated by the new Financial Conduct Authority (FCA), replacing the old Financial Services Authority (FSA).⁶⁹ This is done under the rules in the FCA Handbook (specific and detailed rules dealing with specific

⁶⁶ E.g., the Doorstep and Distance Selling Directives (above n 16), the Consumer Sales Directive (above n 17) and the Unfair Contract Terms Directive (above n 18).

⁶⁷ For similar conclusions in relation to immovable property, see Civic Consulting/EU Commission, DG Justice (F Alleweldt, S Kara, P Rott, C Willett and H Gamper), *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, 2013, Synthesis and Country Reports, available at http://ec.europa.eu/justice/consumer-marketing/files/ucpd_final_report_part_1_synthesis.pdf and http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf.

⁶⁸ For similar conclusions in relation to unsecured credit, see Civic Consulting, *ibid.*

⁶⁹ See Financial Services Act 2012, amending the Financial Services and Markets Act (FSMA) 2000. Credit (secured and unsecured) is also regulated in overlapping ways by the Consumer Credit Act 1974.

practices);⁷⁰ the general principles for business;⁷¹ the Treating Customers Fairly (TCF) Outcomes;⁷² and the CPUFR (the regime implementing the UCPD).⁷³

Certainly it is difficult to make definitive comparisons between the very open-textured general principles for business, the TCF Outcomes and the similarly open-textured (but differently worded) definitions of 'unfair' practices from the UCPD. Comparison is further complicated by the huge volume of more specific rules (contained in the FCA Handbook), which support and complement the more general FCA principles of fairness.⁷⁴ The problem here is to say whether (as well as reflecting the broad FCA principles), these Handbook rules can be said to represent a natural 'unpacking' of the broader UCPD standards of fairness; or whether they go beyond this and provide greater protection.

Nevertheless, we would suggest that the FCA principles may often set higher standards than the UCPD. First of all, let us consider the rules on misleading actions. Violation of the UCPD 'misleading action' provision must involve information as to one of the matters on the list contained in Article 6(1) (a)–(g). This could be considered to be an exhaustive list; and, although it is very broad in scope, it does not necessarily cover every potential type of information. However, a practice might certainly be considered to be misleading, and therefore unfair, under the FCA regime despite involving information by the list in Article 6(1). FCA general principle 7 refers to the obligation to 'communicate information to [consumers] in a way which is clear, fair and not misleading'; and this applies whatever the subject matter of the information.

Also, under the UCPD, it is not sufficient to establish that the practice would mislead the average consumer. It must, in addition, be shown that the impact of the practice is or is likely to be such that the average consumer would take a

70 Available at <http://www.fsa.gov.uk/Pages/handbook/index.shtml>.

71 FCA, *Full Handbook*, Principle 2.1, available at <https://fsahandbook.info/FSA/html/handbook/PRIN/2/1>.

72 FCA, *Treating Customers Fairly*, available at <http://www.fsa.gov.uk/Pages/Doing/Regulated/tcf/index.shtml>; and see J Black, M Hopper and C Band, 'Making a Success of Principles Based Regulation' (2007) *Law and Financial Markets Review* 191; T. Williams, 'Open the Box: An Exploration of the Financial Service Authority's Model of Fairness in Consumer Financial Transactions', in J Devenney et al., above n 7, at 227; and P Cartwright, 'Conceptualising and Understanding Fairness: Lessons from and for Financial Services', in J Devenney et al., above n 7, at 205.

73 On the approach of the FSA (now FCA) to the UCPD/CPRs generally see <http://www.fsa.gov.uk/Pages/About/What/International/ucp/index.shtml>. Note also that the OFT is the main enforcer under the CPRs, but there is an agreement between the OFT and the old FSA (which will presumably carry over to the new FCA) on division of responsibilities for financial services matters – see Concordat between the OFT and FSA, November 2009, available at https://webmail.dmu.ac.uk/exchweb/bin/redir.asp?URL=http://www.fsa.gov.uk/pubs/other/concordat_fsa_of_t_08.pdf.

74 The Handbook subdivides into separate 'sub'-books containing hundreds of rules on such issues as mortgages and home finance; insurance; banking; client assets; building societies; collective investment; credit unions; and dispute resolution.

'transactional decision' different from that which they would take otherwise.⁷⁵ This requirement can make a difference to whether a practice is unfair or not. For instance, a price or other charge that is understated by a few pence arguably still misleads the average consumer; but may be unlikely to cause him or her to contract for a service or product that they would not have bought in any case. If not, the understated price or charge will not be misleading under the UCPD. However, it would arguably be misleading under the FCA regime; which contains no 'transactional decision' requirement.

Turning to 'misleading omissions', first of all, the UCPD test turns on whether the information is 'material' and is 'needed' by the 'average consumer'. The TCF Principles say simply that consumers should be provided with 'clear information and [...] kept appropriately informed. Secondly, as with misleading actions, there is only a misleading omission under the UCPD where the omission is likely to cause the average consumer would take a 'transactional decision' different from that which they would take otherwise.⁷⁶ As indicated above, there is no such requirement in the FCA general principles. Third, the old FSA wrote to the payment protection insurance industry to remind them of typically unacceptable practices at the point of sale which had come to the FSA's attention. One of these was that 'The firm did not take reasonable steps to ensure the customer only bought a policy for which he was eligible to claim benefits.'⁷⁷ There is at least room for debate as to whether information as to eligibility would necessarily be 'needed' or 'material' under the UCPD test.

Now turning to aggressive practices, there are a number of requirements that are specific to the UCPD 'aggressive practices' clause that do not need to be established for there to be unfairness under the FCA regime. These requirements may mean that the FCA regime provides a higher level of protection than the UCPD regime. So, under the UCPD, one route to establishing an aggressive practice is to show that there is 'coercion or harassment' leading to an actual or likely 'significant restriction' on the average consumer's 'freedom of choice or conduct'.⁷⁸ Otherwise, it must be shown that there is 'undue influence'; for which there must be 'exploitation' of a 'position of power' through 'pressure', which 'significantly' impairs (or is likely to so impair) the average consumer's 'freedom of choice or conduct'; specifically, here, by 'significantly' limiting the ability of this average consumer to take an 'informed decision'.⁷⁹ None of these criteria are mentioned in discussing fairness/unfairness in general under the FCA regime. So, it is plausible that practices (pressure selling, aggressive enforcement etc.) might

⁷⁵ See above, n 53.

⁷⁶ Art 7(1).

⁷⁷ FSA, Consultation Paper 10/6, *The Assessment and Redress of Payment Protection Insurance Complaints Feedback on CP09/23 and Further Consultation*, Appendix 3, Point 6.

⁷⁸ Art 8.

⁷⁹ Arts 8 and 2(j).

fail to meet these particular UCPD criteria but still be sufficient to amount to unfairness under the more open-textured FCA regime.

Then, as with misleading practices, there is the requirement of ‘transactional decision making’ which applies to all UCPD concepts. In the case of any practice claimed to be aggressive under the UCPD provisions, it must be shown that the result of the coercion, harassment or undue influence would be (or be likely to be) that consumers would take a transactional decision different to the one they would have taken otherwise.⁸⁰ As we have seen, the concepts of fairness under the FCA regime do not contain such a requirement. So, there could be aggressive behaviour that is of a more one-sided, unilateral nature, where the business simply imposes a detrimental outcome on a consumer or withdraws a service from a consumer. This has the potential to be viewed as unfair under the general FCA concepts of fairness; but it would be more difficult to show that it affects consumer transactional decision making as such (as required under the UCPD).⁸¹

What is clear from the above discussion is that regulation of secured credit operates within a well-established domestic institutional structure and may well set higher standards of protection than those in the UCPD. For these reasons, along with the minimum harmonization allowed by Article 3(9), this homegrown regime is likely to remain the dominant force in financial services regulation;⁸² with the European UCPD norms being unlikely to play a major role.

5. Judicial Approaches to Europeanization

5.1 *The Potential to Increase Standards of Protection Relative to Pre-existing UK Law*

In contrast to the position just described in relation to financial services, the UCPD generally has the potential to increase standards of protection relative to pre-existing UK law. This is something that has been demonstrated at length elsewhere,⁸³ and there is no space here to provide a systematic comparison between the UCPD and pre-existing UK standards. However, it is worthwhile providing some key examples.

⁸⁰ UCPD art 5.

⁸¹ See discussion in C Willett, ‘Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive’, above, n 2 on possible ways around this problem.

⁸² The FSA regime appears to be very much the first ‘port of call’ for the FSA, the UCPD regime being viewed as a relatively residual ‘back up’.

⁸³ See C Willett, ‘Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive’, above, n 2; and C Willett, ‘Unfairness under the Consumer Protection from Unfair Trading Regulations’, above, n 7.

To begin with, there is the UCPD ‘misleading omissions’ concept.⁸⁴ It is well known that there has never been such a general rule against omissions in UK domestic law; so there is clearly now potential for a higher level of protection. Next, one might cite the ‘undue influence’ limb of the *aggressive practices* general clause.⁸⁵ This, as outlined above, covers exploitation of a ‘position of power’ through ‘pressure’, which ‘significantly impairs’ (or is likely to so impair) the average consumer’s ‘freedom of choice or conduct’; specifically by significantly limiting the ability of this average consumer to take an ‘informed decision’.⁸⁶ Pre-existing UK domestic criminal and preventive rules focused mainly on the specific problem of harassment of debtors.⁸⁷ The UCPD undue influence concept seems to have the potential to cover much more than this. For example, greater trader knowledge/skill might be considered to create a ‘power relationship’ and the potential for ‘pressure’ at the sales stage. In this context, some high-pressure selling might well amount to undue influence; where, for instance, consumers are put on the spot to make quick decisions (the decision may, then, not be ‘informed’, as there was insufficient time to think it through). *Post*-contractually, the power relationship and pressure might come, for instance, from vulnerability when struggling with commitments. This might enable traders to pressure consumers into new commitments, refinancing etc. Clearly, these examples go well beyond what is covered by rules on harassment of debtors. They also extend beyond the traditional scope of domestic private law undue influence. *Inter alia*, this requires a special relationship of trust and confidence (rather than just a ‘relationship of power’); and has, in practice in modern times, been restricted to the ‘bank guarantee’ scenario.⁸⁸

In summary, then, the point is that (outside the financial services sphere) the UCPD’s European concepts of fairness contain the potential to increase levels of consumer protection in the United Kingdom. In this sense, the ‘Europeanizing’ effect of the UCPD could be said to be all the more significant. Not only does the UCPD Europeanize the preventive, criminal and private law *tools* (as shown in the first part of this article); it also Europeanizes the *substantive level of protection* provided.

84 UCPD, art 7/CPUTR, regs 6.

85 Generally, see C Willett, ‘Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive’, above, n 2; C Willett ‘Unfairness under the Consumer Protection from Unfair Trading Regulations’, above, n 7; and P Cartwright, ‘Under Pressure: Regulating Aggressive Practices in the UK’, above n 7.

86 And thereby causes him to take or be likely to take a transactional decision he would not take otherwise: UCPD, art arts 8 and 2(j)/CPUTR, regs 7(1) & (3) (b).

87 Administration of Justice Act 1970, s. 40.

88 *RBOS v Etridge (No 2)* [2002] 2 AC 773 for a summary of the cases and a re-statement of the rules.

5.2 Some Illustrative Cases⁸⁹

So far, the evidence suggests that judges have taken a relatively protective approach to interpretation of the UCPD concepts. For example, from a consumer protection perspective, one perennial risk with concepts of ‘fairness’ or ‘good faith’ is that they will be understood to require subjective dishonesty by the trader. Now we have noted above that, in the case of the ‘professional diligence’ concept, there is only *criminal* liability under the UK regime where there is indeed *mens rea* in the form of intention or recklessness by the trader.⁹⁰ There is no mention of trader intention or recklessness where preventive control measures (enforcement orders) are concerned. At the same time, professional diligence is defined for all purposes, by reference, *inter alia*, to ‘honest market practice’.⁹¹ Nevertheless, the High Court has resisted any temptation to read this in a non-protective way. It was made clear in *Tiscali UK Ltd v. British Telecommunications Plc* that there was an ‘objective’ test of dishonesty, in that it was not necessary to demonstrate that at the time of the offending statement, its maker knew it to be false or had no honest belief in its truth.⁹²

Another encouraging decision from a consumer protection perspective is *OFT v Purely Creative*.⁹³ This case dealt with whether various ‘scratch card’ promotions violated the general clauses on misleading actions and omissions. On the facts, it was held that some did and some did not. However, the key point for our purposes is that the High Court understood the ‘average consumer’ concept by reference to a relatively protective ethic, recognizing that such a consumer will not necessarily read all information provided.⁹⁴

89 Aside from the cases discussed here, for examples of cases decided under the CPUTR, see also *McGuffick v Royal Bank of Scotland Plc* [2009] EWHC 2386; *Kingspan Group Plc v Rockwool Ltd* [2011] EWHC 250(Ch); and *OFT v Peter Hall*, available at <http://www.ofc.gov.uk/news-and-updates/press/2010/38-10>.

90 See n 33 and related text.

91 Art 2(h)/CPUTR, reg 2(1).

92 [2008] EWHC 3129(QB).

93 [2011] EWHC 106(Ch). For a discussion see M Morgan-Taylor, ‘Preventing Distribution of Promotions to Consumers Involving Unfair Practices – OFT Application for Order Under Enterprise Act 2002: *OFT v Purely Creative Ltd et al*’ (2011) 16(3) *Communications Law* 115–117. The case also involved analysis of the proper interpretation of Paragraph 31 of Annex 1 to the Directive (i.e., the list of practices that are always to be considered unfair, without the need to apply one of the general test of unfairness). This is because there was also a question as to whether the promotions in question were in breach of paragraph 31. This issue was appealed to the Court of Appeal, whose decision was stayed pending a reference to the ECJ to determine the scope of Paragraph 31 ([2011] EWCA Civ 920). On the ECJ decision see below notes 97–98 and related text.

94 This ‘average consumer’ concept (who is deemed to be ‘reasonably well informed and reasonably circumspect’ is, of course the core benchmark for assessing practices under the regime (UCPD, arts 5–9, Preamble, recital 18/CPUTR, reg. 2 [2]). Of course, this standard can be varied to the average member of targeted or vulnerable groups of

This case is obviously significant in the context of the misleading action and omission concepts. It suggests that courts should focus on the main information provided (or *not* provided, where omissions are concerned) in deciding whether the average consumer is likely to be misled and caused to take a transactional decision that would not otherwise be taken. This core information (or lack of it) is what should determine whether there has been a misleading action or omission, rather than information provided in supplementary form, small print etc.

The most recent case was *Ashbourne Management Services Limited*.⁹⁵ The plaintiff in this case was the Office of Fair Trading, while the defendant was a company which specialized in recruiting gym members for fitness clubs across the country. The case concerned, inter alia, threats to report consumers to credit reference agencies for non-payment of sums allegedly due under the agreements with the gyms. For our purposes the important point is that the High Court decided that such threats amounted to aggressive practices where the sums in question were legitimately in dispute and where the sums were no more than claims for unliquidated damages. This seems to approach the aggressive practices concept in a relatively protective manner. It takes account of the very significant detrimental impact on consumers of being reported to a credit reference agency and therefore having a poor credit record that will affect future attempts to borrow money. Importantly, also, it seems to recognize that traders should not simply be viewed as having a legitimate interest in taking any otherwise legal action to protect their interests. They should be expected to take seriously any genuine dispute as to the validity of their claim.

In summary, UK judges have been relatively sensitive to consumer protection needs in the way in which they have interpreted these UCPD concepts. On the trader side, subjective dishonesty is not required. So, the fairness of practices is to be judged objectively – a practice deemed unfair by these criteria does not become acceptable based on a ‘pure heart and empty head’ defence. On the consumer side of the equation, there is recognition of the information-processing limits of consumers. There also appears to be recognition that the fairness of practices (at least under the aggressive practices concept) should be understood by reference to the detrimental substantive impact of the practice on the consumer.

consumers (UCPD, arts 5[2] [b] and 5[3]/CPUTR, regs 2[4] and 2[5]). There is no space here to discuss these alternative benchmarks. However, see discussion in C Willett, ‘Unfairness under the Consumer Protection from Unfair Trading Regulations’, above, n 7; and see, for example, the OFT work on mental capacity: OFT, Mental Capacity consultation (OFT 1293con), available at <http://www.of.gov.uk/news-and-updates/press/2010/127-10>.

⁹⁵ *Office of Fair Trading v Ashbourne Management Services Limited*, *John Clayton-Wright and Dawne Clayton-Wright* [2011] EWHC 1237(Ch).

6. The Future

This paper has demonstrated that the United Kingdom has implemented the UCPD via a mixture of preventive and criminal enforcement techniques, but that these techniques have been ‘Europeanized’ by the open-textured nature and significant breadth of application of the UCPD concepts. It has also shown that the UCPD may also lead to a more spontaneous (less direct) Europeanization of UK private law, in particular by moving towards introducing remedies for certain violations of the UCPD concepts of fairness.

At the same time, we have demonstrated an important limit to the Europeanization brought about by the UCPD. In the hugely important financial services sector, Article 3(9) of the UCPD, *inter alia*, is likely to mean that the pre-existing domestic regime will not be significantly Europeanized by the UCPD concepts.

In the latter part of the paper, we focused on the role of judges when it comes to the reception of the UCPD in the United Kingdom. It was argued that the UCPD’s European concepts of fairness often have the potential to increase consumer protection in the United Kingdom, and that, so far, UK judges have been relatively protective in the way in which they have interpreted these UCPD concepts.

Of course, as we have noted many times throughout this paper, the UCPD unfairness concepts are of a rather ‘open-textured’ nature. This means that, while they *can* (and have so far) been interpreted in relatively protective ways, they might also be interpreted in ways that are rather more grounded in values of trader self-interest and consumer self-reliance. For instance, for the purposes of the misleading action concept, it might be taken that consumers can be expected to read not only the ‘headline’ information, but also less-prominent information that in some way qualifies or negates a misleading impression that has been given by the headline information.

The point is that we have yet to hear the views of the Supreme Court on such matters.⁹⁶ So we cannot be sure as yet as to what ethic of fairness will ultimately take hold in the United Kingdom. However, it will be interesting to see how the UK courts, in particular the Supreme Court, respond in the longer term to the decision of the ECJ in response to the reference made by the Court of Appeal in the *Purely Creative* case.⁹⁷ The ECJ decided that when para. 31 refers to a ‘false impression’ in relation to winning a prize (when in fact this is subject to some

96 See Willett, above n 22, where one of the present authors argues that (i) the Supreme Court has chosen to unpack and apply the similarly open-textured general clause on unfair contract terms (and associated provisions) (from Directive 93/13/EEC) by reference to an ethic of trader *self-interest* and consumer *self-reliance*, rather than by reference to an ethic of protection; and (ii) that this is in contrast to the more protective approaches taken by the OFT and the Court of Appeal. This may be one reason why the Court of Appeal chose to make a reference to the ECJ in the *Purely Creative* case (above, n 93).

97 See above, n 93.

action or cost for the consumer), this, *inter alia*, includes cases where any one of the optional ways in which to claim the prize requires the consumer to incur any cost whatsoever. The Court explained that para. 31 aims to address the aggressive practice of exploiting the psychological effect of being told a prize has been won, this being likely to induce consumers to take the irrational choice of choosing the more expensive (but quicker) route (e.g., a premium rate call) to discover the nature of the prize.⁹⁸

Of course, this reference went specifically to the interpretation of paragraph 31 of Annex 1 to the Directive and not to interpretation of the general tests of unfairness (i.e., the clauses on misleading and aggressive practices and on professional diligence). However, paragraph 31 is supposed to be a concrete example of the general aggressive practices concept. This concept is concerned with practices which significantly impair consumer freedom of choice.⁹⁹ It might then be argued that the ECJ decision in *Purely Creative* indicates an ECJ view as to how this freedom of choice concept might be understood under the general clause on aggressive practices. It could indicate that the ECJ is sensitive to the potential for consumer freedom of choice to be readily compromised when 'put on the spot' by attractive offers that tend to induce speedy and economically detrimental decisions.

We must now wait to see whether the UK courts (in particular the Supreme Court) decide to take such a protective approach to the aggressive practices concept; whether the UK courts make references under the aggressive practices (or the other) general clauses; and whether the ECJ does indeed choose to take to carry over the protective approach taken under para. 31 to the aggressive practices (and the other) general clauses.

Addendum

From 31 March 2014, the powers of the Office of Fair Trading (OFT) were transferred to a number of other bodies, including, most importantly, to the Competition and Markets Authority and, in the case of financial services, to the Financial Conduct Authority.

Bibliography

- Atwood B, K Thompson and C Willett, *Food Law* (Tottel, 2009).
 Black J, M Hopper and C Band, 'Making a Success of Principles Based Regulation' (2007) *Law and Financial Markets Review* 191.
 Brownsword R, H-W Micklitz, L Niglia and S Weatherill, *The Foundations of European Private Law* (Hart Publishing, 2011).

⁹⁸ C-428/11.

⁹⁹ See n 78 above.

- Cartwright P, *Consumer Protection and the Criminal Law* (Cambridge University Press, 2001).
- , ‘Conceptualising and Understanding Fairness: Lessons from and for Financial Services’, in J Devenney, L Fox O’Mahony and M Kenny (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press, 2010) 205.
- , ‘Under Pressure: Regulating Aggressive Practices in the UK’ (2011) *Lloyds Maritime and Commercial Law Quarterly* 123.
- Civic Consulting/EU Commission, DG Justice (F Alleweldt, S Kara, P Rott, C Willett and H Gamper), *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, 2013, Synthesis and Country Reports, available at http://ec.europa.eu/justice/consumer-marketing/files/ucpd_final_report_part_1_synthesis.pdf and http://ec.europa.eu/justice/consumer-marketing/files/ucpd_study_country_reports.pdf.
- Collins H, ‘Harmonisation by Example: European Laws against Unfair Commercial Practices’ (2010) 73(1) *Modern Law Review* 89.
- FCA, *Full Handbook*, available at <http://www.fsa.gov.uk/Pages/handbook/index.shtml>.
- , *Treating Customers Fairly*, available at <http://www.fsa.gov.uk/Pages/Doing/Regulated/tcf/index.shtml>.
- FSA, Consultation Paper 10/6, *The Assessment and Redress of Payment Protection Insurance Complaints Feedback on CP09/23 and Further Consultation*, FSA/OFT Concordat, November 2009, available at http://www.fsa.gov.uk/pubs/other/concordat_fsa_of08.pdf.
- Grundman S and D Mazeaud, *General Clauses and Standards in European Contract Law* (Kluwer International, 2005).
- Howells G, ‘General Clauses in European Consumer Law’, in H-W Micklitz (ed.), *Verbraucherrecht in Deutschland* (Nomos, 2005).
- , ‘The End of an Era – Implementing the Unfair Commercial Practices Directive in the United Kingdom: Punctual Criminal Law Gives Way to a General Criminal/Civil Law Standard’ (2009) *Journal of Business Law* 183.
- Howells G, H-W Micklitz and T Wilhelmsson, *European Fair Trading Law* (Ashgate, 2006).
- Law Commission, *A Private Right of Redress for Commercial Practices* (2008).
- , *Consumer Redress for Misleading and Aggressive Practices* (LCCP, 2011) 199.
- Law Commissions, *Consumer Redress for Misleading and Aggressive Practices* (2012) Law Com 332, Scot Law Com 226.
- Loos MBM, ‘The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization’ (2007) 4 *European Review of Private Law* 515.
- Morgan-Taylor M, ‘Preventing Distribution of Promotions to Consumers Involving Unfair Practices – OFT Application for Order Under Enterprise Act 2002: *OFT v Purely Creative Ltd et al*’ (2011) 16(3) *Communications Law* 115.

- OFT, *Criminal Enforcement of the Consumer Protection from Unfair Trading Regulations* (OFT, 2010), para 2.1, available at http://www.oft.gov.uk/shared_ofp/policy/OFT1273.pdf.
- , *Mental Capacity Consultation* (OFT, 2010) (OFT 1293con), available at <http://www.oft.gov.uk/news-and-updates/press/2010/127-10>.
- OFT/BERR, *Guidance on the Consumer Protection from Unfair Trading Regulations* (OFT/BERR 2008), available at http://www.oft.gov.uk/shared_ofp/business_leaflets/cpregs/oft1008.pdf.
- Twigg-Flesner C, *The Europeanisation of Contract Law* (Routledge, 2008).
- (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010).
- van Gerven W, 'A Common Law for Europe: The Future Meeting the Past?' (2001) 4 *ERPL* 485.
- Weatherill S and U Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart, 2007).
- Whittaker S, 'The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws', in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart, 2007).
- Willett C, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate, 2007).
- , 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive' (2010) 33 *JCP* 247.
- , 'Unfairness under the Consumer Protection from Unfair Trading Regulations', in J Devenney, L Fox O'Mahony and M Kenny (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press, 2010) 350.
- , 'General Clauses and the Competing Ethics of European Consumer Law in the UK' (2012) 71(2) *Cambridge Law Journal* 412–440.
- Willett C and M Morgan-Taylor, 'Consumer Protection', in J Chuah and M Furmston (eds), *Commercial and Consumer Law* (2nd edn, Longman, 2013, 7.8).
- Williams J and C Hare, 'Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland' (2010) 33(4) *Journal of Consumer Policy* 377–401.
- Williams T, 'Open the Box: An Exploration of the Financial Service Authority's Model of Fairness in Consumer Financial Transactions', in J Devenney, L Fox O'Mahony and M Kenny (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press, 2010).

*Copyright material: You are not permitted to transmit this file in any format or media;
it may not be resold or reused without prior agreement with Ashgate Publishing and
may not be placed on any publicly accessible or commercial servers.*