Contents

P_1	refac	ce	xiii
Li	st oj	f Directives with Abbreviations	xv
1	IN	TRODUCTION	
1	200	eraint Howells	1
	a.	Background	1
	b .	The Traditions of Fair Trade Regulation within the Member States	1
		(i) Special regime for consumers?	2
		(ii) Use of general clause?	4
		(iii) Consumer typology	5
		(iv) Strict liability?	6
		(v) Civil/criminal law	7
		(vi) Sanctions	7
		(vii) Soft law	8
	C	The Community Acquis	9
		(i) Negative harmonisation	9
		(ii) Legislative competence	12
		(iii) Positive regulation before the Unfair Commercial	
		Practices Directive	13
		(iv) Community policy	16
	d.	The Preparation of the Directive and Major Points of Debate	19
		(i) Unfairness standard	20
		(ii) Maximum harmonisation	21
		(iii) Blacklist	22
		(iv) Codes of conduct	23
		(v) Enforcement	23
	e.	Outline of the Directive	23
	f.	Revision, Transposition and Entry into Force	24
		(i) Entry into force	24
		(ii) Transposition	24
		(iii) Informing consumers	25
		(iv) Revision	25

2	MINIMUM/MAXIMUM HARMONISATION AND THE INTERNAL				
	M	ARKET CLAUSE			
	Ho	ans-W. Micklitz	27		
	a.	Introduction to the Debate	27		
	b.	The Legal Background to Maximum Harmonisation and			
		the Internal Market Clause	28		
		(i) Background of the minimum-maximum debate	28		
		(ii) Background of the country of origin principle	30		
		(iii) Background for combining maximum harmonisation and			
		the country of origin principle	32		
	c.	Maximum Harmonisation in the Directive	35		
		(i) The principle and its justification	35		
		(ii) The transition period, Articles 3(5) and (6)	36		
		(iii) Uncertainties in minimum-maximum harmonisation	39		
	d.	The Relationship Between the Directive and the Proposed			
		Regulation on Sales Promotions	39		
	e.	Maximum Harmonisation and the Internal Market Clause			
		in the Directive	40		
		(i) The internal market clause in the legislative process	40		
		(ii) The possible scenario of conflict	42		
		(iii) The correct interpretation of the internal market			
		clause in the Directive	43		
		(iii) Article 4 in the harmonised field of the Directive	44		
		(iv) Article 4 in the non-harmonised area of the Directive	47		
		(v) Article 4 and the deferring effect of full harmonisation	47		
3	SC	COPE OF THE DIRECTIVE			
		omas Wilhelmsson	49		
	0	Introduction	49		
		Collective Protection	51		
		Connective Frotection Commercial Practices	53		
	C.	(i) Content of the definition	53		
			56		
	d	(ii) Before and after the transaction Harming Consumers' Feenamic Interests	58		
	u.	Harming Consumers' Economic Interests (i) Economic interests	3 - 2 - 2		
		(i) Economic interests (ii) Tests and decensive	58 59		
		(iii) Protection of other assistal interests			
	0	(iii) Protection of other societal interests	62		
	С.	Business-to-Consumer Practices (i) Introduction	63		
		(i) Introduction (ii) Definition of consumer	63		
		(ii) Definition of consumer	64		
		(iii) Definition of trader	67		
		(iv) Business-to-consumer practice	69		

		Contents	vii
	f.	Some Explicit Additional Delimitations	70
		(i) Introduction	70
		(ii) Intellectual property rights	71
		(iii) Contract law	71
		(iv) Health and safety	74
		(v) Other Community rules	76
		(vi) National rules based on minimum clause	77
		(vii) Jurisdiction	77
		(viii) Regulated professions	78
		(ix) Financial services and immovable property	80
		(x) Precious metal	80
4	TF	HE GENERAL CLAUSE ON UNFAIR PRACTICES	
	Ha	ans-W. Micklitz	83
	a.	Fair Trading de lege lata – References in Secondary Law	83
	b .	The Structure of the General Clause in the Unfair Commercial	
		Practices Directive	84
		(i) Threefold structure	85
		(ii) Consequences and questions arising from the threefold structure	86
	c.	The Concept of Fairness	86
		(i) The challenge – fairness, national morals, taste and	
		decency, national cultures – how are they interrelated?	86
	a	(ii) European fairness as an autonomous concept	88
		(iii) European fairness and national morals	91
		(iv) Taste and decency	95
		(v) National cultures	96
	d.	Requirements of Professional Diligence	97
		(i) Criticism of the conceptual approach	98
		(ii) National, European and international professional diligence(iii) The significance of professional diligence for	100
		misleading and aggressive commercial practices	101
		(iv) Consequences arising from the lack of Europeanised	
		professional diligence	102
	e.	Material Distortion of the Economic Behaviour of the Consumer	102
		(i) Economic behaviour, informed and transactional decisions (ii) The objective side of the distortion: the autonomy of	103
		the consumer	104
		(iii) The subjective side of the distortion – intent and fault	105
		(iv) The relevance of the materiality criterion	106
		(v) The practical significance of the materiality threshold	107
		(vi) Actual or potential distortion	109
		(vii) Causality between the distortion and the process	
		of taking the decision	110

	f.	The 'Average Consumer' and Particularly Vulnerable Groups	111
		(i) The average consumer as a standard model	111
		(ii) Particularly vulnerable consumer groups as a special provision	112
		(iii) Children, the elderly, disabled and credulous people	113
		(iv) The purpose of the commercial practices	115
		(v) The abolition of statistical evidence?	116
4	g.	Language and Fairness	117
		Relationship of the General Clause and the Special Provisions	117
		(i) Concept and practical significance	117
		(ii) The general clause as safety net	119
		(iii) The system of Annex I	121
5	M	ISLEADING PRACTICES	
	Th	omas Wilhelmsson	123
	a.	Introduction	123
	b.	Misleading Actions	125
		(i) Definition	125
		(ii) The untruthfulness/deceptiveness condition	127
		(iii) The average consumer test	131
		(iv) The materiality condition	136
		(v) What information?	138
		(vi) Imitative marketing	145
		(vii) Non-compliance with codes of conduct	146
	c.	Misleading Omissions	147
		(i) An indirect duty to inform	147
		(ii) Omission and withholding of information	150
		(iii) The consumers' informational needs test	152
		(iv) Material information in invitation to purchase	154
		(v) Established information requirements	157
	d.	Practices That Are Always Regarded as Unfair	158
		(i) Nature of the Annex	158
		(ii) The cases	160
	e.	Understanding Misleading Practices	164
6	A(GGRESSIVE COMMERCIAL PRACTICES	
	Ge	eraint Howells	167
	a.	Introduction	167
		(i) Beyond misleading practice	167
		(ii) How far beyond misleading practices?	168
		(iii) Aggressive practices – elements of an underdeveloped concept	170
	b.	Aggressive Practices	171
		(i) Harassment, coercion, or undue influence	172

	•
Contents	12
00.770.770	

		(ii) Impairment of the consumer's freedom of choice or conduct	174
		(iii) Taking a transactional decision that he would	
		not otherwise have taken	177
		(iv) In its factual context	178
		(v) Legal and illegal means	178
	c.	Harassment	178
		(i) Protection of private sphere	178
		(ii) Relevant factors	179
		(iii) Objective or subjective test	179
		(iv) General harassment laws	180
		(v) Particular practices	181
	d.	Coercion	184
		(i) Relationship with other concepts	184
		(ii) Physical and psychological	184
		(iii) Relevant factors	185
		(iv) Borderline with legitimate pressure	185
	e.	Undue Influence	187
		(i) The definition	187
		(ii) Physical force	187
		(iii) Position of power	187
		(iv) Exploitation of position of power	189
	f.	Relevant Factors	190
	g.	Practices Considered Aggressive in all Circumstances	192
		Towards an Understanding of Aggressive Practices	193
7	CO	DDES OF CONDUCT	
	Ge	eraint Howells	195
	a.	Codes, Soft Law, Self-Regulation and Co-Regulation	195
		A 'Win-Win' Solution	196
	c.	Varying Attitudes to Codes	197
		Support for Codes in EU Policy	199
		Codes in EU Legal Instruments	200
		Code of Conduct – the Definition	202
		(i) Agreement or set of rules	203
		(ii) Trader behaviour	205
		(iii) Commercial practice or business sectors	205
		(iv) Trader undertaking	206
	g.	\sim 1 \sim	206
	0	Non-Compliance With a Code as Misleading Conduct	206
		(i) Not aspirational	208
		(ii) Firm	208
		(iii) Verifiable	209
		(iv) Indication in a commercial practice	210
		(-,) mand and a continue of the process	

	i.	Unfair Practices in All Circumstances Encouraging Reliance on Codes	211
	J. 12	Codes and Standards of Fairness	212
		Policy	215
	1.	1 Officy	213
R	T.F	EGAL REDRESS	
U		ins-W. Micklitz	217
	110	TISTY. IVICALLE	211
	а	Regulation of Enforcement Under the Unfair Commercial	
	u.	Practices Directive: Some Introductory Remarks	217
		(i) The rules under the Unfair Commercial Practices Directive	217
		(ii) The unanswered questions on enforcement	218
		(iii) The broader picture: individual and collective legal	210
		protection in unfair commercial practices law outside the Directive	219
		(iv) A connected issue: cross-border litigation and	41)
		cross-border enforcement	219
		(v) A disclaimer	220
	h	Individual Legal Redress	220
	U.	(i) The individual legal redress of competitors	221
			221
	0	(ii) Individual legal redress for the consumer	221
	C.	Consumer or Trade Organisations	2.2.2
		Consumer or Trade Organisations (i) Freedom of choice or limited choice?	222
		(i) Freedom of choice or limited choice?	222
		(ii) The rules under Article 11 of the Unfair Commercial	222
		Practices Directive	223
		(iii) Other Directives containing provisions on legal actions	222
		taken by associations	223
		(iv) Standing to sue as an EC obligation	226
	1	(v) Minimum requirements for enforcement bodies	227
	d.	Procedure and Remedies	228
		(i) Prior consultation	228
		(ii) Interim relief	229
		(iii) Injunction	229
		(iv) Penalties, sanctions and compensation for damages	230
		(v) Substantiation of claims	231
	e.	Enforcement of Collective Consumer Interests in Conflicts	000
		Across National Borders	232
		(i) Problems and experiences with legal enforcement	
		across national borders	232
		(ii) International jurisdiction for actions against cross-border	
		injunctions	233
		(iii) The right to take action and the legitimate interest	
		to take legal action	233

		Contents	xi
		(iv) The determination of the law applicable under EC	
		private international law	235
		(v) Execution of a judgment	236
	f.	The Regulation (EC) No 2006/2004 on Consumer Protection	
		Cooperation	237
		(i) The objective and contents of the Regulation	238
		(ii) The significance of the Regulation with regard to the	
		organisation of law enforcement	239
9	C	ONCLUSIONS	
	Th	omas Wilhelmsson	241
		A Directive of Legal and Practical Importance	241
	b.	The Measure of Assessment: The Purposes of the Directive	242
	c.	Consumer Confidence	244
	d.	The Level of Protection	247
	e.	Traders' Costs and Risks	250
	f.	Legal Certainty	254
	g.	United in Diversity	256
Ap	pen	adix	261
Index			289