
Abstract  The Unfair Commercial Practices Directive 2005 (UCPD) attempts to achieve a full harmonisation of the rules against unfair business-to-consumer (B2C) practices. However, this paper argues that the UCPD cannot resolve disparities in national laws because of a lack of clarity of concepts and the existence of uncertain substantive and enforcement provisions. This is demonstrated by the Ferguson v British Gas case which extended the loosely formulated UK Protection from Harassment Act 1997 (PHA) to B2C harassment cases covered by the UCPD. Ferguson highlights contradictions in the approaches of the two systems which suggest loopholes in the UCPD’s full harmonisation goal. As well as proposing the amendment of the PHA, the paper suggests that complete harmonisation requires that issues of clarity of concepts, definitions, liability, ancillary tort claims and enforcement rights which create room for creative interpretations and lack of uniformity should be addressed. A one-stop legislation approach to transposition can also improve harmonisation.

Keywords  Consumer protection · Directive on Consumer Rights · Harassment · Protection from Harassment Act 1997 · Unfair Commercial Practices Directive
Introduction

A review of the EC Consumer Law Compendium and Database has revealed disparities in national laws in areas covered by consumer protection directives for reasons including the use of minimum harmonisation directives, the existence of enforcement and other gaps, and ambiguities and lack of clarity of concepts (Schulte-Nô Ike et al. 2008, pp.497-504).

Consequently, the current EU policy strategy favours full harmonisation directives (CEC 2002; 2006). This policy has been reflected in the proposed Directive on Consumer Rights (CEC 2008) and the Unfair Commercial Practices (UCPD). The UCPD is a full harmonisation directive (Recitals 5, 14, 15, 17, Article 3(5)) designed to establish a single regulatory framework to tackle disparities in national laws and prevent legal uncertainties in unfair business-to-consumer (B2C) rules which can create barriers and increase the costs of transactions (Recitals 3, 4, 5, 12). It marks a departure from the minimum harmonisation approach which would have allowed member states to adopt stricter or more protective rules (Twigg-Flesner 2010, 355-356).

There were objections to the maximum harmonisation policy during the drafting of the UCPD (Collins 2005, pp.429-432, 2010, 95, 96). With a few exceptions (for example, Hondius 2010) commentators have been largely critical of maximum harmonisation with some suggesting targeted harmonisation directives instead (Ackermann 2010; Faure 2008; Micklitz and Reich 2009; Reich 2005; Rott and Terryn 2009; Twigg-Flesner 2010; Wilhelmsson 2008). Some scholars have also questioned the effectiveness of using directives in consumer protection. Reich (2005) and Twigg-Flesner (2010) for example, prefer regulations because the essential nature of directives which requires national transposition exacerbates disparities and promotes inconsistent national laws and incoherent applications. However, it is important to examine the pioneering role of the UCPD in order to assess whether the Commission’s new approach actually succeeds in removing disparities in national law.

In accordance with Article 249 EC, the UCPD as a directive is binding only as to the result to be achieved. As a basic principle of EU law is that directives have no horizontal direct effect, the UCPD need to be implemented by transposition into national law and parties cannot rely directly on it. Transposition is a process that targets results to be achieved and does not impose concepts, terminologies and methods on national authorities. Unlike minimum harmonisation directives which introduce minimum levels of protection beyond which national transposition can include more stringent provisions, the UCPD as a full harmonisation directive establishes an upper ceiling. However, Member States are permitted for a period of six years from the 12 June 2007 effective implementation date to maintain existing national provisions which implemented other directives more restrictive or prescriptive than the UCPD (Article 3(5)). The UK which initially opposed the draft UCPD (DTI 2002; Collins 2004, p.1) implemented it through the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (CPUTR) which came into force on 26 May 2008.

Settled EU law demonstrates that although legislation may not be necessary for implementing directives, full and effective application by national authorities and preciseness and clarity of legal position in national law are required. In Enka, the ECJ held that despite member states’ discretion as to the method of implementing directives, a directive that targets uniform application could require “absolute identity” and “identical application” of its provisions. The CPUTR are likely to pass the test since they are almost a wholesale adoption

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of the substantive provisions of the UCPD. There are, however, differences in the detailed provisions in the CPUTR for criminal sanctions and enforcement. Although the UCPD does not contain detailed enforcement provisions, it suggests room for broad enforcement rights and powers including injunctions and civil and criminal penalties (Recital 22, Articles 11, 13), an approach largely reflected in the CPUTR (Regulations 8-24).

Nevertheless, transposition can include modifying existing national laws for consistency with a directive but a Member State can refrain from taking further actions towards transposition if existing national law which is not inconsistent with the directive can achieve the results intended (Schulte-Nölke et al. 2008). The CPUTR therefore repealed 12 laws and amended 11 other consumer-related legislation in order to comply with the UCPD’s maximum harmonisation principle (DTI 2005a, 2006a; OFT/BERR 2008). For example, section 40 of the Administration of Justice Act 1970 was amended to remove business-to-consumer (B2C) practices from of its offence of unlawful harassment of debtors (DTI 2006a, p.63; DTI 2006b, pp.9, 10; Twigg-Flesner et al. 2005, pp.62-66). However, the untouched harassment provisions in the Protection from Harassment Act 1997 (PHA) which have been applied in the Ferguson v British Gas can create obstacles to harmonisation in B2C practices including advertising and marketing, consumer credit, debt collection, and the enforcement and termination of agreements (OFT 2006, paras.2.5-2.6).

This paper therefore takes a fresh look at the harmonisation goal of the UCPD, particularly its pledge in Article 1 of the approximation of national laws, regulations and administrative provisions and its assurance in Recital 12 that “consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU.” The aims of the paper are therefore twofold: firstly, to shed new light on the effectiveness of the full harmonisation policy and, secondly, to examine whether the UK transposition ensures consistency and coherence of implementation and application of the UCPD. The paper proceeds on the basis that the extent of harmonisation is determined by the content of a directive. It does not examine whether regulations should replace directives as consumer protection tools (Reich 2005; Twigg-Flesner 2010) or the merits of full harmonisation (Howells 2002; 2007; Howells and Wilhelmsson 2003; Karsten and Sinai 2003; Stuyck et al. 2006, pp.115-117; Twigg-Flesner and Parry 2007, pp.216-220; Van den Bergh 2002; Wilhelmsson 2002). While it focuses on the prohibition of harassment (Articles 8, 9, Annex 1 items 24-31) this paper,

7 Ferguson v British Gas Trading Ltd [2010] 1 WLR 785 (CA).
however, argues that there are difficult issues of clarity of concepts, definitions, liability, ancillary tort claims, and enforcement rights that could defeat the UCPD’s total harmonisation goal. These issues have created room for Ferguson which exploited sloppy legislative drafting in the PHA.

Legislating against Harassment- UCPD and Full Harmonisation

The UCPD is a fairly more comprehensive directive than prior consumer protection directives which targeted specific matters (Howells et al. 2006; Stuyck et al. 2006, pp.109-112). The overall purpose of the UCPD which is to protect the “average consumer’s” (Article 5(2)(3)) economic interest (Articles 1, 2(e), 5(3)) reflects a combined objective and economic test that does not ordinarily protect consumers from mere distress or discomfort. It contains a broad definition of “commercial practice” which includes conduct before, during and after contracts (Article 3(1)). Article 2(d) defines B2C commercial practice as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.” As the European Court of Justice (ECJ) recognises, this provision is “a particularly wide definition of the concept of commercial practices.”

The wide definition is supported by a three-fold scheme of a general clause, two sets of specific clauses and an exhaustive blacklist.

First is the general prohibition by Article 5(1) of unfair commercial practices. Article 5(2) explains that a commercial practice is unfair “if: it is contrary to the requirements of professional diligence, and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.” This two-fold test is a balancing mechanism that screens out mere distress or anxiety. Therefore a conduct which affects the economic behaviour of consumers as is ordinarily expected of businesses is not unfair if it meets the professional diligence standard. By Article 2(h) professional diligence is the exercise of a reasonable standard of “special skill and care” which is commensurate with honesty market practices and good faith. This suggests an objective test similar to the English system’s “reasonable skill and care” (OFT/BERR 2008; Twigg-Flesner et al. 2005). Article 2(e) indicates that material

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8 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus arenhandelsgesellschaft mbH Case C-304/08, 14 January 2010, para.36.
distortion of consumers’ economic behaviour is the impairment of their ability to make informed decisions making consumers to take transactional decisions they would not have taken. Although the European Commission Staff Working Document has indicated that “transactional decision” includes both decisions to purchase or refrain from making purchasing decisions (CEC 2009), the doubts created about the scope of the expression (Howells 2007) could have been cleared in the UCPD itself.

Secondly, there is a more detailed and specific prohibition of misleading actions (Article 6), misleading omissions (Article 7), and aggressive practices (Article 8), if they satisfy the “transactional decision” condition in Article 5(2). Thirdly, Annex 1 contains a blacklist of 31 practices which are in all circumstances automatically considered unfair (Article 5(5)) and do not require the “transactional decision” condition. This list of high pressure selling practices some which have been prohibited by previous directives may appear not to be very useful because of the catch-all nature of the general and specific prohibitions. It may be, however, a clearer pointer to the legislative intention. The prohibitions echo the debate as to whether mandatory information requirement or outright compulsion/prohibition of particular conduct is the appropriate regulatory technique for consumer protection (Grundmann et al. 2002; Hadfield et al. 1998; Howells 2005; Howells and Wilhelmsson 1998; 2003; Weatherill 1994; 2005, pp.84-115; Wilhelmsson 2004). Although it suggests the objective of regulating information for informed consumer consent, the UCPD also adopts the second regulatory technique by prohibiting practices which could impair consumers’ freedom of choice (Recital 16, Article 2(e)).

One of such prohibited practices is harassment as part of the broader concept of aggressive practices which is the focus of this paper. The relevant UCPD provisions on aggressive practices (Articles 8, 9, Annex 1) are closely followed by the CPUTR (Regulation 7, Schedule 1 items 24 to 31). Aggressive practices are a relatively new area in EU consumer protection (Recital 11) (Howells 2006, p.170), although anecdotal and empirical evidence, for example, shows that “harassment” is a growing but not a particularly recent phenomenon. The UK, for example, has witnessed explosions in “vigorous advertising” of consumer credit services (Griffiths, 2006, p.75), debt⁹ and litigation (Howells, 2010). Creditors usually prefer other means to legal actions and formal debt collection procedures which they consider expensive and slow particularly in relation to the size of consumer debts (Bertola et al. 2006).

The UCPD therefore attempts to fill a gap in the law’s protective screen against aggressive practices.

A key provision is Article 8 which prohibits aggressive practices which through harassment, coercion, or undue influence significantly impair or are likely to significantly impair the average consumer’s freedom of choice and distort their transactional decisions. Undue influence is defined, but the UCPD lacks definitions of actionable harassment and its lower and upper thresholds (Article 2(j)) despite the fact that harassment is a concept that means different things to different people and includes a wide range of feelings. A definition of harassment is required to delimit its outer boundaries, provide sufficient guidance for the courts, and discourage any uncertainty that could be exploited. It may be true that inexactness of definition “allows the law sufficient ‘wiggle room’ to effectuate...remedial ends” (Partlett, 1997, p.192), and that both the de minimis rule in tort law\(^{10}\) and the materiality test in the UCPD (Recital 6, Article 2(e)) can exclude trivial claims, but Article 8 is an open-ended invitation to all manner of claims. It does not consider the interests of businesses which the UCPD also attempts to protect (Recital 8).

Nevertheless Article 9 indicates some relevant factors for determining the occurrence of harassment. The factors under include time, location, nature or persistence, the use of threatening or abusive language or behavior, the exploitation by the trader of any specific misfortune or circumstance, onerous or disproportionate non-contractual barriers imposed by the trader, and any threat to take any action that cannot legally be taken. This list confirms the combined reasonableness and materiality test which suggests a seriousness threshold for traders’ actions and consumers’ responses (Recital 6, Article 9(a)). These vague non-exhaustive factors may be helpful indicators but it is not clear what weight they should be given or whether they are viewed from the consumer or trader’s perspective. In comparison, practices in the blacklist in Annex 1 are clearly unfair irrespective of their effect on consumers’ economic interests and decisions (Article 5(5)).

Compared to minimum harmonisation directives (Dougan, 2000), the UCPD does not permit a greater or a more restrictive level of consumer protection than its provisions except in financial services and immovable property matters (Recital 15, Article 3(9)). As the UCPD excludes national “legislative experimenting” (Stuyck et al. 2006, p.117) it protects

\(^{10}\) *De minimis non curat lex* (The law is not concerned with trifles), recently restated in *Grieves v Everard & Sons Ltd* [2008] 1 AC 281, 307 para.73 (Lord Scott); *Ferguson v British Gas*, above n 7, 791E (Jacobs LJ).
consumers as well as traders by ensuring certainty and uniformity of rules (Recitals 4, 8, 17). National laws must not be “overly protective of consumers” in matters regulated by the UCPD (Collins 2010, p.117). The scheme indicates that “consumers are entitled to no less, but also to no more, than the UCPD provides” since “the consumer will get what (the UCPD) decides that she or he deserves – no less, but certainly no more” (Stuyck et al. 2006, pp.116, 134). In other words, consumers are not protected from every “unfair” commercial practice including those prohibited by previous or existing national rules but not under the UCPD (Karsten and Sinai 2003, p.165).

Early indications of the European Court of Justice (ECJ) jurisprudence suggest the confirmation of full harmonisation in matters within the UCPD’s competence (Glockner 2010, pp.575-584). The court has held that the UCPD affected pre-existing national law and consequently precluded a Belgian prohibition of combined offers regarded as commercial practices under the UCPD, a position it recently confirmed in two decisions. The three decisions are consistent with the court’s view on the Product Liability Directive, an earlier directive that adopted a “complete harmonisation” strategy which prevented Member States from establishing or maintaining favourable or stricter rules than its provisions. Similarly in Cordero Alonso, the court held that Directive 2002/74 required specific transposition into national law and precluded inconsistent existing national rules. Therefore the

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12 Zentrale v Plus, above n 8, paras.35-54; Telekommunikacja Polska SA w Warszawie v Prezes Urzędu Komunikacji Elektronicznej Case C-522/08, 11 March 2010, para.31.
14 María Victoria González Sánchez v Medicina Asturiana SA Case C-183/00 [2002] ECR I-3901, paras.21-34.
15 Anacleto Cordero Alonso v Fondo de Garantía Salarial (Fogasa) Case C-81/05 [2006] ECR I-7569, para.29.
compatibility of the unmodified PHA harassment provisions with the UCPD is considered next.

Legislating against Harassment: the PHA, Then and Now

The PHA prohibits a course of conduct which, with the harasser’s actual or constructive knowledge, amounts to harassment (section 1(1). This provision follows the traditional English law’s focus on victims’ responses and impact of events (Law Commission 1998, para.5.33; Tennant 2002, p.74), but it is not clear whether it concerns initial responses and acute sources only rather than chronic causes of harassment. The PHA’s notion of harassment is, however, significantly different from the UCPD’s professional diligence and materiality test which does not include knowledge (Article 5(2)). Although constructive knowledge in the PHA suggests an objective standard as professional diligence requires, knowledge is relevant in the UCPD only when transactions involves who are vulnerable because of their mental or physical infirmity, age or credulity (Article 5(3)).

Section 7(2) defines harassment as including “alarming the person or causing the person distress.” Apart from contradicting the seriousness test in the UCPD, this definition is not very helpful because “harassment, alarm or distress” can be alternative pointers with different meanings. It is also a low threshold suggesting that it can capture ordinary states of “annoyance or worry” particularly because distress is merely an “emotional disturbance or upset”. In fact under the PHA it “might be harassment even if no alarm or distress were in fact caused.” The difficulty is that emotional injury contains a wide range of conditions varying in severity and duration (Law Commission 1998, pp.8-54). Within this sphere, harassment, like “pain and suffering,” denotes a range of feelings (Law Commission 1995,

17 Southard v DPP [2006] EWHC 3449, para.16 (Fulford, J.).
19 R (on the application of R) v. DPP [2006] EWHC 1375 (Admin).
20 Majrowski v Guy’s and St Thomas’s NHS Trust [2007] 1 AC 224 (HL), para.46 (Baroness Hale of Richmond).
21 New Brunswick (Minister of Health and Community Services v G (J) [1999] 3 SCR 46, 58-60 (Supreme Court of Canada).
para.2.10) including distress and anxiety at the lower end. It is not a surprise that the courts have failed to arrive at a definition of harassment, and without a clear legislative guide they could only offer unhelpful divergent tests (Patten 2010). However, by merely indicating that harassment involves conduct that goes beyond the unpleasant harassment cases to be brought under the PHA without requiring materiality, a situation which as Diagram 1 clearly demonstrates does not promote uniformity of concepts and law.

Section 7(3) declares that “a course of conduct” resulting in harassment requires at least two occurrences. In Sunderland v Conn, the court held that one incident is insufficient because section 7(3) requires at least two incidents which, standing alone, also constitute harassment. To constitute a course of conduct, incidents must have sufficient proximity in time, place and circumstances. The PHA and the UCPD may coincide here since both “course of conduct” and “practice” suggest a pattern of behaviour. However, in requiring at least two incidents the PHA may be clearer than the mere indication of “persistence” as a relevant factor (Article 9(a)). Another uncontroversial provision is section 7(4) which indicates that harassment including speech is likely to cover face-to-face and telephone statements. Implicit also are statements made, generated or disseminated in any written form. The UCPD suggests a similar effect since it does not restrict the form of “threatening or abusive language or behaviour” (Article 9(b)).

Defences under the PHA include proof that the conduct was reasonable even if harassment had resulted (section 1(3)(c)), the prevention and detection of crime, and acting under or in compliance with a law (section 1(3)(a)(b)). Section 12 excludes actions certified

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23 Sunderland City Council v Conn, above n 22. See also Wainright v Home Office, above n 22, 426 (Lord Hoffmann).


by the Secretary of State to concern national security, national economic well-being, and the prevention and detection of serious crime. These defences show that harassment occurs only when “a reasonable man normally constituted, would be unable to adequately cope with stress engendered.” Their objective standard seems compatible with the UCPD’s professional diligence although the details diverge.

Section 2 makes harassment a criminal offence punishable by imprisonment, financial penalty or both, while section 5 provides that the court can grant restraining orders against persons convicted of the offence. Section 3 permits victims of harassment to take civil actions. Civil remedies available include damages and injunctive relief while recoverable damages are for anxiety and financial and other losses. These provisions recognise that civil and criminal laws can coincide in harassment and to that extent are likely to be compatible with the UCPD which has left national laws to decide the nature of penalties (Article 13). Although criminalisation is not expressly permitted, nothing in UCPD suggests a restriction of Member States’ ability to impose criminal sanctions for unfair commercial practices (Stuyck et al. 2006, p.136). Consequently the CPUTR criminalises unfair commercial practices knowingly or recklessly undertaken (Regulation 8), and creates strict liability criminal offences for misleading actions, misleading omissions, aggressive practices and the practices in the blacklist (Regulations 9, 10, 11 and 12).

27 UCPD, Articles 2(h), 5(2), 5(3); CPUTR, Regulations 17, 18; *Ferguson v British Gas*, above n 7, 796C-E (Jacob LJ), 798G-H (Lloyd LJ); *R v C (Sean Peter)* [2001] EWCA Crim 1251 (CA).
The PHA which was originally intended to provide preventative and protective remedies against stalking (Fenwick, 2007, p.870) has been, however, applied to other situations. The key case is *Majrowski*\(^{28}\) in which the House of Lords confirmed that the tort of harassment in the PHA has a broader scope than stalking. Consequently, the PHA has been used, for example, against a series of newspaper publications,\(^{29}\) and applied in workplace situations,\(^{30}\) landlord and tenant matters,\(^{31}\) and disputes between local authorities and residents.\(^{32}\) It has been used to confront repeated legal proceedings,\(^{33}\) tackle insistent and importunate police

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\(^{28}\) *Majrowski v Guy’s*, above n 20.  
\(^{29}\) *Thomas v News Group Newspapers*, above n 22.  
\(^{30}\) *Majrowski v Guy’s*, above n 20; *Sunderland City Council v Conn*, above n 22; *Hammond v International Network Services UK Ltd* [2007] EWHC 2604 (QB); *Veakins v Kier Islington*, above n 22; *Dowson v Chief Constable*, above n 25; *Rayment v Ministry of Defence* [2010] EWHC 218 (QB).  
\(^{31}\) *Allen v Southwark*, above n 22.  
\(^{32}\) Ibid.  
\(^{33}\) Ibid.
questioning, and protect employees of a medical research organization from animal rights activists. The difficulty, however, is that the outer boundaries of the statutory tort are not evident from either the PHA or Majrowski which both predated the UCPD and did not consider the compatibility issues in the two sets of B2C harassment rules. It was not until Ferguson that the PHA was applied to a B2C case. Ferguson which is considered next highlights the dangers posed by the PHA to the full harmonisation goal of the UCPD.

**PHA and Ferguson - Distorting Full Harmonisation**

In Ferguson, the claimant who was a customer of British Gas validly terminated a utility supply contract and immediately contracted with another provider. However for a period of at least five months, British Gas sent the claimant a series of bills and letters threatening to cut off her gas supply, commence legal proceedings against her, and report her to credit rating agencies. The claimant was troubled and, being a businesswoman, her anxiety was aggravated by the threatened reports to credit rating agencies. As credit agencies collect, store, analyze and make available to lenders information on consumers (Ferretti 2010:3-5), the claimant’s anxiety was probably justified. British Gas ignored the claimant’s several letters and telephone calls, even sent her further bills and threat letters, and failed to reply her solicitor’s letter. The claimant could not bring a contractual claim since the contract had been terminated. Moreover, contract law does not recognise injury to feelings except in very limited circumstances. Also motivated by public interest-related concerns about treatment of customers, the claimant claimed harassment under the PHA for “considerable anxiety.” This meets the low threshold of the PHA but it is doubtful whether it is sufficient for a claim.

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34 *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB).
36 *Jarvis v Swans Tours Ltd* [1973] QB 233 (CA); *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA); *Heywood v Wellers* [1976] QB 466 (CA); *Cox v Philips Industries Ltd* [1976] 1 WLR 638, 644 (Lord Denning MR); *Bliss v South East Thames Regional Health Authority* [1987] ICR 700 (CA); *Watts v Morrow* [1991] 1 WLR 1421, (Bingham LJ); *Farley v Skinner* [2002] 2 AC 732 (HL).
37 *Ferguson v British Gas*, above n 7, 787H-788B.
38 Ibid 787F-G.
under the UCPD/CPUTR because the claimant did not allege any material distortion of transactional decision.

However, British Gas applied for the claim to be struck out for failing to disclose a reasonable cause of action under the PHA. The company argued that no harassment arose since the claimant knew the demands were unwarranted; it was not liable for automatic computer generated messages because such messages could not be attributed to it; and its conduct did not satisfy the gravity criterion for the criminal offence. Both the High Court and the Court of Appeal rejected British Gas’ arguments and held that its conduct, if proved, could in principle constitute harassment. It was considered significant that the defendant threatened to “tell a credit reference agency in the next ten days that [the claimant has] not paid”39 but immaterial the claimant knew that the threats were unwarranted.40 It was held immaterial that harassment is caused by automatically generated messages, or by the deliberate actions of an organization or individuals within that organization.41 This decision which reflects an anthropomorphic approach that attributes human characteristics to corporations is, however, incompatible with the impact and materiality requirements of the UCPD (Article 5(2)).

39 Ibid 792B-C.
40 Ibid 791H (Gage LJ).
41 Ibid 791H-792C (Jacobs LJ).
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Table 1: UCPD and PHA - Contradictions and Inconsistencies

Nevertheless *Ferguson* might have exploited the sloppy definition of harassment in the PHA to stretch its boundaries. The definition which lacks clear guides for distinguishing cases of insensitive businesses and oversensitive consumers also fails the materiality test in the UCPD. The UCPD and CPUTR\(^{42}\) provisions on B2C harassment (OFT/BERR, 2008, pp.40-43; Willett, 2010a, pp.259-264, 2010b) ought to have been applied because the actions of British Gas could, for example, constitute “any threat to take legal action which cannot be

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\(^{42}\) UCPD, Articles 8, 9 and Annex 1 items 24-31; CPUTR, Regulations 3(4)(c)(d), 7, 11, 15 and Schedule 1 paras.25, 26.
It is worrying that Ferguson’s model also applies to legally justified demands if “illegitimate pressure” is used. As Table 1 shows, the suggestion that consumers who are in breach of their contractual obligations can bring harassment claims contradicts Article 9(e). The UCPD is unlikely to support claims for irritation or for activities consumers can simply ignore.

The procedural focus of the PHA has wider implications and can open up harassment claims for consumer advertising and marketing including direct contacts and automatically generated messages, an area directly regulated by the UCPD (Articles 1, 2(k), 5(2), 8, 9(b)). It is instructive that although unwanted and automated messages can infringe the Privacy Directive they are unlikely to be unfair under the UCPD (Collins 2010, pp.109-110; Howells 2007, p.109; Johnson 2005, p.165). Unlike the PHA which recognises claims for “persistent and unwanted solicitations” if distress or alarms results, the UCPD does not recognise a stand-alone harassment claim unless it involves the distortion of economic interests (Recitals 4, 6, 7). Ferguson’s interpretation of the PHA is therefore an expansive scheme for consumer protection which can usurp the UCPD, reach far-flung cases and cause unimaginable volume of potential claims. It shows that the PHA distorts the picture of full harmonisation and Twigg-Flesner et al. (2005, pp.5, 62-66) and Twigg-Flesner and Parry (2007, pp.221-222) were right to hint at potential overlaps and inconsistencies with the UCPD although the UK authorities dismissed it (DTI 2005b, p.95).

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43 CPUTR, Regulation 7(2).

44 Ferguson v British Gas, above n 7, 791H (Jacob LJ); S&D Property Investments Ltd v Nisbet, above n 22; Janvier v Sweeney [1919] 2 KB 316 (CA). See also Bunyan v Jordan (1937) 57 CLR 1 (High Court of Australia).

45 CPUTR, Regulation 7(2)(e).


47 UCPD, Annex 1, item 26 (CPU TR Schedule 1 item 26).
Beyond Full Harmonisation

Complete harmonisation excludes competing national laws, particularly legislation that can be exploited by creative and generous interpretation as Ferguson and the PHA demonstrate. Loosely drafted legislation can bring unforeseen and unwanted results, including turning consumers from the hunted to the hunter. An example is the consumer credit litigation which saw a significant growth in the UK partly because of the recently amended provision against the enforceability of improperly executed credit agreements (Howells 2010). Also, if a directive lacks sufficient clarity there may be difficult questions concerning the appropriateness of national law and compatibility with full harmonisation. In the UCPD, however, are issues of definitions of concepts, scope, attribution, criminalisation, ancillary tort claims, and enforcement that need to be addressed to give the complete harmonisation goal a chance of success. These issues which constitute practical difficulties for businesses, consumers, regulators and enforcement authorities create confusion and ambiguities in meanings and a lack of legislative cohesion, and hinder true harmonisation.

Concepts

Uniformity is difficult to achieve if an adequate and overarching definitional structure is not in place. Non-imposition of concepts during transposition creates the problem of separate and sometimes inconsistent national rules on a subject regulated by a consumer protection directive (Roth 2002). In the UK for example, local enforcement authorities because of differing operational and cultural factors have different views on the meanings of UCPD concepts (Williams and Hare 2010). The unfamiliarity of concepts which is evident across other Member States (Collins 2010; Twigg-Flesner and Parry 2007) has been partly triggered by a lack of clarity of concepts used in the UCPD. Apart from the undefined key concept of harassment, it is also worth mentioning that matters of “taste and decency” which national laws can regulate (Recital 7) suggest a loose legislative language. A generous interpretation of “decency” could even suggest the PHA’s compatibility with the UCPD since it targets stalking, a matter of decent behaviour.

It is possible that consistency of meanings can be achieved if national courts make TFEU Article 267 (EC Article 234) references to the ECJ to interpret the UCPD concepts, but this is unlikely to resolve the difficulties. Even with the existence of a general doctrine of
autonomous meaning in EU law, national courts in practice rarely refer concepts in consumer protection directives to the ECJ as they would rather prefer interpretations within the confines of the national legislation (Loos 2007; Twigg-Flesner 2010). This seems the case in the UK where the highest court declined to make references in two high profile cases.49

One-stop legislation

Harmonisation can be improved if transposition involves only one set of national law. This ensures ease of reference and closer scrutiny of consistency in substantive and enforcement provisions. If the UCPD had contained a general statement overriding any other legislation on B2C harassment, references to the PHA in such cases will clearly be irrelevant. Nonetheless the unresolved question is whether the UCPD is intended as the “catch-all” legislation against B2C harassment. Apart from the PHA, there are harassment provisions in the UK Public Order Act 1986 which can impede full harmonisation. According to section 5, an offence is committed if a person “uses threatening, abusive or insulting words or behaviour, or disorderly behaviour; or displays any writing, sign, or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.” Nothing in the legislation suggests the exclusion of B2C harassment from this offence. Therefore a requirement in the UCPD for one set of national legislation for B2C harassment might have prevented the intrusion of the PHA and the Public Order Act.

Similarly, the UCPD does not clarify its relationship with other legislation that may have B2C harassment issues, particularly the consumer protection legislation retained under Article 3(4). It is not clear whether the UCPD has displaced the harassment provisions in such statutes. In consumer credit with its own specific directive and national law (Howells 2010, p.639) for example, Ferguson’s interpretation of the PHA can apply. For example, if unreasonable steps taken to recover debts or serve enforcement notices cause alarm, a claim


under the PHA may be possible. Strangely, neither the PHA nor the UCPD was cited in Harrison where the court decided that a lender could not recover because, among other reasons, its frequent and untraceable telephone calls harassed the consumer. In contradiction to the UCPD, it was immaterial that the consumer was indebted to the lender or that the debt was due and the lender could issue recovery proceedings. This triangular jurisdictional competition involving the UCPD, the specific (consumer credit) legislation and other national law such as the PHA could have been avoided by clearly stipulating the applicable legislation. This approach pushes directives towards a single set of rules in Member States, a position regulations occupy at the EU level.

Crime and attribution

Criminal sanctions are not unknown to corporations and consumer law (Cartwright 2001; 2010; Craig 2009; Diskant 2008; Ermann and Lundman 2001; Horder 2002; Leigh 1982), but the UCPD’s omission of a requirement or approval of criminal sanctions for B2C harassment (Article 13) has created difficulties for its maximum harmonisation objective. Apart from the problem of having two pieces of applicable criminal legislation, when civil and criminal laws coincide in an area such as harassment harmonisation of one without addressing its implication for the other can be untidy. It does not help that B2C harassment may be a criminal offence in one Member State and not in the other, and also that the question of criminalisation in consumer protection has not been addressed at the EU level. It is a controversial issue even in the UK where many commentators preferred civil enforcement to the exclusion of criminal sanctions for the UCPD (DTI 2005b; 2006a; 2006b; 2007; BERR 2008; Williams and Hare 2010, p.384). However, the CPUTR follows the UK’s usual mix of civil and criminal sanctions (DTI 2006b; Cartwright 2007; Hampton 2005; Macrory 2006). Although the UK government stressed that criminal sanctions should not be the “primary” enforcement mechanism for the UCPD (BERR 2008, para. 100), its meaning and practical implications are unclear. The CPUTR (DTI 2006b; 2007; Collins 2010, pp.111-112) contains rules for attribution of corporate criminal liability which could easily be avoided by using the PHA even though the PHA lacks equivalent provisions.

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51 CPUTR, Regulations 3(4)(c)(d), 7, 11, 15.
Also, nothing in the UCPD indicates any rules for corporate liability or that the CPUTR model is followed by all Member States raising the possibility of divergent national attribution rules which defeat the UCPD’s goals of uniformity and certainty. Ferguson\textsuperscript{52} demonstrates that parallel criminal offences and civil wrongs in cases involving individuals and its transmutation to B2C cases involving corporations with complex organizational and other structures are different issues. The UCPD appears to ignore the fact that corporations may be legal persons, but they are not exactly like human beings. As a consequence, criminal liability is imposed directly on corporations or under the doctrine of vicarious liability for the actions or omissions of employees and agents (Pinto and Evans 2003, p.5; Wells 2001, p.30; 2002, p.291). Like the current UK debates on regulatory offences (Law Commission 2010a), an EU-wide debate on criminal sanctions and corporate criminal liability in consumer protection is important. It can clarify the personal and vicarious liabilities of corporations including identifying the class of persons whose acts or omissions can be attributed to them (Gobert 1994, p.401; Pinto and Evans 2003, p.57).\textsuperscript{53}

**Enforcement**

Article 11 and Recital 21 which constitute an open-ended requirement unrestricted by any express indications for enforcement by public bodies and private persons and organizations\textsuperscript{54} can with other unclear enforcement provisions defeat full harmonisation. For example, Article 3(2) exemption of contract law confirms that contractual enforcement rights are unaffected (Whittaker, 2007). While it may be helpful to bind parties to their agreed obligations, contractual enforcement rights which differ from jurisdiction to jurisdiction can create distort harmonisation. Although Article 3(2) seems to indicate that ancillary tort claims are affected since they have not been expressly excluded Recital 9 confirms the

\textsuperscript{52} Ferguson v British Gas, above n 7, 789D-792D, 799F.


\textsuperscript{54} See Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98) Joined cases C-240/98 to C-244/98 [2000] ECR I-4941, paras.27-29.
availability of personal claims. However, the UCPD does not indicate whether any other statutory (as in the PHA) or the common law\(^5\) (Collins 2010, pp.113-114) personal enforcement right is excluded. The CPUTR is similarly silent because consultations are ongoing in the UK to determine whether private claims can arise from matters covered by the UCPD (Collins 2010, p.115; Law Commission 2008; 2010b).

Nevertheless tort law can be a regulatory tool (Betlem 2005; Cane 2002; Pontin 1998; Schwartz 1994) and there is no doubt that the availability of individual tort rights can help the enforcement of the UCPD, particularly if public agencies are reluctant to enforce. Also, tort law can promote both corrective and distributive justice by encouraging or discouraging particular conduct in society (Arvind 2010:349-351; Dagan 2008:811-819; Gordley 2006). However, a full harmonisation system ought to indicate the boundaries of ancillary tort claims to prevent the existence of too much or too little rights in different Member States. This is particularly important for the UCPD because in the UK, for example, consumer litigation including recourse to other national laws seems more dominant than public enforcement. The CPUTR (Regulation 19) may have designated some public enforcement authorities for the UCPD (OFT 2008), but little enforcement, civil or criminal, is taking place (OFT 2009; Williams and Hare 2010, pp. 387, 396-397).

**Conclusion**

This paper demonstrates that the use of maximum directives for consumer protection may not resolve disparities in national laws if ambiguities and lack of clarity of concepts persist. The Commission’s claim that “the implementation of a directive may give rise to a single and coherent set of law at national level which would be simpler to apply and interpret by traders” (CEC 2008, p.8) is simply farfetched in the case of the UCPD. *Ferguson v British Gas* which exploited the loosely formulated PHA to extend its harassment provisions to B2C cases highlights the contradictions in approaches of the PHA and UCPD and suggests loopholes in the latter’s full harmonisation goal. The substantive liability thresholds and causal links, for example, are incompatible. Consequently, the amendment of the PHA to conform with the

\(^5\) *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932, para.30 (Hale LJ); *Hunter v Canary Wharf* [1997] AC 655 (HL); *E (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *O’Rourke v Camden London Borough Council* [1998] AC 188.
UCPD (Twigg-Flesner et al. 2005, pp.66, 85, 121) or an express statement in the PHA to exclude B2C unfair practices (Twigg-Flesner and Parry 2007, p.222) is required.

However, the bigger picture is the need for clarity in full harmonisation directives. Lack of clarity of concepts, definitions, liability, ancillary tort rights, and enforcement creates room for creative interpretations, intrusions by contradictory legislation and manipulation by parties. The review of the UCPD (Recital 24, Article 18) and the proposed Directive on Consumer Rights provide an opportunity to avoid loosely defined, open-ended and uncertain provisions. Another important step towards improving harmonisation is a one-stop legislation approach to transposition. As this account of harassment provisions shows, complete uniformity and certainty in B2C practices may well depend not on whether the UCPD is labelled a full harmonisation directive but on the clarity of its substantive and enforcement provisions and the ease of locating the national transposition.

References


