Volume 4 | Number 1 | Spring 2008

Competition Policy International

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Published in Competition Policy International (print ISSN 1554-0189, online ISSN 1554-6853),
Spring 2008, Vol. 4, No. 1. For articles and more information, visit www.globalcompetitionpolicy.org.

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Most antitrust experts tend to consider consumer protection the son of a lesser God in comparison to antitrust rules. Indeed, customer protection is the very essence of competition policy. A market that functions without distortions will benefit consumers' capability to choose a larger variety of products at a cheaper price. However, not all market distortions fall within the notion of agreements and neither do they represent an abuse of market power, but very often they may constitute the result of an illegitimate aggressive or misleading behavior by companies. After decades of antitrust legislation and case law aimed at fine-tuning the level of protection to a common market, a directive to harmonize the level of consumer protection within the Member States has become essential.

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I. Introduction

Directive 2005/29/EC (the "Directive"),[1] adopted by the European Parliament and the Council on May 11, 2005, has revised the structure of unfair commercial practices in Europe with the aim of fully harmonizing national legislations on unfair practices. These new rules have introduced a substantial innovation in the EU system protecting consumers from unfair commercial practices and from misleading and comparative advertising. They have also redefined some important concepts already regulated by the previous legislation and introduced new categories of unfair conduct.

This paper analyzes the impact that the new rules are likely to have on consumers and enterprises. It initially focuses on the history of consumer protection in Europe and, in particular, on several attempts made, throughout the last four decades, to harmonize relevant national provisions. Furthermore, the new fully harmonizing approach endorsed by the Directive is analyzed, together with the structure of the same act. The newly prescribed concepts of aggressive practice and per se prohibited conducts are critically assessed as well as the interconnection that exists between the different categories of unlawful commercial practices. The paper then highlights the possible divergences that exist with the Directive and the Italian legislation that applies the Directive at Member State level (i.e., LD 145 and LD 146).[2]

Finally, attention is also given to the Italian procedural system set for the concrete implementation of the new rules, among which the alternative dispute resolution system plays an important role.

1 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC & 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005 O.J. (L 149) 22 [hereinafter Directive].

2 Decreto Legislativo 2 agosto 2007, No. 145, Attuazione dell'articolo 14 della direttiva 2005/29/CE che modifica la direttiva 84/450/CEE sulla pubblicità ingannevole (GU 207 del 6/9/2007) and Decreto Legislativo 2 agosto 2007, No. 146, attuazione della direttiva 2005/29/CE relativa alle pratiche commerciali sleali tra imprese e consumatori nel mercato interno e che modifica le direttive 84/450/CEE, 97/7/CE, 98/27/CE, 2002/65/CE, e il Regolamento (CE) 2006/2004 (GU 207 del 6/9/2007) [hereinafter Consumers' Code]. In particular, LD 146 has completely renewed articles 18 to 27 of the Consumers' Code (Legislative Decree 206/2005).

II. Consumer Protection in Europe and the New Directive: Pursuing Full Harmonization

A. FULL HARMONIZATION VERSUS A FRAGMENTARY APPROACH

National rules and approaches towards consumer protection in Europe have been far from coherent and homogeneous. Member States' relevant legislations can be classified and differentiated according to three main criteria. [3] First, a distinction can be drawn between States adopting a public law approach (e.g., Scandinavian countries) and those adopting a private one (e.g., Germany). Second, differentiation can be made between countries in which the rules governing commercial practices are an autonomous branch of law with a related system of legal protection (e.g., Northern European countries), and those in which the same rules are part of a broader system of law of unfair competition (e.g., Belgium and Germany). Third, there are some Member States that apply, with varying degrees of intensity, general fair trading clauses in the national legislation (e.g., Germany), and others that do not have these clauses altogether (e.g., Belgium, Ireland, and the United Kingdom). Historical and practical experience reveals different approaches by Member States, even if a recent uniform trend toward an economic-oriented, cost-benefit analysis can be detected in several States.[4]

At EC level, even if the original Treaty of Rome did not provide a specific legal basis for consumer protection,[5] the attention to consumers' rights has been constantly present in the policy debate throughout the years. As early as the 1960s, the Commission launched its first ambitious proposal aimed at harmonizing the rules on unfair competition. But, given the structural differences in national legislations and, above all, the varying degree of sensitivity among Member States to the issue, the "project resulted [only] in a marvellous comparative series of books edited by the Munich Max Planck Institute under the editorship of Eugen Ulmer"[6] and was finally abandoned.

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3 *See*, in particular, J. Stuyck, E. Terryn, & T. Van Dyck, *Confidence through fairness? The new Directive on unfair business-to-consumer commercial practices in the internal market*, 43 COMMON MKT. L. REV. 107 (2006); T. Bourgoigne, *Characteristic of consumer law*, 14(3) J. CONSUMER POL'Y 293 (1991). More generally, *see* H. W. Micklitz, *An expanded and systemised Community Consumer law as alternative or complement?*, 13(6) EUR. BUS. L. REV. 583 (2002).

4 Examples of significant cost-benefit analysis oriented amendments to national legislations are detectable in, among others, the Netherlands (1997) and Germany (2001).

5 Consumer protection became an autonomous policy aim in 1987 with the adoption of the Single European Act. A specific legal basis for pursuing consumer protection policies was provided in 1992 by the Treaty on European Union (the Treaty of Maastricht) which introduced a special Title IX on consumer protection.

6 Stuyck et al. (2006), *supra* note 3, at 110.

However, one outcome of the intense debate held during the 1960s and 1970s,[7] is that the European Council adopted a number of Directives on specific issues beginning in the mid-1980s. They focused on misleading advertising (1984); doorstep selling (1985); television sales (1989); unfair contract terms (1993); timeshare (1994); comparative advertising (1997); distance selling (1997); and consumer sales (1999).[8] Compared to the Commission's more ambitious initial intention to harmonize the legislation, these sector-based rules were a modest result, driven by pragmatism and policy.

THE DIRECTIVES REFLECTED AN INCREASINGLY MARKET-ORIENTED APPROACH BASED ON THE ASSUMPTION THAT ONLY PROPERLY INFORMED CONSUMERS ARE IN THE POSITION TO MAKE EFFICIENT CHOICES LEADING TO THE MAXIMIZATION OF CONSUMER WELFARE.

Nevertheless, the Directives reflected an increasingly market-oriented approach based on the assumption that only properly informed consumers are in the position to make efficient choices leading to the maximization of consumer welfare. This information paradigm is supposed to produce two effects: on the one hand, the internal market will function properly as a space where consumers are aware of all the opportunities they are offered and where the free movement of persons, services, goods, and capital is guaranteed;[9] on the other hand, it will restore fair competition in the market where the choices of well-informed consumers punish unfair traders.[10]

In 2001, to overcome this fragmented situation, the Commission published the Green Paper on European Consumer Protection.[11] The main scope of the initiative was to trigger an EU-wide debate among scholars, legislators, and the

7 *See* K. J. Cseres, Competition Law And Consumer Protection 193-202 (The Hague, 2005); N. Reich & H. W. Micklitz, Consumer Legislation in EC Countries, a Comparative Analysis (1980); H.W. Micklitz, *A General Framework Directive on Fair Trading*, *in* The Forthcoming EC Directive on Unfair Commercial Practices (Collins ed., 2004).

8 *See* Directive 84/450/EEC, 1984 O.J. (L 250) 17; Directive 85/577/EEC, 1985 O.J. (L 372) 31; Directive 89/522/EEC as amended by Directive 97/36/EC, 1989 O.J. (L 202) 23; Directive 93/13/EEC, 1993 O.J. (L 96) 29; Directive 94/47/EC, 1994 O.J. (L 280) 83; Directive 97/7/EC, 1997 O.J. (L 144) 19; Directive 97/55/EC, 1997 O.J. (L 290) 18; Directive 99/44/EC, 1999 O.J. (L 171) 12 . (Listed here in the same order as in the text of the paper.)

9 On this regard, *see* Case C-362/88, GB INNO BM v. Commission, 1990 E.C.R. 667; G. Howells & T. Wilhelmsson, *EC Consumer Law: Has it come of* age, 28(3) Eur. L. Rev. (2003); G. Howells & T. Wilhelmsson, *EC and US approach to consumer protection - should the gap be bridged?*, *in* The Yearbook of European Law 17 (A. Barav et al. eds., 1997), at 207-67; Stuyck et al. (2006), *supra* note 3, at 108.

10 Le Marché Intérieur après 1992: répondre au défi, Rapport présenté à la Commission par le Groupe à haut niveau sur la fonctionnement du Marché Intérieur (Sutherland report) (1992).

11 European Commission, Green Paper on on European Union Consumer Protection, COM(2001) 531 final (Oct. 2, 2001).

business community over how to harmonize the rules on consumer protection The outcome of the debate was a new Directive by the Commission aimed at achieving total harmonization of unfair business-to-consumer commercial practices rules among Member States.

Total harmonization (under Article 95 of the EC Treaty) implies that once the legislative measure (the Directive) has been adopted (within its scope of application), Member States cannot implement national diverging provisions that are either stricter or more indulgent, except where explicitly permitted. Member States maintain their freedom to make policy and regulate choices only on conducts outside the Directive's scope of application. Therefore, in the case of full harmonization, it is extremely important to precisely delimit the scope of application of the Directive and, conversely, the fields not covered by its provisions. In our case, the concrete application of this principle implies that consumers throughout Europe will be entitled to the same degree ("to no less, but also to no more"[12]) of protection everywhere.

In this regard, it has to be mentioned that, according to the European Court of Justice (ECJ), EU rules can be based on Article 95 only where total harmonization is demonstrated to be an effective instrument in eliminating obstacles to the free movement of goods or the freedom to provide services, or those obstacles that significantly distort competition. The mere finding of disparities among Member States' national legislations, or the fact that some impediments to effective competition do exist, is not sufficient to justify total harmonization of rules.[13] Accordingly, when new legislation is proposed, the need for total harmonization must be demonstrated.

These considerations are important to understand the significance of the Directive and the Explanatory Memorandum to the original proposal.[14] In the latter, the European Commission provides extensive quantitative and qualitative data to demonstrate that real obstacles to consumers' choice, as well as barriers to cross-border trade, exist in the internal market. The Memorandum concluded that the Directive would constitute a unique instrument to eliminate transaction costs, increase consumer confidence, and consequently, increase cross-border demand, thus stimulating competitive pressure. According to Article 1, the Directive's purpose is "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests."

12 Stuyck et al. (2006), *supra* note 3, at 116.

13 *See* Case C-376/98, Germany v. Parliament and Council, 2000 E.C.R I-8419.

14 Explanatory Memorandum concerning the original Proposal for a Directive on Unfair Commercial Practices, COM (2003) 356 final.

We believe that total harmonization and the consequent implementation of the Directive in all 27 Member States indisputably increases the level of protection for consumers and the degree of legal certainty for all market players. The highly detailed formulation of the text of the Directive, coupled with the narrow margin of discretion left for Member States in its implementation, allows companies to implement unique commercial and marketing strategies throughout the entire European Union.

Nonetheless, the evident drawback of the total harmonization approach is that Member States are denied any opportunity—at least in theory—to adapt the scope of the Directive to the actual necessities of their country taking into account cultural, historical, commercial, and legal differences.[15] As noted in the literature,[16] full harmonization would have been equally achievable by means of a framework directive setting principles and objectives, even in a stringent manner where necessary, rather than via extremely detailed provisions (e.g., lists of conducts) that leave no room whatsoever for state intervention. A system as such runs the risk of being too rigid to be able to dynamically react to new emerging market practices, technological innovations, and consumers attitudes that arise in a continuously evolving sector such as commercial and sales practices.

III. The Directive and Its Implementation in the Italian Legal System

A. THE NEW RULES ON BUSINESS-TO-CONSUMERS UNFAIR PRACTICES

1. Limits of Application

The Directive applies only to business-to-consumer commercial practices.[17] This implies that all practices that are deemed to harm only the economic interests of traders, either as customers or competitors, are not affected by the new rules.

Recital 7 excludes the applicability of the Directive to national requirements on taste and decency. Given that taste and decency are very difficult to define, it will be of some interest to verify which application, at both a national and EU level, the administrative and judicial bodies will give them. It will also be interesting to see if, by means of extensive interpretation of those concepts, other eth-

15 On the necessity to leave some room for State intervention, *see* CSERES (2005), *supra* note 5. *See also* H. W. Micklitz & S. Weatherhill, *Consumer Policy in the European Community: before and after Maastricht*, 16(3-4) J. CONSUMER POL'Y 379 (2002).

16 *See* Stuyck et al. (2006), *supra* note 3, at 143 et seq., in particular the interesting parallel with the conclusions of the Committee of wise man on the regulation of European securities markets of February 2001.

17 Directive, *supra* note 1, at art. 3.

ical rules, possibly regulating commercial practices, will also fall outside the scope of the harmonized rules. In addition, rules on competition and intellectual property rights (IPRs), both Community and national, are untouched by the new rule (Recital 9).

Recital 10 of the Directive recalls and confirms the residual nature of the new rules in relation to special provisions regulating certain aspects of commercial practices. In that framework, Article 3 of the Directive explicitly states that the new rules do not affect:

(i) contract law and in particular the rules on formation, validity, and effects of the contract;[18]

(ii) Community and national rules on health and safety aspect of the products;[19] and

(iii) rules disciplining the jurisdictional competence of the Courts,[20] and all rules governing regulated professions.[21]

Article 3(9) excludes financial services and immovable property; indeed, in these sectors, Member States are entitled to adopt diverging rules, either more stringent or more lenient, considering the specific complexity and circumstances of the transactions at stake. Last, Article 3(10) surprisingly excludes rules relating to the certification and indication of the fineness of precious metal articles from the scope of the Directive. Does this mean that an 18-carat gold ring could have different values for an Italian woman than an Estonian one?

2. Some Notions

Article 2 of the Directive defines "consumer" as the natural person who, in commercial practices covered by the new rules, acts for purposes that are outside his trade, business, craft, or profession. However, Articles 5, 6, 7, and 8 talk about the "average consumer". According to the interpretation given by the ECJ, the "average consumer" is someone who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural, and linguistic factors.[22] In Italy, both the supreme administrative court (Consiglio di Stato) and

18 *Id.* at art. 3(2).

19 *Id.* at art. 3(3).

20 *Id.* at art. 3(7).

21 *Id.* at art. 3(8).

22 *See* recently, inter alia, Case C-412/05 P, Alcon v. OHIM, 2007 E.C.R. I-nyr (judgment of Apr. 26, 2007); Case C-74/06, Commission v. Greece, 2007 E.C.R. II-nyr (judgment of Sep. 20, 2007); or *see also*, tracing back a consolidated case law, Case C-470/93, Mars, 1995 E.C.R. I-1923 and Case C-342/97, Lloyd Schuhfabrik Meyer, 1999 E.C.R. I-3819.

the national competition authority (the Autorità) have repeatedly held an interpretation of the concept that is in line with that of the ECJ.[23] Nonetheless, criteria like those envisaged by the ECJ may potentially give rise to inconsistent interpretations by national judicial and administrative bodies throughout Europe. This is especially true considering that the ECJ's definition of "average consumer" is not a static one, but rather a dynamic notion that could change depending on the products or services involved. Therefore, the practical delineation of "average consumer"—the fulcrum of the protective intents of the entire new rule—is of particular interest.

The term "trader" is any natural or legal person acting for purposes related to his trade, business, craft, or profession, and anyone acting in his name or behalf. Business-to-consumer commercial practices are defined as "any act, omission, course of conduct or representation, and commercial communication (including advertising and marketing) by a trader directly connected with the promotion, sale or supply of a product to consumers."[24] Thus, the concept of trader is broader than in the past, whereas it used to be defined as the "advertising agent"; the subject ordering the advertising campaign, or the owner of the medium used to communicate the practice.

In Italy,[25] the trader is supposed to be "only" connected, and not "directly" connected to the promotion, sale, or supply of a product to consumers. This is a very significant difference that could jeopardize full harmonization, to the extent that it widens the scope of the Directive to activities that are carried out primarily for purposes other than those stated therein. Judicial interpretation of the substantial differences between the Directive and national rules may be helpful in understanding any consequences potentially deriving from it.

3. The General Prohibition

Article 5 of the Directive provides the general clause that prohibits unfair commercial practices.[26] It gives a general definition of unfair practice (in paragraph 2) and specifies, in paragraph 4, two specific subcategories of prohibited practices (misleading and aggressive).

23 *See*, inter alia, Case 1263/2006, Consiglio di Stato (judgment of Mar. 8, 2006).

24 Directive, *supra* note 1, at art. 2.

25 Consumers' Code, *supra* note 2, at art. 18.

26 Article 20 of the Italian Consumers' Code (*id.*), as general prohibited category, refers to "incorrect" commercial practices rather than to "unfair" (like in the original formulation of the Directive). This terminological discrepancy is due to the need to avoid confusions and overlapping with the provisions of the civil code on unfair competition.

Based on two criteria, a commercial practice is deemed to be unfair when:

(i) it is contrary to the requirements of professional diligence; and

(ii) it materially (appreciably in the formulation of the Italian rules) distorts or is likely to materially distort the economic behavior (with regard to the product) of the average consumer whom it reaches or to whom it is addressed, or of the average member of a group when a commercial practice is directed to a particular group of consumers.

To consider a practice as unfair and thus to prohibit it, both criteria must be satisfied. Consequently, a practice that is able to appreciably distort the economic conduct of the consumer, but that is carried out with due professional diligence, will escape the prohibition as set out in Article 5.

With regards to the first criterion, Article 2 of the Directive defines "professional diligence" as "the standard degree of specific skills and care which a trader may reasonably be expected to exercise toward consumers, commensurate with honest market practices and/or the general principle of good faith in the trader's field of activity." The definition given by the Italian legislator is slightly different and refers to "correctness" rather than to honest market practices. Besides possible semantic differences, the two concepts are likely to coincide in their application. As for the notion of correctness and good faith, it is likely that the abundant jurisprudence developed in other fields of law will be recalled to interpret their application in the case of unfair practices.

TWO CONDITIONS HAVE TO BE SATISFIED. ON THE ONE HAND, THE CONSUMER MUST BE DRIVEN TO A TRANSACTIONAL DECISION THAT HE WOULD NOT HAVE TAKEN WITHOUT THE TRADER'S INTERVENTION. ON THE OTHER HAND, THE PRACTICE MUST BE ABLE TO APPRECIABLY DISTORT THE CONSUMER'S ABILITY TO MAKE AN INFORMED DECISION.

The second criterion requires that the practice (is able) to distort the consumer's economic behavior in an appreciable way. The distortion does not have to actually occur; indeed, it is enough that the distortion is likely to occur as a result of the practice. This kind of distortion is defined in Article 2 as "using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a decision of commercial nature that he would have not taken otherwise."

As a result, two conditions have to be satisfied. On the one hand, the consumer must be driven to a transactional decision that he would not have taken without the trader's intervention. On the other hand, the practice must be able to appreciably distort the consumer's ability to make an informed decision. This implies that minimum influence exercised in the regular development of commercial and marketing practices are excluded by the scope of the new rules. This approach reflects the original intentions of Recital 6 of the Directive which states that:

> "[I]n line with the principle of proportionality, this Directive protects consumers from the consequences of . . . unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. [. . .] Further, this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perception of products and influence their behaviour without impairing the consumers' ability to make an informed decision."[27]

There is a difference between the Italian and the English versions of the Directive (reflected in the Italian national rules) that is worth mentioning. The English version refers to an "informed" consumer's decision, while the Italian text speaks of a conscious or aware ("consapevole") decision. The Italian adjective seems to be broader than the English one, as it potentially includes not only commercial information, normally the purpose of an advertising and marketing campaign, but also some other elements (e.g., behavioral, cultural, and emotional) that play an important role in the formation of the final willingness and choice of the consumer.

Taking into account that the Italian legislator's policy seems to be inspired by the idea that consumers act economically, and that economic behavior is based on the ability of the consumer to make a conscious or informed decision as well as on the need not to have that ability unduly impaired, the semantic difference might be of some relevance. In fact, the range of elements on which traders try to exercise influence and persuasion might (or might not) fall within the scope of the rule depending on the interpretation of "informed decision".

Besides the figure of the average consumers, Article 5(3) of the Directive regulates cases in which commercial practices:

> "are likely to materially distort the economic behaviour of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. [Those practices] shall be assessed from the perspective of the average member of that group."[28]

27 Directive, *supra* note 1, at recital 6.

28 *Id.* at art 5(3).

Therefore, particularly vulnerable consumers are granted a strengthened form of protection when they are among the intended audience of commercial practices. In these circumstances, particular responsibility and precaution is required of the trader with respect to the rights guaranteed to vulnerable consumers. In Italy, for example, the judicial enforcement system has strengthened these rules by introducing an inversion of the burden of proof in which the trader is expected to demonstrate, with factual allegations, that he could not have reasonably foreseen the impact of the practice on those consumers.[29] In any case, these provisions are "without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally."[30]

In this regard, it is important to bear in mind that the rule of unfair practices applies to all practices operated before, during, and after the commercial transaction related to a certain product. This implies that traders will be subject to the new rule, not only within the timeframe of their actual contractual relations with the consumers, but throughout the entire development of their activities.[31]

4. The Two Subcategories of Prohibited Conducts: Misleading and Aggressive Conducts

As mentioned before, Article 4 of the Directive provides that misleading and aggressive practices are prohibited. Articles 6 and 7 define and set out the limits of misleading actions and omissions. Furthermore, Articles 8 and 9 define the aggressive practices and the criteria for their evaluation and assessment. The definition of both misleading and aggressive practices does not require contrariety to professional diligence; rather, it refers only to the average consumer. It does not mention the possible impact of the practice on particular categories of vulnerable consumers.

The absence of reference to professional diligence tends to enlarge the number of cases that may fall within the concepts of misleading and aggressive practices, in the sense that a practice can be either misleading or aggressive even in the absence of a breach of professional diligence. One wonders how to interpret the absence of explicit reference to vulnerable categories of consumers, since it is clear that a coherent application of the rule, in any case, requires adequate protection of weaker subjects especially in the case of practices that are the most likely to be perpetrated.

29 Consumers' Code, *supra* note 2, at art. 27(5).

30 Directive, *supra* note 1, at art. 5(3).

31 *Id*. at recital 13.

a) Misleading actions

Misleading practices are those:

(i) that contain false information and, therefore, are untruthful;

(ii) that, in their overall presentation, even if they contain factually correct information, deceive or are likely to deceive the average consumer with regards to one or more of the essential elements of the offer as we will examine later in this paper; and

(iii) that, in either case, cause, or are likely to cause, consumers to make a decision of a commercial nature that they would not have taken otherwise.[32]

As anticipated in the previous paragraph, the last criterion qualifies the previous two, in the sense that the false or deceivable information must have a material impact on the decision process of the consumer, influencing his commercial choice.

The elements that may mislead or deceive the average consumer include:

(a) the existence or nature of the product;

(b) the main characteristics of the product (e.g., its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin, expected results from its use, or results from the product tests carried out on it);

(c) the extent of the trader's commitments, the reasons for the commercial practice and the nature of the sales process, or any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

(e) the need for a service, part, replacement, or repair;

(f) the nature, attributes, and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation, or connection and ownership of industrial, commercial, or IPRs or his awards and distinctions; and

(g) the consumer's rights, including the right to replacement or reimbursement.[33]

32 *Id.* at cfr. art. 6.

33 *Id.*

Having taken into account all features and circumstances of each case, commercial practices will also be considered misleading if they cause, or are likely to cause, the consumer to make a decision of commercial nature that he would not otherwise have taken, if they involve any of the following:

(a) any marketing of the product that creates confusion with any other products, trademarks, trade names, or other distinguishing marks of a competitor, including illegal comparative advertising; or

(b) a trader's non-compliance with the duties contained in the codes of conduct under which the trader has agreed to be bound, where these duties are verifiable.[34]

As discussed in Section II.B later in this paper, the formulation of the provisions referring to possible confusion on products and distinguishing marks of competitors affecting consumers' choices may generate parallel (or even multiple) application of the new rules together with those on unfair competition[35] and those on misleading advertising in the business-to-business dealings. In other words, misleading comparative advertising may at the same time infringe this Directive as well as Directive 2006/114/EC ("Directive 114").[36]

AS IS CLEAR FROM THE WORDING OF THE PROVISION, IT DISCIPLINES OMISSIONS MORE THAN ACTIONS. THEREFORE, ITS INCLUSION AMONG ACTIVE MISLEADING PRACTICES IS CERTAINLY SUSCEPTIBLE TO CRITICISM FROM A COHERENCE POINT OF VIEW.

Transposing these principles in the Italian system, the legislator has added two further paragraphs that provide consumers with special protection with respect to practices concerning products possibly hazardous for security and health, and products that may be harmful specifically to the health of children and adolescents. In our opinion, the choice of the Italian legislator to provide special protection to certain categories of products and consumers is compatible with, on the one hand, Article 3(3) of the Directive leaving "without prejudice . . . national rules relating to the health and safety aspects of products" and, on the other hand, with the general principle analyzed before to provide strengthened protection for categories of weaker consumers.

In particular, commercial practices concerning products that could potentially endanger the health and the safety of consumers are misleading if they fail to inform consumers of the risk and induce them to not respect normal standards of

34 *Id*. at cfr. art. 6(2). The last criterion is the same one adopted both in the general prohibition clause and in the rest of the provisions on misleading practices.

35 *See*, in particular, Article 2598 of the Italian civil code.

36 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (Text with EEA relevance), 2006 O.J. (L 376) 21 [hereinafter Directive 114].

prudence and control. As is clear from the wording of the provision, it disciplines omissions more than actions. Therefore, its inclusion among active misleading practices is certainly susceptible to criticism from a coherence point of view.[37] Commercial practices are also misleading when they are capable of reaching children and adolescents, and when they are able to threaten, even indirectly, their safety.[38]

b) Misleading omissions

A commercial practice is considered to be a misleading omission, taking into account all of its features and circumstances, in the factual context in which it is carried out, as well as the limitation of the communication medium, if:

(i) it omits material information; and

(ii) it causes, or it is likely to cause, the average consumer to take a decision of a commercial nature that he would not have taken otherwise.[39]

A "misleading omission" is defined as practices that a trader hides or provides in an unclear, unintelligible, ambiguous, or untimely manner, or any relevant material information that the trader fails to identify in the commercial intent of the practice (if not already evident from the contest) and, as set forth in the general prohibition clause, that "cause, or are likely to cause, the consumer to take a decision of commercial nature that he (or she) would not have taken otherwise."[40]

In all circumstances, the omissive nature of the practice must be assessed, taking into account the medium used to communicate the commercial practice and the limitations in time and space arising from its nature. The efforts made by the trader to provide necessary information by other means must also be considered when assessing the possible omission.[41]

Specific and detailed rules regulate instances in which an invitation to purchase is extended. This is defined in Article 2 of the Directive as a "commercial communication which indicates characteristics of the product and the price in a way appropriate with respect to the means used for the commercial communication and therefore enabling the consumer to make a purchase." Accordingly, Article 7(4) imposes far-reaching positive disclosure duties on traders with regard to information they are obliged to provide, including:

37 Consumers' Code, *supra* note 2, at cfr. art. 21(3).

38 *Id.* at cfr. Art. 21(4).

39 Directive, *supra* note 1, at art. 7(1).

40 *Id.* at cfr. art. 7(2).

41 *Id*. at art. 7(3).

(a) an appropriate description of the main characteristics of the product;

(b) coordinates or those of the trader he is acting on behalf of;

(c) the price, inclusive of taxes, or the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery, or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) the arrangements for payment, delivery, performance, and the complaint handling policy, if they depart from the requirements of professional diligence; and

(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

Moreover, under Article 7(5), all other information requirements provided by Community law related to commercial communication are relevant under Article 7(1). This creates a clear link between the new rule and the existing EU rules.[42] To assess the relevance of further Community disclosure obligations (including the residual opportunity of Member States to maintain more stringent disclosure requirements), Article 7(5) must be examined in combination with Recital 15 of the Directive, which reads:

> "Where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive. By contrast Member States will be able, when allowed by the minimum clauses in Community law, to maintain or introduce more stringent provisions in conformity with Community law so as to ensure a higher level of protection of consumers' individual contractual rights."[43]

c) Aggressive practices

For the first time, the Directive has introduced the category of aggressive practices. A commercial practice is regarded as aggressive if:

42 A non-exhaustive list of the Communitarian information requirements is contained in Annex II of the Directive.

43 In this regard, *see* the prospected contractual implication of recital 15 on the national legal system in Stuyck et al. (2006), *supra* note 3, at 129-30.

(i) the trader exercises harassment or coercion, including the use of physical force or undue influence over the consumer;

(ii) the trader's conduct significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product; and

(iii) the trader's conduct thereby causes, or it is likely to cause, him to take a decision of a commercial nature that he would not have taken otherwise.[44]

As in the general prohibition clause and in the active and omissive misleading practices, the final effect is that consumers adopt a decision different from what they would have otherwise made without the practice. In this case, the final decision depends on the limitation of freedom (the word thereby connects the second and the third criteria). Once again, the "average consumer" is the relevant subject for the application of the rule.

The definition of aggressive practice is straightforward, leaving little space for interpretation. In fact, even if the concepts of harassment and coercion are not defined in the Directive or in the (Italian) national legislation, they can be considered as quite simply identifiable in the common experience. Coercion includes physical force, but is not limited to it. Undue influence is defined as the exploitation of "a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make a conscious decision."[45] The trader, with the aim of frightening the consumer, might also deliberately create a position of power. The limitation (i.e., the influence exercised on the consumer) is explicitly required to be significant.[46]

Some factors have to be taken into consideration in order to determine if a practice implies harassment, coercion, use of physical force, or undue influence, such as:

(a) the timing, location, nature, or persistence of the practice;

(b) the use of threatening or abusive language or behavior;

(c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;

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44 Directive, *supra* note 1, at cfr. art. 8.

45 *Id.* at art. 2.

46 *See also* L. Di Nella, *Prime considerazioni sulla disciplina delle pratiche commerciali aggressive*, *in* CONTRATTO E IMPRESA IN EUROPA 1 (2007).

(d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and

(e) any threat to take any action that cannot legally be taken.[47]

This list is certainly not exhaustive and other factors should be considered separately and not collectively. This means that, on the one hand, in the practical application of national rules implementing Article 9, other factors might also be relevant and, on the other hand, the presence of only one element might be considered enough to judge a practice aggressive.

5. The Black List: Per Se Prohibitions

The Directive enumerates a long and detailed list of 31 practices that are per se illegal regardless of the circumstances of the case. The factual consequence is that, since the expiration of the implementing period granted to Member States on December 12, 2007, those practices are, as such, prohibited in the entire European Union.[48]

The list of conducts contains a heterogeneous variety of practices (23 misleading and eight aggressive) that vary from practices already prohibited in the legislation of the majority of Member States, to other newly introduced by the Directive. The listed misleading practices mainly refer to traders providing false information about products' features or origin, endorsement of code of conducts, market conditions, price, or contractual terms. Bait advertising as well as bait and switch practices are also included in the black list. False statements aimed at persuading consumers that a product is available only for a very limited period of time, "in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice," are also per se prohibited. It is also prohibited to provide post-sales services in a language different from that in which the trader has communicated prior to the transaction or to give the impression that those services are available only in a State different from the one where the product is sold. Moreover, presenting consumers' rights as if they were a distinctive feature of the trader's offer is blacklisted too. Some specific commercial strategies, such as pyramidal sales system, also constitute prohibited practices. Claims that the product is free when it is not or offers of promotions without awarding the prize are also blacklisted.

Similarly, a number of practices are considered to be aggressive in any case. They mainly refer to strong pressure exercised on consumers, such as creating the

47 Directive, *supra* note 1, at cfr. art. 9.

48 *Id.* at cfr. annex 1. The expiration date has not been respected strictly by all Member States. For example, the United Kingdom has announced that it will implement the Directive by April 2008, *see* Department for Business Enterprise & Regulatory Reform, Unfair Commercial Practices Directive, *at* http://www.berr.gov.uk/consumers/buying-selling/ucp/index.html (last visited Feb. 15, 2008).

impression that the consumer cannot leave the premises until the conclusion of the contract, conducting unsolicited house calls, and marketing products via remote media "except in circumstances and to the extent justified under national law to enforce a contractual obligation."[49] Practices aimed at dissuading consumers from exercising their contractual rights, including unauthorized direct targeting of children to buy products, or demanding immediate or deferred payment for unsolicited products are also prohibited.

THE PROVISION OF A SPECIFIC LIST OF PER SE PROHIBITED CLAUSES REPRESENTS ONE OF THE MAJOR INNOVATIONS INTRODUCED BY THE DIRECTIVE. NONETHELESS, WHEN REFERRED TO COMMERCIAL PRACTICES, THIS APPROACH DOES NOT ESCAPE SOME POSSIBLE CRITICISMS.

The idea of creating lists of per se prohibited practices is well-known in competition law since the very beginning of its enforcement. As early as 1965 the first Block Exemption Regulation[50]—exempting exclusive distribution and purchasing agreements from the application of Article 86(1) of the EC Treaty[51]—empowered the Commission to specify "the restrictions or clauses which must not be contained in the agreements."[52] The provision of blacklisted clauses is built on the assumption, supported by economic analysis, that some conduct will always be detrimental for competition. Blacklisted clauses have been increasingly used in all the Block Exemption Regulations adopted in competition law.[53]

The provision of a specific list of per se prohibited clauses represents one of the major innovations introduced by the Directive. The declared aim is to increase legal certainty for traders and consumers, throughout Europe and within each single member state, as to which practices are forbidden. Nonetheless, when referred to commercial practices, this approach, that undoubtedly provides market players with a number of (fully harmonized) benchmarks, does not escape some possible criticisms.

First, the automatic presumption of illegality does not align with the market-oriented approach of the new rule. In fact, the practices are prohibited even if they do not produce any effect on consumers' behavior and are unlikely to do so.

49 Directive, *supra* note 1, at 26 (annex I).

50 Regulation 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, 1965 O.J. (L 36) 533.

51 Now Article 81(1).

52 *Ibidem* at art. 1(2).

53 *See*, in particular, Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, 1999 O.J. (L 336) 1; Regulation 2958/2000 on the application of Article 81(3) of the EC Treaty to categories of specialization agreements, 2000 O.J. (L304) 3; Regulation 2659/2000 on the application of Article 81(3) of the EC Treaty to categories of research and development agreements, 2000 O.J. (L 304) 7, all of which are still in force.

Second, possible interpretative issues may arise when applying the black list. Some of the expressions used in the list, such as "systematic failure" or "pertinent correspondence", are not so undisputed as to exclude any possible interpretative problems. If it is certainly true that at a national level those concepts have to be, and will be, interpreted according to settled case law and tradition, then it is also true that such an interpretation might give rise to a divergence of understanding, that is legal uncertainty, in the application of the black list in the Member States. In the following years, it will probably be the ECJ, via preliminary rulings judgments, that will settle the disputes concerning different national interpretation of these prohibited practices.

The final concern pertains to the static nature of the black list which, as mentioned earlier, can be modified only via a modification of the Directive, which is a very complex and time-consuming procedure.[54]

6. Article 4 of the Directive: The Internal Market Clause

As already argued, the main purpose of full harmonization is to make the EU internal market more effective. For this reason, Article 4 of the Directive provides that "Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive." This is the "internal market clause", which provides that Member States may not hinder, through their national rules, the effective achievement of the internal market. This type of clause generally refers to the principle of mutual recognition and home country control (also called the "country of origin rule"). According to this principle, each Member State can recognize as legitimate, and thus allow goods or services (such as commercial practices) legally produced or provided in another Member State (the country of origin) entrance into its territory. As a result, only the latter State exercises control with regards to the respect of the rules.

In the event of full harmonization, this principle should be implied. Nonetheless, the wording of Article 4 is not so unequivocal, showing a political compromise underneath it. This is even more so, if one compares the final version of the Article to its original draft in which the principle was clearly recognized.[55] Since some Member States were more in favor of allowing the hosting state to impose higher mandatory requirements in protection of consumers, the

54 *See supra* text, at Section II.A.

55 The original Proposal for the Directive, *supra* note 14, at art. 4 provided that:

> 1. Traders shall only comply with the national provisions, falling within the field approximated by this Directive, of the Member State in which they are established. The Member State in which the trader is established shall ensure such compliance.
>
> 2. Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

explicit reference to the principle has been eliminated from the final formulation of the Directive. If one were to interpret Article 4 as giving Member States the possibility to adopt stricter rules, this would jeopardize the same scope of the Directive, which, as already stated, tends towards full harmonization. However, the current formulation of Article 4 is not clear and leaves room for several plausible interpretations. We believe that, even without an explicit reference to the home country principle, Article 4 guarantees legal certainty via the provision of a rebuttable presumption of legality. Once a practice has been deemed fair by one Member State, it will be considered so in all other Member States until the contrary is proven. Such an interpretation seems to be the only one compatible with the intent of total harmonization.[56]

7. The New Rules in Relation to Existing EU Legislation

To guarantee coordination with existing rules on commercial practices, the Directive's action has been two-fold. On the one side, it has modified some other Directives. In particular it is worth mentioning that the scope of the Directive 84/450/EEC[57] on misleading and comparative advertising has been limited to business-to-business practices. Furthermore, among the conditions of allowance for comparative advertising, the not-misleading nature of the practice as defined in the new Directive has been added.[58] Further amendments have been made to the rules on unsolicited supply (Directive 97/7/EC).[59] The rules on injunction for the protection of collective consumers' interests have also been modified with the inclusion of the Directive in the list of directives covered by the scope of application of those rules (Directive 98/27/EC).[60] The object of the Directive has also been included in the topics where cooperation between the Commission and the national competition authorities is allowed in accordance with Regulation 2006/2004/EC.[61]

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56 *See* European Consumer Law Group, Proposed Directive on Unfair Commercial Practices, ECLG/134/2004 (Dec. 2004), *available at* www.europeanconsumerlawgroup.org; T. Wilhelmsson, *The Abuse of the Confident Consumer as a Justification for EC Consumer Law*, 27(3) J. Consumer Pol'y 317 (2004).

57 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, 1984 O.J. (L 250) 17.

58 *See* Directive, *supra* note 1, at art. 14.

59 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, 1997 O.J. (L 144) 19.

60 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 51.

61 Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)Text with EEA relevance, 2004 O.J. (L 364) 1.

On the other side, the Directive (and consequently the national implementing rules) explicitly limits its scope of application to areas where there are no "specific Community law provisions regulating specific aspects of unfair commercial practices."[62] Therefore, in strict application of the principle lex specialis derogat legi generalis, reflecting the omni-comprehensive scope of the EU legislator, the Directive is defined as having a residual nature.

Finally, the Directive establishes a transitional period allowing Member States to continue to apply until 2013 national provisions:

> "within the field approximated by (the) Directive which are more restrictive or prescriptive than (the) Directive and which implement directives containing minimum harmonization clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective."[63]

B. MISLEADING AND COMPARATIVE ADVERTISING

Following the adoption of the Directive, the EU rule of misleading and comparative advertising, as modified by the same Directive, has been codified in Directive 114. This Directive pursues a minimum harmonization goal. Accordingly, it does not prevent Member States from adopting more stringent provisions aimed at protecting competitors. Being an exception, the conditions of legality of comparative advertising are provided as exhaustive (i.e., fully harmonized). This approach reflects the great importance explicitly recognized by Directive 114 to this particular form of advertising for the fair and undistorted development of competition within the internal market.

The main difference between the previous rule and the new one is that the new one is limited to the business-to-business commercial practices. As stated in Article 1, the objective of Directive 114 is indeed to protect traders from misleading advertising and from its unfair consequences as well as to determine the conditions of legality of comparative advertising. Being the scope of Directive 114 the minimum harmonization of national rules, the new national rules are not entirely coincident with its provisions. Therefore, we describe the Italian rules with a particular focus on the prescriptions resulting from EU rules.

62 Directive, *supra* note 1, at recital 10.

63 *Id.* at art. 3(5).

The Italian legislator has substantially confirmed the previous rule on misleading advertising. It has adapted it to the novelties contained in Directive 114 and transposed it in an independent legislative tool (the LD 145). Under Article 1 of LD 145, publicity must be evident, truthful, and correct. It is considered misleading if:

(i) it is able to induce traders in error;

(ii) where, due to its misleading nature, it is able to distort their economic behavior; or

(iii) it is able to harm a competitor.

It seems unlikely that misleading advertising may be detrimental only to a competitor, and not also to final consumers. Therefore, the question is, if a behavior is misleading to both the competitor and the final consumers, does it infringe both the Directive and Directive 114? And may it be punished twice or does the violation of the former absorb the violation of the latter?

If a behavior is misleading to both the competitor and the final consumers, does it infringe both the Directive and Directive 114? And may it be punished twice or does the violation of the former absorb the violation of the latter?

These questions remain unanswered. In Italy, two factors seem to indicate that the dispute would be regulated exclusively by rules on business-to-consumer practices. First, the fact that those rules realize full harmonization and—in the EU legislator's intention—a complete abolition of all impediments to cross-border transactions seems to indicate that, where consumers are involved, these rules prevail and apply to all practices. Second, and this is simply a factual observation, officials of the Italian Competition Authority, in their first interpretation given to the new rules, have also taken this position.[64]

To determine the misleading character of the advertising, all its features and aspects must be considered, and in particular:

(a) the main characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use;

(b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided; and

(c) the nature, attributes, and rights of the advertiser, such as his identity

64 Le nuove regole delle pratiche commerciali aggressive, sleali, ingannevoli, ITA Conference Milan (Nov. 15-16, 2007).

and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.[65]

Article 5 of LD 145 requires that the advertising nature of the practice has to be clearly detectable and prohibits every form of subliminal campaign. Moreover, LD 145 reproduces, in Articles 6 and 7, the rules protecting health and safety as well as children and adolescents provided by Articles 21(3) and 21(4) of the Consumers' Code.[66] In addition, the rule protecting children includes a further paragraph that defines as misleading the publicity that abuses children's credulity and lack of experience or that uses children and adolescents in an advertising campaign (besides when explicitly allowed by law).[67] These articles (which as already mentioned are not included in the original Directives) confirm the special sensitivity demonstrated by the Italian legislator toward the protection of children and of health and safety.

Finally, Article 4 reproduces the conditions of legality of comparative advertising listed in Article 4 of Directive 114. These conditions realize a full harmonization of the EU rule in this sector. Comparative advertising will be permitted when (all) of these conditions are met:

(a) it is not misleading;

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more materials, relevant, verifiable, and representative features of those goods and services, which may include price;

(d) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; and

65 Directive 114, *supra* note 36, at cf. art. 3.

66 *See* page X of this paper.

67 Consumers' Code, *supra* note 2, at art. 7.

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

The third paragraph of Article 4, adding something to the provisions of the Directive, specifies that in the case of special offers, their terms of validity have to be indicated clearly and unequivocally.

IV. The Italian Administrative and Judicial Protection of the Rights Granted by the New Rule

It is an established principle of EU law that Member States are substantially free, in the framework of their domestic judiciary system, to set the rules they consider most appropriate to protect individuals' rights deriving from EU law. Member States are only bound by the principle of effectiveness and equivalence. Accordingly, the Directive has left a great deal of the part dedicated to the enforcement provisions to Member States' discretion.[68] They have been only required to guarantee "adequate and effective means … to combat unfair commercial practices in order to enforce compliance with the provisions of the Directive."[69] To this aim, the Directive has left open a number of provisions that States are allowed to adopt that may better suit their national system.

As for the Italian implementing legislation, it has to first be said that the two new rules, as introduced by LD 145 and LD 146, have both granted wide powers to the national competition authority (the Autorità) for the effective protections of rights guaranteed by the new rules. To this end, the Autorità can investigate and sanction unfair practices in a way that is largely comparable with the Italian competition act. This circumstance seems to suggest that the Italian legislator assigns the same social disvalue to antitrust violation (namely, collusive and abusive conducts) as to unfair practices. If this interpretation is correct, the approach, nevertheless, is highly debatable. In fact, it appears clear to us that the net social effect, in terms of total welfare decrease, of an antitrust infringement may be much larger than the effect of an unfair commercial practice which is likely to impact a limited number of consumers.

Even if the Directive does not require it, the Autorità has the power to initiate ex officio investigations[70] and to wait for a complaint (that can be lodged by all subjects or organizations with an interest to do so)[71] in order to open an inves-

68 *Id.* at art. 11-13.

69 *Id.* at art. 11(1).

70 This power is granted by Article 8(2) of LD 145 in case of misleading and comparative advertising and by Article 27(2) of the Consumers' Code in case of unfair business-to-consumer practices.

71 Procedural regulations, *infra* note 70, at art. 5. Also these provisions are not entirely clear about what type of "interest" an organization must have to ask the Authority intervention.

tigation. What is more, the procedural regulations, recently approved by the Autorità,[72] have granted the power to initiate a procedure to the official responsible for the procedure "having considered all the elements in his possession or brought to his attention by complaints."[73] This clearly gives enormous, as well as questionable, discretional power to initiate antitrust investigations to a single individual rather than to the Autorità as a whole.

Furthermore, this official maintains a high degree of discretional power during all of the procedures. In fact, he is entitled to play a substantial role already in the pre-investigative phase. In particular, before opening an investigation, the official has the opportunity to collect whatever material he might consider useful to the evaluation of the circumstance, and to request information and documents of all private or public subjects. At the same stage, except in instances of particularly grave conduct, the official, having informed the plenum of the Autorità, can invite the trader to eliminate "the elements of potential unfairness" through "more suasion".[74]

This last possibility is actually quite odd. It implies that, standing an alleged infringement of the new rule(s), the official can invite the trader to stop the practice. Thus, if the trader is effectively perpetrating an infringement, then it has an opportunity to eliminate the possibility of procedures with no consequences whatsoever and, apparently, without giving any compliance guarantee. But, what happens formally to the illicit? Is the response potentially given to the "invitation" binding? And, if so, according to which normative provision? The answers to these questions remain obscure.

During the procedure, the official has the power to ask for all information considered necessary, of all public or private subjects, and to dispose the hearing of the parties.[75] Only in order to carry out inspections, with the help of fiscal police, the authorization of the Autorità is required.[76] Once again, these powers seem overly broad.

The second main feature of the procedure is that it is based somewhat on an inversion of the burden of proof. The new rules state that, where justified by the

72 The power to self-adopt procedural regulations is granted to the Autorità under Article 8(11) of LD 145 in case of misleading and comparative advertising and under Article 27(11) of the Consumers' Code in case of unfair business-to-consumer practices.

73 Regolamento sulle procedure istruttorie in materia di pubblicità ingannevole e comparativa illecita (adopted with decision 17590/2007 on the 15 November 2007, GU 283/2007) and Regolamento sulle procedure istruttorie in materia di pratiche commerciali scorrette (adopted with decision 17589/2007 on the 15 November 2007, GU 283/2007) [hereinafter Procedural regulations].

74 Procedural regulations, *supra* note 72, at art. 4.

75 *Id.* at art. 12.

76 *Id.* at art. 14.

circumstances of the case, the Autorità can ask the trader to prove the correctness of the factual data shown in his commercial practice. If the demonstration is omitted, or considered insufficient, the data are considered incorrect.[77] The policy choice of the legislator has strong implications and provides the widest spectrum of regulatory powers to the Autorità. The problem here is that the procedural regulations[78] have imparted the power to dispose the inversion of the burden of proof on the individual responsible for the procedure, not the Autorità. This poses, once more, an issue of conformity with the principle of legality, together with a clear interpretative problem about what is and is not considered the Autorità, when the law refers to it.

Another significant innovation is the ability of the trader, except in case of practices seriously and manifestly misleading, following the opening of the procedure, to offer commitments to eliminate the profiles of illegitimacy of the practice.[79] Where the Autorità considers those commitments appropriate, it can make them binding on the trader (even if the procedural rules say "make" them binding, contrary to the Legislative Decrees that use a more hypothetical "can make") and can order their publication at the trader's expense. The clear advantage for the trader in presenting commitments is that the procedure is closed without any admittance of guiltiness and, consequently, with no decision ascertaining (and declaring) a violation of the rules. For the Autorità, this should guarantee a shortened procedure and significant cost-saving that, considering its scarce resources, should allow it to pursue more cases.

FOR THE AUTORITÀ, THIS SHOULD GUARANTEE A SHORTENED PROCEDURE AND SIGNIFICANT COST-SAVING THAT, CONSIDERING ITS SCARCE RESOURCES, SHOULD ALLOW IT TO PURSUE MORE CASES.

Nonetheless, what is not clear from these provisions is the possible practical content of these commitments. In the Italian antitrust act, the recently introduced possibility to offer commitments[80] is clearly second to the elimination of

77 Consumers' Code, *supra* note 2, at art. 8(5) of LD 145 & 27(5).

78 Procedural regulations, *supra* note 72, at art. 15.

79 *See* Consumers' Code, *supra* note 2, at rt. 8(7) of LD 145 & 27(7). Those provisions have been specified and implemented by Article 8 of the Procedural regulations (*supra* note 72).

80 Referring to Article 9 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003 O.J. (L 1) 1), Legislative Decree 223/2006 has introduced the new Art. 14*ter* of the Italian Competition Act (l. 287/1990). The new article allows firms to offer commitments aimed at meeting concerns expressed by the Autorità and at eliminating the alleged anticompetitive conducts. *See* W. P. J. Wils, *Settlement of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003*, 29(3) WORLD COMPETITION 345 (2006); L. Di Via, *Le decisioni in material di impegni nella prassi decisionale dell?autorità garante*, IX(2) MERCATO CONCORRENZA E REGOLE 229 (2007); F. Cintioli, *Le nuove misure riparatorie del danno alla concorrenza*, *in* I GIURISPRUDENZA COMMERCIALE 1 (forthcoming 2008).

the anticompetitive distortions of the market as a result of the undertaking's behavior by means of the proposed commitments. On the contrary, in the new rule, it is not entirely clear what the content of the trader's proposal should be and, in particular, if the mere guarantee not to perpetrate the practice anymore should be considered appropriate. If this is the case, the rule should be strongly criticized since it would allow the trader to violate the rules and, should a proceeding be initiated, solve everything with a simple "sorry, I won't do that again". This is not, in our opinion, in the spirit of the rules. The problem is that it is actually quite complicated to foresee a different content for commitments in this field, where the elimination of the profiles of illegitimacy can hardly consist in something different than stop the practice.

Another power given to the Autorità is to adopt, acting on its own initiative, interim measures that suspend the commercial practice or the advertising.[81] Once more, the transposition of the new powers bestowed on the Autorità by the Italian competition act in case of antitrust violation appears to be rather mechanical.[82] It is currently unclear, or even imaginable, what grave and irreparable damage (to the market or to consumers?) could arise from the perpetration of the conduct justifying the adoption of interim measures.

At the outcome of the proceeding, the Autorità can prohibit the diffusion or the continuation of the practice, order the publication of its decision at trader's expenses, or order the publication of the corrective declaration aimed at impeding the practice to produce further effects. With the decision, the Autorità can also impose pecuniary sanctions ranging from EUR 5,000 to 500,000. Moreover, in the case of repeated non-compliance with its interim measures and decisions, or with the approved commitments, the Autorità can impose a sanction of up to EUR 150,000 (minimum EUR 10,000) and suspend the trader's commercial activities.

Appeals against decisions of the Autorità are subject to the exclusive jurisdiction of the administrative judge, which, in the Italian legal system, means the jurisdiction of the Regional Administrative Tribunal of Lazio (TAR Lazio) in first instance and the Consiglio di Stato as the judge of second instance reviewing the legality of the act.

81 Procedural regulations, *supra* note 72, at art 9.

82 Law Decree 223/2006 (that later become Law N. 248/2006) has introduced the new Article 14*bis* of the Italian Competition Act (l. 287/1990) allowing the Autorità to adopt interim measures in cases of urgency due to the risk of serious and irreparable damage to competition.

A. SELF-DISCIPLINE AND CODES OF CONDUCT

Finally, it is certainly remarkable that, following the dispositions of the Directive,[83] the Italian rules give a strengthened and renovated role to code of conducts, adopted by entrepreneurial and professional associations and organizations, disciplining the conduct of traders that commit themselves to respect them. The codes are supposed to indicate the subject (or the body) responsible for supervising their effective implementation. Interestingly enough, codes have to be available also in English and "properly" made known to consumers.[84] These rules seems to be aimed at encouraging the extension of companies' activities, and to the entrepreneurial world as a whole, of codes of conduct inspired by the deontological codes disciplining liberal professions. This certainly appears to deserve encouragement and support.

Article 27-*ter* of the Consumers' Code and Article 9 of LD 145 provide for forms of self-discipline, allowing consumers and traders to agree on resorting to the subject responsible for the effective implementation of codes of conduct—prior to the regular procedure in front of the Autorità—in order to consensually solve the dispute concerning the unfair practice. In doing so, parties can agree not to resort to the Autorità until the final pronouncement.

These rules seem to envisage an alternative dispute resolution system (ADR) that is somewhat non-mandatory and discretional for the parties and, if used effectively, might reduce the workload of the Autorità. Given the fact that the right to go to the Autorità for recourse is completely unaffected by the opportunity offered by the ADR, and the fact that in Italy ADR plays a relatively small role, it will be interesting to see if practical results will be obtained. An opportunity to attain this is given, at least in case of unfair business-to-consumer practices, by the Autorità and professional and entrepreneurial associations, and organizations compelled to periodically transmit to the Ministry for Economic Development all decisions adopted under the new rule. The Ministry intends to make public the key facts about the decisions adopted, their content, and the adopting authority. The Italian legislator intends, and this is likely to happen after the start-up period, that this should create a kind of case law and maxims digest that should reduce future disputes and, in particular, recourses to the Autorità.[85]

83 Directive, *supra* note 1, at art. 10.

84 *See* Consumers' Code, *supra* note 2, at art. 27*bis*.

85 *Id.* at art. 27*quater*.

V. Conclusions

In this paper, we have described the characteristics and the structure of the new rule focusing on the main innovations brought about by the EU (and Italian) system of consumer protection and advertising regulation. We have also focused on possible discrepancies between the Italian rules and the provisions of the Directive that, in a field of law leaning towards full harmonization in Europe, might create some systemic inconsistencies.

Having described the material provisions of the Directive, a few words are needed to describe the interplay existing between the general prohibition clause, the two sub-categories, and the black list. Stuyck, Terryn, and Van Dyck's (2006)[86] interpretation is very interesting, as it describes the three levels as non-concentric circumferences, none of which entirely coincide with one another. According to the three authors, for each of the three categories of practices there are some practices that do not overlap with the other two categories. This would imply that the general prohibition clause of Article 5 does not comprehend all practices and, accordingly, that some misleading, aggressive, and blacklisted practices escape the general definition of unfairness.

WE WELCOME ANOTHER STEP TOWARDS EFFECTIVE CONSUMER PROTECTION AND LEGAL CERTAINTY FOR MARKET OPERATORS THROUGHOUT THE WHOLE INTERNAL MARKET. NONETHELESS, WE ALSO EMPHASIZE THE PECULIAR CHOICE OF ADOPTING RULES AS DETAILED AS TO IMPEDE MEMBER STATES TO INTRODUCE EVEN MINOR AMENDMENTS THAT MIGHT BE TRIGGERED BY UNEXPECTED NATIONAL NECESSITIES OR MARKET DEVELOPMENTS.

In the absence of a more rigorous judicial interpretation clarifying the issue, we believe that the general clause will certainly also catch practices that are neither misleading nor aggressive (and, of course, also not blacklisted), as it constitutes a general prohibition that encompasses all practices able, in any way, to distort consumers' economic conduct. At the same time, it seems difficult to imagine conduct that is either aggressive, misleading, or blacklisted, and not, at the same time, unfair.

As for the policy choices of the EU legislator, we welcome another step towards effective consumer protection and legal certainty for market operators throughout the whole internal market. Nonetheless, we also emphasize the peculiar choice of adopting rules as detailed as to impede Member States, in a continuously changing sector, to introduce even minor amendments that might be triggered by unexpected national necessities or market developments. The difficulty faced by the EU system to maintain coherence and effective harmonization must also be stressed.

86 *See* Stuyck et al. (2006), *supra* note 3, at 132-34.

Finally, describing the system of administrative and judicial protection structured by the Italian legislator and by the same Autorità, we have focused on a number of inconsistencies and debatable legislative choices that, in few cases, also raise the question of the compatibility of the drafted system with the general principle of legality. In particular, the degree of discretion recognized to the official in charge of the procedure has raised serious doubts and perplexities.

After only a few months since the effective implementation of the Directive, it is still quite difficult to foresee the effects it will have on consumer protection and traders' and companies' behavior. Experience and concrete cases, together with some resolving ("harmonizing", some might say) preliminary rulings of the ECJ, will clarify a number of open interpretative issues. In the case of Italy, in particular, there are a number of new rules that have to be tested for their impact on the market and, more generally, on the country's existing culture of consumer protection. The Autorità has very recently activated, and published on its website, a free phone number that can be used by consumers to point out cases of suspected unfair commercial practices, or misleading and occult advertising. Apparently the line is very busy and receives an enormous number of calls every day. If this is true, then it might be a sign of the increasing establishment of a culture in which consumers are aware of the necessity of truly effective competition, of their rights, and of the necessity to personally take action to enforce them.