

PROPOSED DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES

Geraint Howells, Professor of Law, University of Sheffield

Background

Consumer law has been greatly influenced by the impact of Europe. Product liability¹ and safety² are clearly directly influenced by EC Directives. Consumer contract law has also been changed by the impact of the directives on unfair terms³ and sales law⁴ and other areas like consumer credit⁵ have been addressed albeit to a more modest extent. One feature of much of this legislation has been the reliance on general clauses, most prominently in the Unfair Terms Directive which introduced the good faith concept into British law. It is understandable why Europe should prefer general clauses: they are common place in the Civil Codes of Europe and it is easier to agree on general principles than to negotiate detailed regulation at the Council table. The common law is traditionally hostile to such general clauses, but the OFT has easily come to terms with the Unfair Terms Directive and has made great use of its new powers.

The Community has always had an interest in trading practices law concerning the way products are advertised and marketed. Even if the *Keck*⁶ decision means that national regulation can less easily be attacked though negative harmonisation based on article 28 of the Treaty, the Commission has continued its process of positive harmonisation. These include specific measures relating to matters such as price indications⁷ as well as broader measures related to misleading and comparative advertising⁸, distance selling,⁹ distance marketing of consumer financial services¹⁰ and e-

¹ Directive 85/374/EC: OJ 1985 L 210/29.

² See now, Directive 2001/95/EC: OJ 2002 L 11/4.

³ Directive 93/13/EEC: OJ 1993 L 95/29

⁴ Directive 99/44/EC: OJ 1999 L 177/12.

⁵ Directive 87/102/EEC (as amended): OJ 1987 L42/48.

⁶ *Keck and Mithouard*, joined cases C-267/91 & C-268/91 [1993] ECR I-6097.

⁷ Directive 98/6/EC: OJ 1998 L80/27

⁸ Directive 84/450/EEC: OJ 1984 L 250/17 as amended by Directive 97/55/EC: OJ 1997 L 290/18.

⁹ Directive 97/7: OJ 1997 L 144/19.

¹⁰ Directive 2002/65/EC: OJ 2002 L 271/16.

commerce.¹¹ The Commission is now promising a more ambitious general approach to the regulation of unfair commercial practices.¹²

It was perhaps natural for the Commission to think of moving towards a European duty to trade fairly (or, as it has become, not to trade unfairly). The move to introduce such a general duty has been carefully prepared. There have been background research reports¹³ and an Extended Impact Assessment¹⁴ in which your writer played a modest role. There has been a Green Paper on EU Consumer Protection¹⁵ and Follow-Up Communication.¹⁶ A proposal for a Directive concerning business-to-consumer commercial practices is currently being discussed.¹⁷

The DTI in the UK have been surprisingly supportive of the measure.¹⁸ Initially, although it conceded that the experience with the Unfair Terms Directive had been positive despite their earlier apprehensions, it still thought a broad duty to trade fairly was too unmanageable. However, the UK has changed its stance and supports the proposal. This is partly because the duty is now cast in the negative form of there being a duty not to trade *unfairly* and partly one suspects it is due to a recent DTI comparative study which highlighted the lack of a general duty as one thing preventing the DTI achieving its objective of being on a par with the world's best consumer protection agency by 2006.¹⁹ It was also no doubt heartened by a report from my colleagues at Sheffield University, which suggested the concept of a general duty was not too alien to the English tradition.²⁰

¹¹ Directive 2000/31/EC: OJ 2000 L 178/1.

¹² COM (2003) 356. Although some specific rules will continue as evidenced by the current proposal for a regulation on sales promotions.

¹³ Studies by View, Price Waterhouse and Lex Fori and one co-ordinated by Profs Schulze and Schulte-Nölke are available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm

¹⁴ Available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/impact_assessment_en.pdf

¹⁵ COM (2001) 531.

¹⁶ COM (2002) 289.

¹⁷ COM (2003) 356. DTI issued a consultation paper, *Unfair Commercial Practices Directive – Consultation on a draft EU Directive COM (2003) 35* in July 2003.

¹⁸ Ibid.

¹⁹ *Comparative Report on Consumer Policy Regimes*, (October 2003).

²⁰ R. Bradgate, R. Brownsword, C. Twigg-Flesner, *The Impact of Adopting a Duty to Trade Fairly*, (July 2003) available at <http://www.dti.gov.uk/ccp/topics1/pdf1/unfairreport.pdf>

Internal market and maximal harmonisation

A general duty along the lines of the current proposal has long been on the wish list of many in the consumer movement. The efforts of Sir Gordon Borrie to introduce the concept, when he was Director-General, came to nought. One might therefore anticipate this European initiative would be welcomed by consumer representatives. Indeed it has its supporters within the consumer movement. However, there is also some apprehension. Not because of the proposal's substantive content: much of this is widely welcomed. Rather it is the manner in which the proposed general duty will interact with national law that is causing most concern.

Consumer law directives typically rely for their legal basis on their being justified as internal market measures, albeit that the Treaty calls for a high level of protection to be taken as a base.²¹ Consumer measures can be justified as internal market measures where differing national rules operate as barriers to trade or distort competition.²² Traditionally European consumer law directives had a minimal harmonisation clause, allowing member states to maintain or introduce stricter measures of protection. Clearly the minimal harmonisation approach merely brings the systems closer together. This may address the distortion of competition issue if the European level is sufficiently high so that any additional national legislation is insignificant. However, even minor additional national rules can act as barriers to trade, particularly, if they require changes to be made to the content or presentation of the product or service.

Business obviously would prefer to only have to comply with one set of rules set down by Europe and not have to comply with 15 (soon 25) sets of additional national rules. The EC –dominated as it is by an internal market philosophy- is increasingly favouring such solutions which either remove member states' competence in areas governed by EC directives or, as in the present proposal, establishes a system of mutual recognition so that traders only have to comply with the national rules of members states in which

²¹ Art. 95 and art. 153(3)(a).

²² *Germany v European Parliament and another (supported by France and others, interveners)*, C-376/98 ; ECJ 5 october 2000, *R v Secretary of State for Health and Others , ex parte Imperial Tobacco Ltd and others* , C-74/99, (2000) All ER (EC) 769

they are established.²³ Thus, whilst in theory the members states would be free to retain national laws, they would not be allowed to enforce them against businesses established in other member states.

The risk is that the proposed directive will result in national deregulation. If, for instance, some provisions of the Trade Descriptions Act 1968 could not be enforced (because they exceeded the level of protection allowed by the Directive) against businesses trading in Britain, but established in other member states, why should British companies be placed at this competitive disadvantage? National deregulation may be a good thing where the national rules are too high (perhaps because they have not changed with the times) or act as protectionist barriers to trade. However, national difference may also be justified for various socio-economic and cultural reasons. This might even include an expectation by consumers in some states that they do not have to be very careful consumers, as in the past their state was protected them on the assumption that they are careless and gullible. Moreover, even if one agrees with the basic philosophy of the proposed Directive, one might be reluctant, just yet, to give up tried and trusted national measures for a newly created general clause whose concrete application is still uncertain. This is especially so as there is no provision for emergency measures to counter new practices that might, perhaps for technical reasons, fall outside the Directive.

More critically one might suggest that the Directive's level of protection is adapted from European Court jurisprudence and pitches the level of protection too low. The standard adopted by the Court was perhaps necessary to promote European integration and to protect the affluent well educated consumers that take advantage of the single market. It might not, however, be suitable for all citizens of the Community in all circumstances. Indeed diversity can be seen as essential to the maintenance of different national cultures and important to provide laboratories for testing different techniques of protection.

It has been suggested that minimal harmonisation would fail to address consumer lack of confidence when shopping across

²³ Art.4.

borders.²⁴ In fact this would only be a problem if the minimum standard was set too low. Having the possibility of higher protection when shopping abroad can hardly be a disincentive to consumers.

Business although obviously nervous of any new consumer protection initiative, is likely to appreciate the deregulatory tendencies of the proposed Directive. It is suggested that the Directive because of its maximal harmonisation stance will make it easier to do business across borders, but this is not as sure an outcome as one might expect. In the first place the proposed general clause proposed is not as extensive as many in continental Europe. It is limited to economic practices, and does not cover moral issues or practices that affect competitors but not consumers. These broader provisions could continue to be used against marketing practices at the national level, despite their being in compliance with the Directive. Furthermore, with a general clause the devil is in the application rather than the detail. Local knowledge will be needed to assess how courts and public authorities will apply the general clause. Indeed this can be less transparent than detailed national legislation.

Given the measure is only a proposal a detailed analysis of its provisions would be premature, but an outline would assist the reader to assess whether the fears expressed above should be taken seriously.

Prohibition of unfair commercial practices²⁵

Unfair commercial practices are prohibited. These are practices which contrary to the requirements of professional diligence materially distort or are likely to materially distort the economic behaviour with regard to the product²⁶ of the average consumer or the average member of a group if the product is specifically directed to a particular group of consumers. It then goes on to state that in particular misleading or aggressive practices (as spelt out in subsequent articles) are unfair. Annex 1 contains a “black-list” of practices that are always regarded as unfair.

²⁴ COM (2003) 356 at para 28.

²⁵ Art.5.

²⁶ Product is defined to include services: art 2(d)

Professional diligence is defined as “the measure of special skill and care exercised by a trader commensurate with the requirements of normal market practice towards consumers in his field of activity in the internal market”.²⁷ Does this standard import a requirement of negligence (or something even less demanding) that would undermine the UK tradition of strict liability in regulatory law; or could the failure to make out the due diligence standard be enough?

The proposed Directive talks about the average consumer, but then defines the average consumer as someone who is “reasonably well informed and reasonably observant and circumspect”.²⁸ Is the average consumer really so careful as that definition suggests? This definition was developed with the cross-border shopper in mind and might not work in all situations. The definition of average is adjusted when the commercial practice is specifically directed to a particular group of consumers to refer to the average member of that group. One can see how this might apply to some products like chair lifts that are clearly aimed at the elderly and/or infirm. But in such cases how do we amend the standard? Do we assume the average elderly person is less capable of protecting themselves? Clearly some elderly people have particular problems, but there is likely to be an angry reaction to the suggestion that the average elderly person is less capable than the average middle aged person of making their own decisions. Moreover, even if such a variable standard could be applied, many products may be heavily used by specific vulnerable groups but are not specifically directed at them. Are electric blankets specifically targeted at the elderly or expensive loans at low income over-indebted consumers?

There is an exception for practices that do not “materially” distort economic behaviour. This certainly excludes *de minimis* cases, but there must be some uncertainty as to whether the materiality criterion will be applied consistently across the breadth of Europe. What is material to an average Swedish consumer might not be to the average Greek.

It is worth emphasising that the proposed test of unfairness only concerns affects on the economic behaviour of the consumer. The

²⁷ Art.2(j)

²⁸ Art. 2(b).

fact consumer marketing practices lacks taste decency or social responsibility would not be relevant. The Commission also notes it would not cover slavish imitation or denigration of competitors; nor does it cover unfair practices between businesses, such as refusals to supply.²⁹

Misleading Commercial Practices³⁰

Misleading practices are those which in any way, including overall presentation, cause or are likely to cause the average consumer to take a transactional decision that he would not otherwise have taken. Central to the provision is the limitation to transactional decisions. This concept is not defined or expanded on. Is it limited to decisions to enter into a contract? Presumably it would have to extend to decisions not to enter into a contract, because its terms had been misrepresented to make an alternative more appealing. What about misleading conduct during a contract, for instance causing one to terminate a credit or hire agreement or to fail to complain about faulty goods or services. Are these transactional decisions?

The consumer's transactional decision must have been caused by his being deceived or likely to be deceived about a number of specific listed factors. The misleading provisions also covers practices leading to confusion about competitor products, but only to the extent the consumer rather than the competitor is harmed. Non-compliance with a code of conduct will be misleading, but under strict conditions: the commitment must be firm and capable of being verified and both the traders signing up to the code and its content must be publicly verifiable. Likewise non-compliance with an undertaking to a public authority is a misleading and hence unfair practice.

There are also interesting provisions making it misleading to omit to provide material information that the average consumer needs to make an informed transactional decision. This only applies where the trader has made an "invitation to purchase" and the proposal cites a list of matters considered material if they are not apparent from the context. Also material are information requirements in relation to advertising, commercial

²⁹ COM (2003) 356 paras 39-41.

³⁰ Art. 6-7

communications and marketing established by Community law and a non-exhaustive list of such measures is found in Annex 2. Hiding material information or providing it in an unclear, unintelligible, ambiguous or untimely manner are also treated as omissions, as is failing to identify the commercial intent of a commercial practice.

Aggressive Commercial Practices³¹

Aggressive conduct is directed at harassment, coercion and undue influence that significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. Undue influence is defined as "exploiting a position of power to apply pressure, without using physical force, in a way which significantly limits the consumer's ability to make an informed decision".³² A number of circumstances that should be taken into account are specified.

Codes of Conduct³³

Encouragement is given to the development of codes and to the use of bodies established by such codes for resolving disputes, so long as this is additional to court or administrative proceedings.

Enforcement³⁴

Persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices must either (i) be allowed to bring legal actions against such practices, and/or (ii) bring the practice to the attention of the competent authorities who can either decide on complaints or initiate appropriate legal proceedings. Member states are free to decide which form of redress to allow and whether redress to alternative dispute resolution bodies should be required in the first instance.

There must be powers (including accelerated procedures) to order the cessation of a practice or its prohibition even without proof of

³¹ Arts 8-9.

³² Art. 2(1).

³³ Art.10.

³⁴ Arts 11-13.

loss or damage and without evidence of intention or negligence on the part of the trader. How the absence of negligence provision sits alongside the requirement of breach of professional diligence is not entirely clear. May be the answer lies partly in misleading and aggressive practices always being deemed to fall below the standards of professional diligence. Member states can require publication of the decision and the publication of a corrective statement.

Courts and administrative authorities can require traders to substantiate factual claims. Failure to furnish such information or provision of insufficient information allows the claim to be considered inaccurate.

Penalties must be provided for breach of national provisions. These must be “effective, proportionate and constitute a deterrent.”

Information³⁵

Member states must take appropriate measures to inform consumers of their national implementing measures and encourage trade and professional organisations to inform consumers of their code of conduct.

Conclusion

It looks likely that Europe will adopt a Directive on unfair commercial practices. The general principle is to be applauded, but there are some reservations about this particular proposal. It seems too confident about the abilities of the average consumer. Moreover a system which only protects the average consumer is wrong. The interests of the vulnerable have to be taken into account even if sometimes the general good means that protection cannot be extended to cover them. The present proposal does not even take the concerns of the lower than average consumer into account. This is particularly problematic as the Directive will seek maximal harmonisation. Europe is not yet so uniform that this can safely be achieved and certainly it would be rash to throw out tried and tested national laws for a new general clause of uncertain application. Ideally the Directive should be a minimal harmonisation directive. At the very least there should be a

³⁵ Art.17.

safeguard clause allowing member states to adopt provisions to adapt to new emerging problems under the surveillance of the Commission.

In its present form this proposal cannot be implemented simply by adding on regulations to the existing laws, as has been done with say unfair terms³⁶ and sale of goods.³⁷ It will require a wholesale appraisal and reformulation of national trade practice law of both a horizontal and vertical character. This is a topic which will dominate consumer protection law reform for the next decade.

³⁶ See now Unfair Terms in Consumer Contracts Regulations 1999: S.I. 1999/2083.

³⁷ Sale and Supply of Goods to Consumers Regulations 2002: S.I. 2002/3045.