

CONSUMER PROVISIONS IN THE ENTERPRISE BILL- PAST, PRESENT AND FUTURE REGULATION OF FAIR TRADING

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PAST - PRE-EXISTING LAW

The Office of Fair Trading (OFT) is the main body charged with protecting the economic interests of consumers. The Fair Trading Act 1973 never actually established the OFT but it grew up around the office of the Director General of Fair

Trading. The Act introduced a range of powers and duties on the Director General

many of which are being overhauled by the Enterprise Bill.

Part II of the Fair Trading Act 1973 introduced a scheme whereby the Director General could propose amendments to the law where the consumer's economic interests were threatened. Unfortunately the Part II procedure was widely viewed as a failure. Its legal powers were too narrow and the procedures too cumbersome. Only three orders were made under it.

S.124(3), Fair Trading Act 1973 imposes a duty on the Director General 'to encourage associations to prepare and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers in the United Kingdom'.

In 1991 the Office of Fair Trading adopted a new approach to the development of codes: instead of negotiating their detailed wording, the Office would instead endorse codes which met a series of 'best practice' criteria. These required:

- (i) the trade association to have a significant influence on the sector;
- (ii) compliance with the code to be mandatory for members;
- (iii) consultation during the preparation of the code with consumer organisations and enforcement bodies and with the Office of Fair Trading on competition aspects;
- (iv) the code to give consumers genuine benefits above legal requirements, to set high standards and remove undesirable practices;
- (v) information to be provided to consumers, publicity to be given for the code and those who comply with it and copies of the code to be made available;
- (vi) adequate complaints-handling machinery, a conciliation service and a low-cost independent arbitration scheme;
- (vii) monitoring, with annual reports; and

(viii) provision for penalties and mechanisms to ensure that judgments can be enforced against defaulting members.

Following an internal review an element of independence was required for both redress and disciplinary procedures from 1993.

Rogue traders

Part III, Fair Trading Act 1973 provides a mechanism by which the Director General can seek assurances from individual rogue traders or as a last resort (where a trader has persisted in a course of conduct which is unfair and detrimental to consumers) go to court to obtain an undertaking or order. The Director General's powers arise when persons carrying on a business persist in a course of conduct which is both detrimental to the economic, health, safety or other interests of consumers in the UK and is unfair to consumers according to the Act's criteria. Unfairness for these purposes includes contraventions of any enactment which imposes duties, prohibitions or restrictions enforceable by criminal proceedings, whether or not that enactment was an explicitly consumer protection measure and irrespective of whether there has been an actual conviction. Additionally unfairness also includes breaches of contractual or other duties enforceable in civil proceedings which arise in the course of business. There must therefore have been a breach of the civil or criminal law, though this need not have been established by a court.

The procedures are long-winded and , even if an assurance or court action eventually results, the practice will meanwhile have continued – to the consumer detriment – for a long time whilst evidence is collected and the procedures gone through. A major problem is the requirement to show that the business has 'persisted in a course of conduct'. Even once a persistently unfair course of conduct has been established, before taking court action the Director General has first to use his best endeavours to obtain a written assurance from the trader that he or she will refrain from that or any similar conduct in the course of that business.

Reform

On several occasions, the Director General has suggested the addition of a fall-back power to catch rogue traders more effectively than under the present law. An ambitious discussion paper *A General Duty to Trade Fairly* was put out in 1986 followed by a more pragmatic report, *Trading Malpractices*, in 1990. For several years there was much discussion, but little action. More recently a new emphasis has been given to consumer protection. The OFT has revised its approach to Codes of Practice and the DTI has taken on this initiative as well as supporting a revision of Part III Fair Trading Act in its recent White Paper.

In *Voluntary Codes of Practice (1996)* the OFT found that many codes are not well respected by enforcement authorities and consumer advisers and that the current arrangements had to be improved. Its report *Raising Standards of*

Consumer Care (1998) proposed a radical overhaul with the BSI being suggested as a body that might develop a core standard and a suite of sectoral standards which businesses would sign up to in order to be able to display a 'better trader' logo. The proposals ran into problems from the trade side. It was clear that trade associations were concerned about ceding the power both to develop codes of practice themselves and to discipline their members. It was also suggested that BSI procedures that worked well for technical standards were too cumbersome for these types of procedures.

In the DTI's *White Paper - modern markets, confident consumers* the government's approach is essentially to give the OFT the role of developing core principles which the codes should comply with. It also proposed the OFT be allowed to award a seal of approval to codes.

It is worthwhile to quote in full the proposed core principles for codes

"Consumers should see:

- truthful adverts
- clear, helpful and adequate pre-contractual information
- clear, fair contracts
- staff who know about and meet the terms of the code as well as their legal responsibilities
- an effective complaints handling system run by the business
- if problems cannot be resolved in-house, an effective and low cost redress mechanism
- publicity about the code from the business and the sponsors, including a report on the operation of the code

Behind the scenes

- the sponsor should have a supervisory body for the code made up of people from the sector and consumers, with some independent members
- the sponsor should tailor the core principles to develop its own code, taking into account the needs and characteristics of the sector such as the size of businesses within it, and keep it up to date
- businesses in the sector should agree to deliver on the principles in the tailored code and report regularly to the sponsor on the operation of the code
- the sponsor should provide an effective and low cost redress mechanism in the event of an unresolved dispute between a member and a consumer
- the sponsor should put into place an effective system to underpin compliance and to address breaches by members
- the redress and compliance systems should, wherever necessary and possible, include an independent element
- the sponsor should publish a report on compliance with the code and complaints about its operation.

The DTI fleshed out its approach in a number of *White Paper-follow up reports*:

Policy Paper on Codes of Practice - available at <http://www.dti.gov.uk/consumer/law/2.htm>

Reform of Part II of the Fair Trading Act 1973 available at <http://www.dti.gov.uk/consumer/law/7.htm>

Reform of Part III of the Fair Trading Act 1973 available at <http://www.dti.gov.uk/consumer/law/8.htm>

Although it should be noted that the final proposals in the Enterprise Bill do not always follow these documents.

Stop-Now Orders (E.C. Directive) Regulations S.I. 2001/1422

These implement Directive 98/27 on injunctions for the protection of the consumers' interests (OJ L166/51). They give the Director General of Fair Trading, public qualified entities, other UK qualified entity or a Community qualified entity the power to bring actions under s. 35 of the Fair Trading Act 1973 for any Community infringements. These are acts contrary to listed directives as transposed into the internal legal order which harm the collective interests of consumers. Qualified entities must be so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity, have demonstrated the ability to protect the collective interest of consumers by promoting high standards of integrity and fair dealing and be ready and willing to co-operate with other appropriate bodies with responsibilities under the regulations. The Director and any public qualified entity i.e. independent public body responsible for protecting the collective interest of consumers and listed in Sched 3 may bring proceedings in any other member state or bring proceedings in the UK on behalf of any qualified Community entity.

PRESENT - THE ENTERPRISE BILL/ACT

Office of Fair Trading

The Fair Trading Act 1973 had established the office of the Director General of Fair Trading and around him grew the Office of Fair Trading, but this had never been officially established. The Enterprise Bill abolishes the Director General and transfers his functions to the Office of Fair Trading which it establishes. Its general functions include the acquisition of information, provision of information to the public and making proposals or giving other information or advice to ministers. This last function makes the moribund Part II of the Fair Trading Act 1973 redundant and it is repealed.

Designated consumer bodies can make super-complaints to the OFT about any features, or combination of features, of a market in the United Kingdom

for goods and services which appears to be significantly harming the interests of consumers. The OFT must respond within 90 days.

Promoting good consumer practice

The OFT also has the function of promoting good consumer practice. In particular this involves making arrangements for approving consumer codes, giving its approval or withdrawing approval and providing for the use of an official symbol. The arrangements for such approvals will be published. One can imagine that this will follow the pattern outlined above.

Enforcement of consumer regulation

Terminology

Consumer means for domestic infringements where goods or services are supplied to an individual otherwise than in the course of a business by a person acting in the course of a business.

For Community infringements a consumer is a person who is a consumer for the injunctions directive or a listed directive as specified in sched 13.

Domestic infringements are those committed by a person in the course of a business, which fall within a specified range of acts of contraventions which amount to a breach of criminal or civil law or attempts to avoid such rules, and harms the collective interest of consumers in the United Kingdom.

Community infringements are acts of omissions which harm the collective interest of consumers and which contravene listed directives as given effect to by laws, regulations or administrative provisions of an EEA state or contravene such laws that provide additional permitted protections. These can be specified by the Secretary of State for the UK.

General enforcers are OFT, local weights and measures authorities and DETI in NI.

Designated authorities are those designated by order. They must be a body the Secretary of State thinks has as one of its purposes the protection of the collective interests of consumers. He must be satisfied any public body is independent. Other bodies must satisfy criteria specified in orders.

Community enforcer is any body specified in OJ that is not a general or designated enforcer.

An order can designate an enforcer in relation to all or specified infringements.

Enforcement procedure

An enforcement order must not be sought until there has been consultation with the potential defendant or OFT (if not enforcer). Consultation is not necessary if OFT thinks application should be made without delay.

Application to High Court or county court if business carried on in England, Wales or N.I. Court of Sessions in Scotland. In the case of a Community enforcer Court can question whether the purpose of the enforcer justifies it making the application. Other enforcers must notify OFT of result.

The OFT can direct that an application only be made by itself or only by such other enforcer as it directs.

Enforcement orders can be made if the court finds that the person has engaged in conduct which constitutes the infringement or in the case of a Community infringement finds the person named is likely to engage in conduct which constitutes the infringement. The use of the phrase conduct rather than the requirement of persistency or even that there have been a course of conduct should make it easier to obtain orders and undertakings. Account must be taken of any undertakings given and any failure to comply with them. The order must indicate the nature of the conduct that amounts to an infringement and direct the person not to continue or repeat it, engage in such conduct in the course of his business or consent or connive in the carrying out of such conduct by a body corporate with which he has a special relationship. The Bill sets out who are accessories to bodies corporate. The Court can require the order or a corrective statement be published by the defendant to eliminate any continuing effects of the infringement. Instead of an order the Court may accept an undertaking to the same effect. It is also possible to seek an interim enforcement notice. Enforcers can accept undertakings in similar terms to the court. The terms of the undertaking and the identity of the person who gave it must be notified to the OFT. Where the court has made an enforcement order, interim enforcement order or accepted an undertaking that is breached, the OFT has the same right to apply to court for an order as the original enforcer.

In the case of Community infringements every general enforcer and designated enforcer that is a public body can take proceedings in other EEA states for cessation prohibition of Community Infringements. Every general enforcer and every designated enforcer may cooperate with a Community enforcer for the purposes of bringing proceedings in EEA states or the exercise by the Community enforcer of its functions.

FUTURE - THE IMPACT OF EUROPE

Having just overhauled our fair trading laws everyone might be looking for a period of stability. However, this might be changed by the impact of Europe. In its Green Paper on Consumer Protection COM (2001) 531 the EC Commission suggested that greater harmonisation of fair trading laws were needed to complete the internal market. It consulted on whether this was best achieved by a series of specific directives or a mixed approach of a

comprehensive framework directive, supplemented by targeted directives where necessary. As regards specific proposals it seems clear that it favours a move towards maximal harmonisation in line with the proposed Sales Promotion Regulation. As regards a framework directive it raised the question of whether the general clause would relate to fair commercial practices or something more limited like deceptive and misleading practices. The issues of whether there should be practical guidance was also raised as was the development of codes. Codes would remain voluntary and at that stage the Commission was reluctant to have a role in approving codes, but in the Follow-up Communication it said it would consult on its role in relation to codes. It also proposed to improve enforcement procedures by increasing cooperation between national bodies.

In its Follow-up Communication COM (2002) 289 the Commission seemed to favour a framework directive based on maximum harmonisation and the principles of mutual recognition and country of origin control. The legislation should be based on fair commercial practices based around the unfairness of the practice and a consumer detriment test. The general clause would be supplemented by a number of specific rules and a non-exhaustive list of examples would be drawn up. Possible elements of the fairness/unfairness categories were said to be a prohibition on commercial practices that mislead or are likely to deceive, a duty to disclose all material information, prohibition of physical force, harassment, coercion or undue influence and effective assistance and complaint handling in the after-sales period. The focus should be on practices that affect consumers as a whole rather than individuals and there should be injunction powers.