PRIVATE LAW IN EUROPEAN CONTEXT SERIES

The Forthcoming EC Directive on Unfair Commercial Practices

Contract, Consumer and Competition Law Implications

Edited by
Hugh Collins

Kluwer Law International

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The Forthcoming EC Directive on Unfair Commercial Practices

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VOLUME 5

For the
Society of European Contract Law (SECOLA)

Contract law is probably the most dynamic area of European Private Law and also the fundamental private law discipline in all national legal systems. SECOLA was founded to assist the study of European contract law and to enhance its quality. SECOLA organises an open, interdisciplinary, truly international and interdisciplinary discussion platform. The focus of the Society is upon newly enacted European Community legal measures, on core concepts in the field of European contract law, and on proposals for further legislation. The Society organises one or two international conferences each year, arranges for the publication of scholarly discussions in the field including books to be published in this series, and assists with other network activities. In addition, SECOLA is building up an information platform, systematically structured, containing all relevant European legal measures in full text in all official languages of the Community, together with their transposition into national laws and with reference to the pertinent scholarly literature (see www. secola.org).

This volume in this series was realised jointly by SECOLA with the London School of Economics and the British Institute of International and Comparative Law. It builds on the papers delivered at a conference held in London in May 2002, sponsored additionally by Allen & Overy, solicitors.

A list of previous titles in the series may be found at the end of this volume.

Preface

Bringing with them sunshine and hot weather, delegates to the second annual conference of the Society of European Contract Law (SECOLA) convened in London in May 2002 to discuss aspects of the progress towards European Union contract law. The focus of the meeting was on the law governing marketing, an emphasis prompted not only by the European Commission's recent Green Paper on Consumer Protection in October 2001 (Com (2001) 531), but also on the ground that this field was of particular interest because it investigated some of the most contested ground in the project of negative integration to complete the Internal Market. The meeting was conscious that if the Commission succeeded in justifying EC regulation of marketing practices and implemented a uniform legal regime in this area, it would constitute a major step towards the creation of an European Union law of contract more generally, not merely because this field is important in any system of law, but also because it might demonstrate by an example that uniform laws in relation to contracts are an essential ingredient in the aim of dismantling barriers to cross-border trade.

As ever, Professor Grundmann, as the President of the Society, provided the driving force behind the agenda for the meeting, and facilitated a fascinating discussion over the two days of the conference. The topic compelled a productive dialogue to open up between lawyers approaching the issue of unfair commercial practices from three perspectives: consumer protection regulation, competition law, and general contract law. Nor was the conference confined to purely legal analysis: perhaps the most intensive debates concerned the economic analysis of legal regulation, particularly with respect to the efficiency of consumer protection regulation and its compatibility with the agenda of promoting the competitiveness of markets. Hence, the essays collected in this volume, which represent revised versions of some of the papers presented at the conference, range over the fields of consumer law, competition law, and general contract law, and engage not only with legal problems, but also discuss the economic implications of different proposals for legal regulation of unfair commercial practices.

After the contributions for this book went to press, the Commission took a further step towards the realisation of its proposal to regulate unfair commercial practices. It published a draft Directive concerning business-to-consumer

commercial practices in the Internal Market.[1] The proposed Directive follows closely the ideas presented in the earlier consultation documents discussed in this volume. The central principle of the draft Directive is that 'unfair commercial practices are prohibited'.[2] The draft then proceeds to define commercial practices as unfair if (a) the practice is 'contrary to the requirements of professional diligence' and (b) it materially distorts the economic behaviour of the average consumer (or the average member of the particular group at which the practice is targeted). Without diminishing the generality of this principle, the Directive uses two further methods to give greater specificity to the concept of unfair commercial practices. It defines in general terms two types of unfair commercial practices: 'misleading commercial practices' and 'aggressive commercial practices'. In addition, the draft Directive proposes a 'black list' of commercial practices, which shall in all circumstances be regarded as unfair. Although this preface is not the place to discuss the details of these provisions for their substance is considered in the essays in this volume, it is worth highlighting here some of the major features of the draft Directive.

Perhaps most controversially, the Commission proposes that the Directive should be a measure of 'maximum harmonisation'. In other words, the Commission intends that the Directive should set both minimum and maximum standards for consumer protection against unfair commercial practices. Thus Member States cannot restrict the freedom to provide services nor restrict the free movement of goods for the reason that the marketing practices employed are regarded as unfair commercial practices by reference to standards other than those established by the Directive. There is also a 'mutual recognition' clause, which has the effect that traders engaged in cross-border activity need only comply with national laws of the Member State in which they are established. For example, if a business trading out of Belgium uses marketing techniques for selling goods in Italy that the Italian authorities regard as unfair to consumers, even if the commercial practices appear unlawful under Italian domestic law, any sanctions against the business can only be taken under Belgian law, and furthermore the applicable standards must only be those which serve to implement this draft Directive in Belgium.

This proposal for maximum harmonisation is likely to be highly contro-

[1] Brussels, 18.6.2003 COM(2003) 356 final; 20003/0134 (COD) (Draft Directive).

[2] Draft Directive, Article 5.1.

versial in those countries with high levels of consumer protection, which go beyond the standards contained in the Directive. Under this draft Directive Member States will not be able to enforce those added protections for consumers in so far as they deal with matters within the field approximated by the Directive. Thus the fear, discussed by several contributors in this volume, that the Commission, for the sake of completing the internal market, will insist on a levelling down of consumer protection as well as a levelling up, is fully realised. It would be ironical, to say the least, if a measure initially welcomed as a path-breaking initiative to protect consumers and to promote the internal market should turn out to be one that in fact diminishes the legal protection afforded to many consumers in Europe.

The precise extent to which Member States might be required to reduce levels of consumer protection if this draft Directive is implemented as it stands remains extremely difficult to establish. Harmonisation is only required within the field of unfair commercial practices in business-to-consumer transactions. It follows that strict harmonisation is not required for commercial practices which fall outside the scope of what is meant by 'unfair commercial practices' in the Directive. It is true that the scope of the Directive is extremely broad owing to its 'general clause' described above. This width is expanded, because a further clarification explains that the Directive applied to practices both before and after a commercial transaction has been made. Nevertheless, there are bound to be borderline cases where it can be contested whether a consumer protection measure in national law concerns an unfair commercial practice. For example, suppose that a German law requires a trader to provide a consumer with information about the environmental impact of a product, and that a French trader marketing products in Germany fails to comply with this requirement. Does the draft Directive pre-empt this German standard and prevent its enforcement? The answer depends on whether this disclosure requirement falls within either the scope of a 'misleading commercial practice', which includes misleading omissions to provide consumers with material information that they require to take an informed transactional decision,[3] or falls under the general clause defining unfair commercial practices described above. The emphasis of the draft Directive is upon consumers' economic interests, so perhaps their environmental concerns will not be covered. If, however, the German disclosure

[3] Draft Directive Art. 7.

requirement falls within the scope of the Directive it will be unenforceable against the French trader.

The precise impact of the Directive is further complicated by its focus on consumer protection. As the essays in this volume make abundantly clear, it is not straightforward to distinguish between, on the one hand, consumer protection measures, and on the other hand, laws designed to protect traders against unfair competition by other traders. Indeed most laws in this area have a double effect: they both protect the consumer and also prevent unscrupulous traders from obtaining a competitive advantage against rival businesses. For example, misleading claims that goods have been reduced in price ('sale', 'great bargains', 'prices slashed') both protect consumers against deception and protect rival businesses against unfair competition. Because this Directive has been proposed by the directorate of the Commission concerned with consumer protection, it only purports to harmonise the law governing commercial practices directed by traders towards consumers, and not to affect unfair competition between traders. Yet this dividing line is plainly an untenable distinction in practice. Many national legal systems make no such distinction, but rather have a unified consumer and competition law in this area. The European Community encountered this problem before in the context of comparative advertising, where one business denigrates by unfavourable comparisons the products of another. Is the requirement of truthfulness in such comparative advertising designed to protect consumers or to protect businesses?[4] The answer, of course, is both. But the proposed Directive is only intended to harmonise the law governing unfair commercial practices with respect to consumer protection not competition. How this distinction will be drawn is unclear. But it is an important distinction, because national laws that do not approximate to the standards of the Directive in the field of consumer protection will be unenforceable, whereas those that concern competition between businesses will be valid (provided, of course, that they comply with other European requirements of the internal market).

One further matter regarding the scope of the draft Directive should be noted here. The proposal is to preserve existing more specific Directives in so far as they provide specific requirements for traders to follow, such as a duty to disclose certain types of information. But the draft Directive is perceived to be a 'framework directive', by which is meant that the general clause is applicable to any unfair commercial practices, even if those practices have

[4] Directive 84/450, as amended by Directive 97/55.

been previously regulated in general terms. For example, the e-commerce Directive requires disclosure of certain types of information by the trader on the Internet, and the proposed Directive will add to this requirement by prohibiting the supply of this information in a misleading way.[5] An exception to this pattern is the replacement of the misleading advertising Directive by the proposed directive, except, of course, with respect to misleading advertising that harms other businesses.[6]

By these measures the proposed Directive seeks to avoid conflicts between it and existing or future Directives. But this purported reconciliation does not highlight the point that many previous Directives were minimum standards, so that Member States could preserve superior protection in national law for consumers. For example, the package travel Directive permits Member States to adopt more stringent consumer protection measures.[7] This permission must now be read in the light of the maximum harmonisation of the proposed directive on unfair commercial practices. Any more stringent measures for consumer protection with respect to package travel must not exceed the legal requirements of the general clause on unfair commercial practices. Again there seems to be the prospect of EC law compelling the levelling down of national measures of consumer protection.

The precise implications of this potential levelling-down effect are hard to predict, but it is worth noting here that they may affect not only trading standards but also measures designed to achieve effective enforcement. For example, where the burden of proof is placed can seriously affect the chances of successful enforcement against rogue traders. In the general clause that defines the concept of unfair commercial practices, there are two difficult matters to prove: that the trader has deviated from the requirements of professional diligence, and that the conduct is likely to distort the economic behaviour of consumers. One can predict that traders who may be challenged under this provision will insist that any claimant or enforcement body should prove deviation from professional diligence and distortion of consumers' economic behaviour, which may prove difficult. Under UK law this problem is

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[5] Directive 2000/31, OJ L 178, 17/07/2000, p.1.

[6] It is proposed to re-enact slightly altered provisions: Draft Directive, Art.14. There is also a proposal for a new Directive on consumer credit to replace Directive 87/102, OJ L278, 11/10/1988, p.33, which will be a maximal harmonisation Directive: COM (2002) 443 final, 2002/0222 (COD).

[7] Directive 90/314. OJ L 158/59, 23.6.90.

often addressed by the use of strict liability in criminal statues combined with a defence available to the trader that it had exercised 'due diligence'.[8] The effect of this provision is that the trader must demonstrate that it was careful to comply with the relevant standards, thereby imposing the burden of proof on the trader. It seems possible that the proposed Directive is inconsistent with such a reversal of the normal burden of proof, which would require UK law to be altered, thereby reducing the chances of successful prosecution.

This issue of effective enforcement is always a matter of prime concern in connection with the regulation of unfair commercial practices. Rogue traders have a habit of disappearing, changing their methods rapidly, and operating from remote locations. The proposed draft Directive adopts the now standard provisions of EC law to enhance enforcement possibilities including the use of consumer organisations and administrative enforcement agencies to bring complaints, and the availability of injunctions against unfair commercial practices.[9] Since the proposed draft Directive adopts the rule of 'mutual recognition', under which each Member State has exclusive control over traders established within their own territory, effective enforcement of the standard is plainly at risk where a trader operates out of one country, but harms the interests of consumers exclusively in other countries. The option canvassed earlier of dealing with this problem by a 'federal' or EU enforcement authority seems to have been silently dropped. It has been recognised for a long time, however, that if 'mutual recognition' is used, there needs to be effective co-operation in enforcement by national authorities.

Although the proposed draft Directive does not tackle this problem, the Commission has also proposed a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws.[10] In short the proposed Regulation requires 'mutual recognition' to be accompanied by 'mutual assistance' by designated competent authorities in each Member State. Mutual assistance includes a duty to supply information on request to a competent authority of another Member State, a duty to notify the competent authorities of other Member States when a competent authority becomes aware of infringements of Community consumer protection laws,

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[8] E.g. Trade Descriptions Act 1968, s. 24.

[9] There is a separate proposal for a consolidated or codified version of the Directive on injunctions for the protection of consumers' interests: COM (2003) 241 final, 2003/0099 (COD), 12.5.2003.

[10] COM(2003) 443 final, 2003/0162 (COD), 18.7.2003.

and a duty on request to take all necessary measures to bring about the cessation or prohibition of an infringement of EC consumer law. It is clear that without this mutual assistance envisaged in the draft Regulation, the enforcement of the proposed draft Directive on unfair commercial practices will be severely hampered. The two instruments need to be seen as a package, even though they have been separated into distinct legislative measures.

Finally, with respect to the content of the proposed draft Directive, considerable interest and concern, as reflected in the essays in this volume, was generated by the Commission's earlier reflections on the possible use of other non-legislative governance mechanisms such as 'soft law', 'co-regulation', codes of practice, and the like. In particular, voluntary codes of conduct are used in some countries both to help specify the legal requirements and also to ratchet up consumer protection standards. The proposed draft Directive permits national trade associations to enforce their own codes of conduct against their own members, provided that these rules do not exclude the application of the legislative standards.[11] It is also an automatically unfair commercial practice on the 'black list' to claim falsely either to be a signatory to a code or that the code has an endorsement from a public or other body.[12] But more concretely, it is also a misleading unfair commercial practice where a trader fails to comply with commitments contained in a code of conduct by which the trader has undertaken to be bound, provided that the commitment was firm and that the list of signatories to the code is publicly verifiable information.[13] Beyond these points, however, the Commission seems to have withdrawn, at least for the time being, from its more ambitious proposal to promote the use of European-wide codes of conduct in order to help specify the standard of unfair commercial practices. As a consequence, the criticism that the general clause governing unfair commercial practices is too vague to provide adequate guidance to businesses may be voiced again as an objection to the proposed Draft Directive.

Authors in this volume also raise questions about the implications of the proposed draft Directive for the evolution of general contract law. Although the scope of the draft Directive is confined to business-to-consumer transac-

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[11] Draft Directive Art. 10. This replicates the provision contained in the existing misleading advertising Directive.

[12] Draft Directive, Annex 1, paragraphs (1) and (2).

[13] Draft Directive Art.6(2).

tions, it sets a new standard for pre- and post-contractual dealings, which may have an impact, or at least an irritating effect, on general contract law in national legal systems. It may also indirectly lay the foundations for general standards in any evolving European general contract law. The proposed draft Directive declares that it is without prejudice to the rules on the validity, formation or effect of a contract.[14] Yet one wonders what national courts will do when faced with a purported contract which has been secured by the use of an unfair commercial practice: will they simply apply traditional national laws on the formation and validity of contracts, or will they strive to invalidate the contract? If the latter, which seems distinctly likely, they may be indirectly modifying the applicable national standards. This modification of national law may operate, however, either to improve or to weaken the protection of the victims of unfair commercial practices according to the prior position of national law.

The proposed draft Directive on unfair commercial practices is subject to the co-decision procedure, so that both the European Parliament and the Council must agree the final text. Although that process may prove lengthy, it seems from the rapid progress made with this Directive and its widespread support in both Council and Parliament that it fair for us to describe it in the title to this book as not merely a proposal but a forthcoming Directive.

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December 2003.

[14] Draft Directive Art.3(2).

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