

Opinion of the European Economic and Social Committee on the 'proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)'

COM(2003) 356 final - 2003/0134 (COD)

(2004/C 108/17)

On 25 July 2003 the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Economic Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 16 December 2003. The rapporteur was Mr Hernández Bataller.

At its 405th plenary session (meeting of 29 January 2004) the European Economic and Social Committee adopted the following opinion by 77 votes to eight with ten abstentions.

1. Introduction

1.1 In the green paper on consumer protection in the European Union ⁽¹⁾, the European Commission outlined the case for reform of EU consumer protection legislation, identifying a framework directive containing a general duty in relation to unfair commercial practices as a possible basis for reform.

1.2 The Committee issued an opinion on this green paper ⁽²⁾, expressing support for a framework directive and agreeing that 'a general clause containing a legal standard is a flexible and suitable instrument to govern marketing behaviour in a very dynamic area, which is constantly developing and undergoing change' ⁽³⁾.

1.3 The follow-up communication to the green paper ⁽⁴⁾ provided information on the results of the consultation and an outline of how the framework directive harmonising the relationship between unfair competition, consumer protection and the role of codes of conduct could be structured.

1.4 Around the same time the Commission approved a Communication on sales promotions in the Internal Market and a Proposal for a European Parliament and Council Regulation on sales promotions in the Internal Market ⁽⁵⁾. In its opinion on these documents ⁽⁶⁾ the Committee recommended that the Commission revise the proposal, taking particular account of the public debate on the green paper on consumer protection, so as to ensure that the various Community policies are consistent with each other.

2. Content of the proposed directive

2.1 The proposal defines the conditions which determine whether a commercial practice is unfair; it does not impose any positive obligations which a trader has to comply with to show that he is trading fairly.

2.2 It contains an internal market clause which provides that traders have to comply only with the requirements of the country of origin and prevents other Member States from imposing additional requirements on those traders who do so (i.e. mutual recognition).

2.3 It fully harmonises EU requirements relating to unfair business-to-consumer commercial practices and provides – according to the Commission – an appropriately high level of consumer protection.

2.3.1 This harmonisation relates to those unfair commercial practices which harm consumers' economic interests. Hence consumer health and the safety aspects of products are outside its scope, except misleading health claims which will be appraised under the provisions on misleading commercial practices.

2.3.2 The proposed directive will apply where there are no specific provisions in sectoral legislation governing unfair commercial practices. Where such specific provisions do exist, they will take precedence over the framework directive.

2.4 It contains a general prohibition which will replace existing national general clauses and divergent principles. Its aim is to define a common EU framework.

⁽¹⁾ COM(2001) 531 final

⁽²⁾ OJ C 125 of 27.5.2002.

⁽³⁾ Ibid.

⁽⁴⁾ COM(2002) 289 final

⁽⁵⁾ COM(2001) 546 final

⁽⁶⁾ OJ C 221 of 17.9.2002. COM(2001) 546 final.

2.4.1 The general prohibition covers unfair commercial practices. It establishes three conditions for determining whether a practice is unfair. A plaintiff will have to demonstrate that all three conditions are satisfied in order for a practice to be judged unfair:

- the practice must be contrary to the requirements of professional diligence;
- the benchmark consumer to be considered in assessing the impact of the practice is the 'average' consumer;
- the practice must materially distort or be likely to materially distort consumers' economic behaviour.

2.5 The benchmark consumer is the 'average consumer' as defined by the case-law of the European Court of Justice, rather than the vulnerable or atypical consumer. For the ECJ the average consumer is 'reasonably well-informed, observant and circumspect', with the proviso that where a specific group of consumers is targeted, the characteristics of the average member of that group are taken into account in assessing the impact of the practice.

2.6 It identifies two key types of unfair commercial practices: those which are 'misleading' and those which are 'aggressive'. These provisions apply all the same elements as are contained in the 'general prohibition', but function independently of it.

2.6.1 This means that a practice which is either misleading or aggressive according to the corresponding provisions is automatically unfair; if the practice is neither misleading nor aggressive, the general prohibition will determine whether it is unfair.

2.6.2 A commercial practice may mislead either through action or omission, and this division is reflected in the structure of the articles.

2.6.3 With regard to fair or unfair after-sale commercial practices, the proposal does not contain any definitions but instead applies the same fairness principles to commercial practices before and after the point of sale.

2.6.4 The proposal acknowledges that codes of conduct are fundamentally voluntary in nature and establishes criteria to indicate when the trader's performance in relation to the code might reasonably be expected to influence the consumer's decision.

2.6.5 It describes three ways in which a commercial practice can be aggressive, namely harassment, coercion and undue influence.

2.7 It incorporates the business-to-consumer provisions of the misleading advertising Directive and limits the scope of the existing directive to business-to-business advertising and comparative advertising which may harm a competitor, but where there is no consumer detriment.

2.8 An annex to the directive contains a short black list of commercial practices. These are practices which will in all circumstances be unfair and therefore banned in all Member States. An ex ante prohibition is therefore imposed on these specific practices.

3. General comments

3.1 The EESC endorses the Commission's aim of providing a high level of consumer protection and facilitating the operation of the internal market. It acknowledges not only the timeliness of the proposal, but also the effort put into the public debate sponsored by the Commission and the ex ante assessment drawn up before the presentation of the proposal. It hopes that the same approach will be followed for future proposals concerning consumer protection.

3.1.1 The EESC has already approved the Commission's new approach consisting of general legislation backed up by codes. It agrees on the need to avoid excessively detailed regulation, which is neither in the interest of consumers nor of business, and to introduce progressively the highest possible level of harmonisation of consumer protection legislation by the most appropriate means ⁽⁷⁾.

3.1.2 The EESC particularly welcomes the fact that the specific directives are to have precedence over the framework directive where there are divergences between them.

3.1.3 It is also important that protection from unfair commercial practices applies before and after the point of sale and/or service delivery.

3.1.4 The EESC has already welcomed ⁽⁸⁾ the drawing-up of codes of conduct to which firms subscribe voluntarily, provided that they are of good quality, concentrate on the definition of good practices and are monitored by the public authorities and the associations (employers, consumers, etc.) which have subscribed to them. For this reason it is pleased that the proposal provides for the possibility of legal penalties if the decisions of the bodies responsible for applying and monitoring the codes are not complied with.

⁽⁷⁾ OJ C 95 of 23.4.2003.

⁽⁸⁾ Ibid.

3.1.5 The EESC recommends that the Commission strengthen the protection afforded by the proposal as regards new technologies, especially their use by the most vulnerable groups (children in particular), so as to supplement the legal framework established by the adoption of the directive on electronic commerce ⁽⁹⁾.

3.2 Notwithstanding these comments, the proposed directive raises a number of basic questions:

3.3. *Specific comments*

Minimum harmonisation

3.3.1 The EC Treaty imposes on the Commission a duty to achieve results with its proposals to harmonise legislation, to ensure that they provide 'a high level of consumer protection'. This proposal, however, places more emphasis on 'establishing uniform rules at Community level and (...) clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the Internet Market and to meet the requirement of legal certainty' (4th recital to the proposal).

3.3.2 The EESC fears that the proposal will lower the existing level of consumer protection in the Member States and thinks that this will be difficult to explain to people ⁽¹⁰⁾. Hence it would like to see a standstill clause inserted in the proposal guaranteeing that existing levels of protection will not fall.

3.3.3 The EESC has already spoken out for maximum harmonisation, considering that protection of consumers in line with Article 153 should be at the highest level ⁽¹¹⁾.

3.3.4 More progress is possibly needed on the harmonisation of contractual law along the lines already laid down in the last Commission communication ⁽¹²⁾.

3.4 *Scope*

3.4.1 The proposed directive creates a new legal regime for misleading advertising in relation to consumers, but does not replace the old rules which would continue to apply, with a few changes, in relation to traders. The regulation of comparative advertising is excluded from this proposed directive on consumer protection and would be covered, with the proposed changes, by the present Directive 1984/450/EEC, as amended by Directive 1997/55/EC, on misleading advertising in relation to traders. In addition, and contrary to what is stated in the proposal, this would enable the Member States to maintain or adopt provisions affording greater protection for traders and competitors from misleading advertising.

⁽⁹⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce

⁽¹⁰⁾ See footnote 7

⁽¹¹⁾ See footnote 2

⁽¹²⁾ COM(2003) 68 final

3.4.1.1 The EESC considers that the simultaneous establishment of two different legal regimes to regulate the same subject – misleading advertising – according to which economic agent is affected, traders or consumers, could considerably complicate the current legal framework and could result in inconsistencies and differences in treatment and regulation. All of this goes against the principle of legislative simplification and could lead to a lack of legal security.

3.4.1.2 The EESC considers that it would be better to have a single set of rules on misleading advertising, with this proposal either repealing the current directive or amending it. The legislative aim should be to focus on organising the internal market and strengthening consumer protection through an objective regulation which is concerned with 'the facts' – misleading advertising – and which simultaneously gives protection to all those concerned, instead of establishing two regulations which may differ in content and protection mechanisms depending on the areas in which they apply (supply or demand).

3.4.2 Assuming that the Commission does not intend to substantially widen the scope of the directive along these lines, it should, as a first step, at least provide for mandatory application *mutatis mutandis* ('reflex-application') in those cases where a commercial practice which is unfair in a business-to-consumer relation forms part of a business-to-business contractual relation at an earlier stage in the distribution chain.

3.4.3. The provision whereby the State in which the head office is located has to ensure compliance with the rules gives rise to practical problems in cases where an enterprise is involved in cross-border activities. The EESC calls upon the Commission to expand upon how the provision is to be applied in this context.

3.5 *Legal basis*

3.5.1 The basis of the proposal is Article 95 of the ECT which concerns the approximation of legislation affecting the establishment or functioning of the internal market. However, it is Article 153 of the ECT which states that the Community must ensure a high level of protection and contribute to protecting consumers' economic interests. The EESC would prefer to base the proposal on the latter article ⁽¹³⁾ or possibly on both articles.

3.6 *Concept of the 'average consumer'*

3.6.1 The Commission uses the term 'average consumer' in its proposal, as interpreted in the case law of the Court of Justice, i.e. a consumer who is 'reasonably well-informed, observant and circumspect'.

⁽¹³⁾ Footnote 2

3.6.2 The EESC fears that the use of this interpretive criterion will mean that consumer-protection policy loses its protective nature and, notwithstanding the special attention that the proposal devotes to the most vulnerable groups, fails to protect less well-informed or less well-educated consumers. It should not be forgotten that there is a material inequality between the parties in consumer-to-business relations.

3.6.3 The 'average consumer' referred to in the proposed directive has to be able to make 'informed' decisions. Under the case law prevailing in some Member States, advertisements are not required to mention anything which might be negative or detrimental for the product or service being offered. Consumers can, however, only make informed decisions if they have this information. In the EESC's view, it is important to find a clear and practical solution to this problem.

3.7 *Unfair commercial practices*

3.7.1 The Committee has already agreed that a general clause containing a legal standard is a flexible and suitable instrument for governing marketing behaviour in a very dynamic area, which is constantly developing and undergoing change⁽¹⁴⁾.

3.7.2 The proposal has a negative approach to commercial practice and appends a list of practices that are considered unfair. The EESC considers, however, that it should adopt a positive approach to unfair commercial practice, more in line with relevant modern legislation. A commercial clause with this approach would make it possible to adjust to changing market conditions and competitive practices and to monitor dubious practices for fairness.

3.8. *Conceptual clarity of the proposal*

3.8.1 All laws should provide legal security and certainty. The proposal contains concepts alien to the laws of many Member States, e.g. 'professional diligence', which, according to the Commission, is analogous to 'good business conduct'. The EESC would suggest that the Commission clearly explain in the explanatory memorandum to the proposal what this concept means so that legal, economic and social players can understand the scope of the proposal precisely.

3.9 *Consistency with other Community legislation*

3.9.1 The EESC fears that the adoption of the directive will not increase transparency in business-to-consumer relations and that it will not be fully consistent with other Community legislation. In particular it hopes that fears of a possible clash with the proposed regulation on sales promotions in the internal market⁽¹⁵⁾ are unfounded. The two texts should be complementary. The Committee calls on the Commission to provide further guidance on the relationship between this directive and the existing sectoral directives and other areas of law (e.g. contract law), and to make it available before the directive enters into force.

3.9.2 Some of the terms used in the proposal should be checked in the various language versions, in particular 'aggressive commercial practices'; it is not really appropriate to use words like 'coercion' and 'threat' in a private law text since such conduct would be considered a crime in many Member States' legislation.

3.10 *Out-of-court settlements*

3.10.1 To complement the codes of conduct, the proposal should consider the possibility of adopting measures for the out-of-court settlement of disputes enabling consumers and businesses to rapidly and flexibly resolve disputes over unfair commercial practices before appropriate bodies. This would be without prejudice to the fundamental right to proper legal protection from the courts. Such bodies should at all events comply with the principles of independence, transparency, the adversarial principle, effectiveness, legality, liberty and representation as set out in Commission Recommendation 98/257/EC⁽¹⁶⁾.

3.10.2 The proposal sets out some implementing measures that the Member States have to take in order to make the directive more effective, such as the adoption of preventive measures or the possibility of requiring the trader to substantiate claims in relation to products and services. The EESC believes that consideration should be given to other measures which are only regarded as optional in the proposal and which would reinforce the application of the framework directive, such as the publication in the mass media, at the court's discretion, of the judicial decisions enforcing the cessation of unfair commercial practices.

Brussels, 29 January 2004.

The President
of the European Economic and Social
Committee
Roger BRIESCH

⁽¹⁴⁾ Footnote 2

⁽¹⁵⁾ Footnote 6

⁽¹⁶⁾ Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. OJ L 115 of 17.4.1998

APPENDIX

to the Opinion of the European Economic and Social Committee

The following amendments were defeated although they obtained at least a quarter of the votes cast.

Point 3.6

Delete points 3.6.1 and 3.6.2.

Result of vote:

For 24, against 55, abstentions 3.

Point 3.7.2

Delete.

Result of vote:

For 24, against 59, abstentions 4.

The following text from the section opinion was defeated in favour of an amendment, but obtained at least a quarter of the votes cast:

3.3.1 The EC Treaty imposes on the Commission a *duty to achieve results* with its proposals to harmonise legislation, to ensure that they provide '*a high level of consumer protection*'. This proposal, however, places more emphasis on 'establishing uniform rules at Community level and (...) clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the Internet Market and to meet the requirement of legal certainty' (4th recital to the proposal).

Result of vote:

For 28, against 53, abstentions 5.
