

Remarks on the 'Omnibus' Directive

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Outline

- Views from academia and pragmatism
- Two things to keep precious
 - Fines
 - The right to private remedies
- One thing to reconsider
 - Justifications for de-harmonisation (UCPD)

Views from academia



- Draft directive is criticised
- ‘New Deal for Consumer’ portrayed as
 - A ‘pig in the poke’ (M. Loos)
 - A ‘bad hand’ (C. Twigg-Flessner)
- Does not actually draw on REFIT
- Does not go far enough
- Unclear on several points

Where we stand



- Not much time
- Not a priority of the presidency
- **Real question:** is the proposal for a modernisation directive better than nothing?
- **Yes it is!**
 - Sanctions (up to 4% of worldwide turnover for large infringements): **gamechanger**
 - Private enforcement: **an important first step**

1. Fines

- EU consumer law will be on the radar of large multinational companies
- EU is serious not only about competition law (10%) and data protection (4%) but also about consumer rights (4%)



2. Private remedies

1. In addition to the requirement to ensure adequate and effective means to enforce compliance in Article 11, **Member States shall ensure that contractual and non-contractual remedies are also available** for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair commercial practices in accordance with their national law.
2. Contractual remedies shall include, as a **minimum, the possibility for the consumer to unilaterally terminate the contract.**
3. Non-contractual remedies shall include, as a **minimum, the possibility of compensation for damages suffered** by the consumer.

Criticisms



- C. Twigg-Flessner: does little more than to establish a basic principle, but leaving all the details to the Member States
- M. Loos:
 - Does this remedy have retroactive effect?
 - Is fault required?
 - Does *any* unfair commercial practice justify termination?
 - Is the right to damages applicable only if a contract has been concluded, or also if the consumer did not conclude a contract but nevertheless has suffered a loss as a result of the unfair commercial practice?
 - Are Member States free to apply national contract law or tort law requirements and limitations for the application of these remedies?
 - Must the consumer prove a causal link between the unfair commercial practice and the conclusion of the contract or the damage suffered?

Pragmatically



- This is a directive
- Directives are meant to articulate principles, not to work out the details
- It would take a regulation to work all this out, and it would not have political support
- This is not unprecedented

An analogy

- *Courage and Manfredi* (Court cases on private remedies in competition law)
- *Courage v Crehan* C-453/99
 - “The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101](1) would be put at risk if it were not open to **any individual to claim damages for loss** caused to him by a contract or by conduct liable to restrict or distort competition (para. 26)”

An analogy (continued)

- About same level of generality: there must be a action
 - A change in the law: not every MS provided for such actions
 - First step
 - There are still hurdles
 - Directive on damage actions (Directive 2014/04)
 - Piece of the puzzle still missing: collective redress
- First steps are important

De-Harmonisation (UCPD)

Article 3 (UCPD) is amended as follows:

(a) Paragraph 5 is replaced by the following:

This Directive **does not prevent Member States from adopting provisions** to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home, or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers, **provided that such provisions are justified on grounds of public policy or the protection of the respect for private life.**



3 justifications

- Subsidiarity
 - But how is it specific?
 - Private life
 - Unsolicited visit to consumer home: OK – but excursions?
 - And why does it have to be national law – rather than EU law – which protects private life?
 - Clarification of relationship between national law and EU law
 - Relationship was perfectly clear...
- Justifications are utterly unconvincing

+ 1 problematic reference

- Practices are unlikely to have cross-border effect
 - OK for doorstep selling but excursions ?
- Cross-border effect has **never been** an element relevant to **scope of application** of EU consumer law
 - ≠ Free movement rules
 - ≠ Judicial cooperation
- Unconvincing justifications and problematic reference to cross-border effects => **Dangerous invitation to reason by analogy and de-harmonise further**

- Be honest, say it is political
- Draft justification [much] more narrowly
- Drop reference to subsidiarity, privacy and clarification (please)
- Make it sound fact-based
- Better contingent than absurd

‘in light of the need to take swift action against some unfair practices which may develop locally and in light of experience at national level’...

Wrap up

- Adopt the directive
- It's worth it
 - Sanctions
 - Private enforcement
- Consider amending justifications for restricting scope of UCPD
 - Avoid sending vague message on acceptability of de-harmonisation

The other political hot topic: fish fingers

- Viktor Orbán, [« the biggest scandal of the recent past »](#)
- Bulgaria's leader, Boyko Borissov [« food apartheid »](#), [« This is unacceptable and insulting »](#)

State of the Union 2017



“I will not accept that in some parts of Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical,”

“Slovaks do not deserve less fish in their fish fingers, Hungarians less meat in their meals, Czechs less cacao in their chocolate.”

Legal translation

Example added to article 6 UCPD (misleading practices)

(c) Any marketing of a product as being identical to the same product marketed in several other Member States, while those products have significantly different composition or characteristics;

- Not blacklisted
- Possibly ineffective: consumer will have to prove practice 'deceives or is likely to deceive the average consumer'
- If EP wants to send strong political signal to Visegrád group, black list perhaps preferable
 - But consider clarifying that traders can adapt recipe to national taste (with proper labelling)