

Consumer protection: unfair business-to-consumer commercial practices. 'Unfair Commercial Practices Directive'

2003/0134(COD) - 18/06/2003 - Document attached to the procedure

The European Commission indicated in 2002 its commitment to developing impact assessment of new proposals. This document begins by looking at the data related to the under-development of the consumer dimension of the internal market, and the barriers that hold such development back. There is fragmented regulation on unfair commercial practice. The Commission made a proposal (please see the document of 18/06/03.) the objectives of which are: - ensure that consumers are not treated unfairly by businesses, and in particular that they are not subjected to either misleading or aggressive behaviour from traders or otherwise have their freedom of choice impaired; - ensure that legitimate businesses are able to market cross-border and on a pan-EU basis without having to change their business strategies or incur undue costs. The problems could not be addressed without changes to legislation. Two approaches were then examined, and the favoured approach selected following further consultation and analysis of the likelihood of meeting the objectives. The precise content of the framework directive proposal, was then further refined and adjustments made to increase the positive and minimise negative impacts, for example by changing the approach to after-sale services, disclosure and codes of conduct. The final proposal: - fully harmonises at a high, common level of protection in which consumers can have confidence - establishes EU-wide conditions for identifying 'unfairness', replacing existing divergent general clauses - provides legal certainty through an internal market clause, unfairness categories and a blacklist of prohibited practices - identifies a role for codes of conduct to maximise the positive impact of legal convergence. The main elements of the final proposal are therefore as follows: - a 'general prohibition' banning unfair practices, setting out conditions, including a material distortion of consumers' economic behaviour, for determining whether a commercial practices is unfair, and establishing the ECJ's average consumer as the benchmark consumer, except where a specific group of consumers is targeted. The proposal reflects the principle of proportionality by defining practices which are unfair and therefore problematic. It does not seek to impose positive fairness standards. It ensures that the impact on the average consumer rather than the weakest possible consumer is taken into account, unless a specific group is directly targeted. It specifies that a practice is only unfair if the effect on consumer's behaviour 'material', i.e. sufficiently significant to affect their decision in relation to a product. It also has an 'internal market clause' putting in place mutual recognition based on the law where the trader is established, for certainty and clarity. The Commission goes on to look at the more ambitious proposals that were rejected and discusses the reasons for this. It also looks at the trade-offs involved. The most important trade-off is the balance to be struck between consumer protection and business freedom concerning the benchmark consumer to be used in determining what is an unfair practice. In some Member States, the benchmark for judging the misleading nature of an advertisement is a more credulous consumer than average. In most Member States the benchmark is the average consumer, and this is what the Commission selected. The Commission has concluded that sufficient evidence exists to justify proceeding with a proposal now. There is evidence: - that internal market barriers exist arising from unfair commercial practices and their regulation; - that these barriers cause problems for real-life businesses and consumers, and will continue to do so even if other internal market barriers are addressed; and - that the approach selected is an effective way of meeting the twin objectives of reducing deterrents to businesses and consumers' lack of confidence, and doing so in a way which meets the requirements of better regulation. A related proposal for a regulation on administrative co-operation will further increase the positive impacts of the framework directive and, in turn, this directive will make it easier for that proposal to realise its potential by providing a simpler, common legal framework for enforcers.