

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

2003/0134(COD) - 16/11/2004 - Commission communication on Council's position

The Commission supports the Council's common position. It is line with the aims and approach taken in the Commission's original proposal and endorsed by the Parliament. The common position reflects the spirit of all or part of 51 of the 58 amendments which were acceptable to the Commission in full, in part or with changes, and 3 amendments which the Commission had originally indicated it was unable to accept.

In particular:

- the common position retains the average consumer benchmark proposed by the Commission and supported by the Parliament as the 'default' benchmark against which the impact of potentially unfair commercial practices will be assessed. The drafting has been amended so that there is no longer a definition of the average consumer in the text, following concerns that this would prevent the concept from evolving in line with ECJ jurisprudence;
- the common position also makes specific provision for the protection of vulnerable consumers. This reflects the concern expressed in a number of Parliament amendments that the articulation between protection of the average consumer and of vulnerable consumers should be more explicit. The Commission can support these changes because they do not require an assessment of each individual's circumstances, which would be unworkable. They do ensure that vulnerable consumers can be protected when they are particularly at risk while safeguarding legitimate advertising practices, such as statements which are not meant to be taken literally;
- the Council adjusts the concept of professional diligence to incorporate the concept of good faith and refers to the standard of skill and care that a trader may reasonably be expected to exercise;
- it includes a definition of 'transactional decision' to clarify what is included within a consideration of the consumer's 'economic behaviour';
- on the choice of law, the Commission's proposal had included a provision specifying that the law of the country where the trader was established would always be the applicable law (i.e. a choice of law rule). The Parliament's amendment had proposed excluding the rules which determine the law applicable to non-contractual obligations from this provision. The Commission had indicated that this amendment was not acceptable because it could have the effect of making traders subject to the public law requirements of one country and, simultaneously, under the laws governing international private law, the law of another member state. In the common position, the choice of law rule was deleted in part because of most Member States' concern that in cross-border disputes consumers could be disadvantaged if the law of the trader were applied. The Commission does not share these concerns because of the full harmonisation and the high level of consumer protection achieved in the proposal. However, the Commission does not consider it essential to insist on this point in this particular case given the considerable simplification arising from the full harmonisation and the consequent internal market benefits. In line with normal practice, the applicable law in cross-border disputes will therefore be determined by the courts.
- the common position includes a temporary derogation for national laws based on the minimum clauses in existing directives, which reflects that proposed in Parliament's amendment. It also includes a clause

calling for a review of the application of the directive after four years. The Commission is prepared to accept this derogation on the basis that it is limited and temporary, to enable Member States to manage the transition from minimum to full harmonisation.

The following declaration is annexed to the Commission's opinion:

The Commission can only agree to the deletion of article 4.1 of its proposal on the understanding that the present directive provides for a full harmonisation of the domain covered by the directive and that for this reason article 4.1 is not legally required to ensure the proper functioning of the internal market in this field. The practical implementation of this directive will be actively monitored by the Commission so as to achieve its uniform application.