

Europe/Regulation

European Union beefs up consumer protection in move to harmonise different national laws

THE EUROPEAN PARLIAMENT and the Council of the European Union (EU) recently adopted new rules governing business-to-consumer practices, with a view to harmonizing existing laws in the different EU member states. Although member states will have two years to transpose the new rules into their national laws, businesses that are involved in cross-border sales to EU consumers should be aware of the changes that lie ahead, says *Wim Nauwelaerts*, Counsel at *Hogan & Hartson*, tel: 32 2 505 0911; email: wnauwelaerts@hhlaw.com

By adopting Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, the European Parliament and the Council have sent a strong signal for increased harmonisation of consumer protection throughout the EU. The national laws of the EU member states relating to unfair trade practices involving consumers currently show significant divergence that could distort competition as well as the functioning of the internal market.

In the field of misleading advertising, for example, some EU member states have adopted measures that provide more extensive consumers protection, while others adhere to the minimum protection criteria set out in Council Directive 84/450/EEC concerning misleading and comparative advertising.

The European Parliament and the Council acknowledge that such disparities may cause legal uncertainty and trade barriers for businesses that frequently engage in cross-border business-to-consumer marketing, advertising and sales promotions. Hence the directive attempts to approximate the different national laws on unfair trading in the EU, including the rules on unfair advertising and distance contracts.

The directive applies to unfair business-to-consumer commercial practices that take place before, during or after a commercial transaction. It introduces a single, common general prohibition of those unfair practices that materially distort or are likely to materially distort consumers' economic behaviour. In addition, a commercial practice will be deemed unfair if it does not meet the standard of special skill and care that a trader may reasonably be expected to exercise towards consumers ("professional diligence").

As a benchmark, the directive refers to the average consumer, who is reasonably well-informed, observant and circumspect (taking into consideration appropriate social and cultural factors).

The general prohibition in the directive is elaborated by specific rules on the two types of unfair commercial

practices that are the most common — misleading commercial practices and aggressive commercial practices. A commercial practice is considered misleading if it contains false information and is therefore untruthful vis-à-vis the average consumer. Even if the information provided is factually correct, a commercial practice may be misleading if it deceives or is likely to deceive the average consumer.

To assess the misleading nature of commercial practices, several elements will be taken into account, including the main characteristics of the product or service, the trader's motives for the commercial practice and the manner in which prices are calculated.

Aggressive commercial practices cover actions that significantly impair the consumer's freedom of choice or conduct, including the use of physical force or other forms of coercion, harassment, or "undue influence". Exercising "undue influence" will constitute unfair commercial conduct if the trader is exploiting a position of power in relation to the consumer, to the effect that the consumer's ability to make an informed decision is curtailed.

For legal certainty's sake, the directive blacklists 31 particular types of commercial practices that are always considered unfair, regardless of case-specific circumstances. The blacklist — which may only be amended through revision of the directive — outlaws, for instance, false statements that a product or service will only be available on particular terms for a very limited time, made in order to elicit an immediate decision from the consumer.

Consumer organisations and business associations are likely to applaud the directive's efforts to enhance consumer protection in the EU by harmonizing the existing rules. The blacklist is likely to become a useful tool to assess commercial practices, preferably before they are actually implemented. Furthermore, the directive has recognized the important role that trade associations can play in terms of self-enforcement, by encouraging the use of codes of conduct to ensure that the directive's principles are applied in specific economic fields.

It may indeed be possible to reduce recourse to administrative or judicial actions if code owners are able to exercise effective control over the application of the new rules. However, some businesses may be disappointed by the fact that the directive does not affect the EU member states' laws on unfair commercial practices concerning business-to-business transactions.

The 25 EU member states are required to transpose the directive into their national laws by 12 June, 2007. ■