CROSS-BORDER ENFORCEMENT OF EC CONSUMER LAW - - CPC REGULATION

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Abstract

Regulation (EC) No 2006/2004 on Consumer Protection Cooperation was adopted in 2004 to tackle the growing cross border problems in the Internal Market. It lays down the framework and general conditions under which authorities, responsible for enforcement in the Member States, are to cooperate.The Regulation links up national, public enforcement authorities in an EU-wide Enforcement Network which has been given the means to exchange information and to work together to stop rogue traders or any other cross-border breach to consumer protection laws.

Key words

EC consumer protection, administrative cooperation, public enforcement, cross-border enforcement

Introduction

There are two main EC law instruments containing specific provisions on powers to enforce consumer law: a 1998 Directive[1] and a 2004 Regulation[2]. The purpose of the Directive 98/27 is to approximate laws, regulations and administrative provisions of the Member States

[1] DIRECTIVE 98/27/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 1998 on injunctions for the protection of consumers' interests, O J L 166/51, 11. 06. 1998. Hereinafter referred to as the Directive 98/27.

[2] REGULATION (EC) No 2006/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (Text with EEA relevance), OJ L 364, 9.12.2004, p. 1–11 amended by: DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance), OJ L 149, 11.6.2005, p. 22–39; Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) OJ L 332, 18.12.2007, p. 27–45. Hereinafter referred to as the CPC Regulation.

relating to injunctions in order to protect the collective interests of consumers included in the Directives listed in the Annex[3]. The Directive 98/27 requires that all member states make it possible for qualified entities to take action before domestic courts to protect the various specific rights given to consumers under the measures implementing the EC directives on consumer law into the domestic legal system. Such action may be taken for purely domestic problems[4] or for the cross-border enforcement of such rights by allowing qualified entities from one member state to take action against a trader from another member state in the courts of that trader's jurisdiction. CPC Regulation allows cooperation between Member States for consumer protection. The Regulation establishes a network of authorities responsible for monitoring the application of legislation concerning consumers. The aim is to ensure compliance with the legislation and the smooth functioning of the internal market. Whereas the action for injunction uder the Directive may be taken for either domestic or cross-border problems, the Regulation applies only to intra-Community infringements of consumer protection legislation. The above acts create combined effects on a number of conceivable transnational enforcement scenarios.

A legal framework for improving co-operation between consumer protection enforcement authorities – has it been needed?

[3] See: Directive 98/27/EC, Article 1 and the list of the Directives in Annex:
* Directive 84/450/EEC (misleading advertising and comparative advertising);
* Directive 85/577/EEC (contracts negotiated away from business premises);
* Directive 87/102/EEC et seq. (consumer credit);
* Directive 89/552/EEC et seq. (Television without Frontiers);
* Directive 90/314/EEC (package travel, package holidays and package tours);
* Directive 2001/83/EC (Community code relating to medicinal products for human use)
* Directive 93/13/EEC (unfair terms in consumer contracts);
* Directive 94/47/EEC (time-sharing);
* Directive 97/7/EC (distance contracts);
* Directive 1999/44/EC (sale of consumer goods and associated guarantees , included in the annex following adoption of the Directive of 25 May 1999);
* Directive 2000/31/EC (Directive on electronic commerce);
* Directive 2005/29/EC (unfair commercial contracts , entered in the Annex following the adoption of the Directive of 12 June 2005)
* Directive 2002/65/EC (Distance contracts for financial services);
* Directive 2006/123/EC (Services Directive).

[4] I.e., an entity from member state A can take an action before the courts in that state to prevent infringements of the relevant legislation by a trader from that state.

The Internal Market depends as much on the adequacy of enforcement of the rules as on the rules themselves[5]. Consumer protection laws – like virtually all legislation – are only as good as their enforcement. The Directive 98/27 gives national consumer enforcement bodies and consumer associations nominated by the Member States the power to seek injunctions in courts (on their own or other Member States initiative) to stop traders infringing EU consumer protection directives. What was lacking, it was the ability for these bodies to cooperate effectively in cracking down on rogue traders who operate cross-border.

The creation of the internal market had already necessitated the development of some cooperation on enforcement and co-ordination. For example, formal co-operation mechanisms had been put in place with respect to internal market policies on taxation[6], customs[7], food[8] and product safety, competition[9], financial services[10]. The need for effective cross-border enforcement for consumer protection has also been recognised in the international domain. In 1999 the OECD adopted a recommendation on consumer protection in relation to e-commerce that stated that member countries should through 'their judicial, regulatory and law enforcement authorities co-operate at the international level, as appropriate, through information exchange, coordination, communication and joint action to combat cross-border fraudulent, misleading and unfair commercial conduct'[11]. On 11 June 2003, the OECD adopted further guidelines protecting consumers from cross-border fraudulent and deceptive commercial practices that recognise that the same enforcement problems and inadequacies of existing systems exist worldwide[12].

The starting point for closer co-operation in EC consumer protection was International Marketing Supervision Network (IMSN)[13] that is a bi-annual forum for informal co-operation

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[5] See: Hearing on the Green Paper on Consumer Protection, 7 December 2001, Enorcement, Tornblom Carina, http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/speech_tornblom_en.pdf

[6] Proposal for a Council Regulation on administrative cooperation in the field of value added tax COM (2001) 294 final OJ C270 of 25.09.2001 p 87

[7] Council Regulation 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters OJ L 082 of 22/03/1997.

[8] Proposal for a regulation of the European Parliament and of the Council on official feed and food controls COM (2003) 52 final

[9] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1 of 4.01.2003

[10] Proposal for a directive of the European Parliament and of the Council on investment services and regulated markets COM (2002) 625 (01) and the recently adopted directive on insider dealing and market manipulation (market abuse) - common position: OJ C 228 E of 25.09.2002 p19.

[11] Recommendation of the Council of the OECD concerning Guidelines for Consumer Protection in the context of electronic commerce, adopted on 9 December 1999 [C(99)184/FINAL]

[12] http://www.oecd.org/sti/crossborderfraud

[13] Recently re-named: the International Consumer Protection Enforcement Network (ICPEN).

between enforcement practitioners from around the world[14]. Therefore informal mechanisms have had their place and a legal framework for co-operation could have been built on these achievements. The IMSN, especially its European sub-group attained much in trying to establish better cooperation and identified its limitations, i.e.: in some Member States there was no formal single contact point; differing confidentiality requirements made practical information exchange complex and often impossible; there were no systematic or reliable channels to ensure that other national enforcement authorities would provide assistance or even respond to requests for information. Similarly, the European Commission in the Green Paper acknowledged that the existing informal co-operation arrangements have been highly successful within their informal framework. However, they do not provide the necessary co-operation tools that have been developed in other policy areas[15]. Commission also stressed that a framework for systematic information exchange was essential for effective market surveillance, lack of formal co-operation within the EU also had the consequence that the EU was unable to co-operate effectively with third countries.

The key elements of such a legal framework according to the Commission's reasoning in the Green Paper were the following: the nomination of competent authorities by each Member State to co-ordinate enforcement co-operation among national, regional and local bodies and act as a single point of contact; the establishment of common databases and communication networks that respect confidentiality requirements; the establishment of reciprocal mutual assistance rights and obligations among the Member States (that could cover information exchange on request and spontaneously, reciprocal use of national notification, surveillance, investigation and seizure powers); the possibility for Member States to carry out co-ordinated enforcement actions (simultaneous investigations, injunctions etc.) albeit under national enforcement powers; the establishment of obligations on Member States to supply information (statistics, complaints, risk patterns, emergencies) to the Commission for dissemination, to other Member States to enhance the co-ordination of market surveillance; the possibility for the EU to enter into co-operation with third countries on enforcement and join global enforcement networks; the possibility to carry out common EU and national projects such as the creation of information and communication networks, common databases, training, seminars, exchanges and common inspections[16].

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[14] See: para. 5.1 of the GREEN PAPER on European Union Consumer Protection (presented by the Commission) Brussels, 2.10.2001, COM(2001) 531 final. Hereinafter referred to as the Green Paper.
[15] Ibidem.
[16] Ibid. Paragraph 5.2

Most of the member states' governments strongly supported the Commission's ideas[17]. There was widespread agreement that such an instrument would help secure the proper functioning of the internal market and enhance consumer protection.

The Regulation on consumer protection cooperation

According to Article 1 of the Regulation there are two specific objectives to achieve. First, providing for cooperation between enforcement authorities in dealing with intra-Community infringements that disrupt the internal market. Second, contributing to improving the quality and consistency of enforcement of consumer protection laws and to the monitoring of the protection of consumer economic interests[18]. Article 2 limits the scope of the regulation to intra-Community infringements of EU legislation that protects consumers' interests.

Competent authorities, defined as public authorities with specific consumer protection enforcement responsibilities, are at the heart of the proposed regulation[19]. Each Member State designates the competent authorities and a single liaison office responsible for the application of the Regulation. These authorities have the investigation and enforcement powers necessary for the application of the Regulation and exercise them in conformity with national law. The action must be taken without delay to put a stop to any infringement identified, using the appropriate legal instrument. In most cases this will be an injunction that makes it possible to stop or prohibit unlawful activities and take rogue traders to court in other Member States. European legislation in this field is harmonised and provides for injunctions against any infringements which may harm consumers' collective interests[20]. E.g. in the case of misleading advertising and unfair commercial practices, contracts negotiated away from business premises, consumer credit, television without frontiers, package travel, package holidays and package tours, medicinal products for human use, unfair contractual terms, time-shares, distance contracts, sale of consumer goods and associated guarantees and unfair

[17] See: Responses to the Green Paper on Consumer Protection, Member States' Governments: http://ec.europa.eu/consumers/enforcement/governments_en.htm

[18] Paragraph 3.1.1 of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on cooperation between national authorities responsible for the enforcement of consumer protection laws, Brussels, 18.7.2003 COM(2003) 443 final, 2003/0162 (COD)

[19] Ibidem, para. 27.

[20] Article 4 (1) of the Directive 98/27 requires that each member state where an infringement originates must permit any qualified entity from another member state where the collective interests of consumers are affected by the infringement, to bring an action for an injunction. The locus standi of a qualified entity to launch proceedings may not be questioned if it is included in the list compiled and published by the Commission. To that end, member states are obliged by Art. 4(2) of the Directive to notify the Commission of the qualified entities from their jurisdiction.

commercial contracts. No enforcement rights or responsibilities have been granted for the European Commission.

The Regulation establishes a framework for mutual assistance which covers the exchange of information (Articles: 6, 7), requests for enforcement measures (Article 8) and coordination of market surveillance and enforcement activities (Article 9). Rules for the implementation of Regulation regarding mutual assistance between competent authorities and the conditions governing that assistance are laid down by the Commission Decision 2007/76/EC.[21] To set an example, according to Article 7 of the Regulation: when a competent authority becomes aware of an intra-Community infringement it must notify the authorities of other Member States and the Commission. It also supplies, at the request of another competent authority, all relevant information required to establish whether an intra-Community infringement has occurred. In addition, it must take all necessary enforcement measures to bring about the cessation or prohibition of the infringement. Furthermore the competent authorities inform the Commission of intra-Community infringements, the measures taken and the effect thereof, and the coordination of their activities. Information communicated may only be used for the purposes of ensuring compliance with the laws that protect consumers' interests. The Commission stores and processes the information it receives in an electronic database (Article 10). According to conditions governing mutual assistance (Chapter III of the Regulation) requests for mutual assistance must contain sufficient information to enable the authority to fulfil the request. In certain circumstances an authority may refuse to comply with a request for enforcement measures or information or decide not to fulfil its obligations. In this case it informs the applicant authority and the Commission of the grounds for refusing to comply with a request for assistance.

With reference to various activities of Community interest Article 16 states that: 'To the extent necessary to achieve the objectives of this Regulation, Member States shall inform each other and the Commission of their activities (...) in areas such as' e.g.: concerning enforcement coordination: the training of their consumer protection enforcement officials, the collection and classification of consumer complaints, the development of information and

[21] Commission Decision 2007/76/EC of 22 December 2006 implementing Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance (notified under document number C(2006) 6903) (Text with EEA relevance),OJ L 32, 6.2.2007, the annexes of that Decision stipulate the information requirements, which include the minimum information to be included in requests for mutual assistance and alerts, the time limits for such requests, the access to information exchanged and the languages to be used.

communication tools the development of standards, methodologies and guidelines for consumer protection enforcement officials; with regard to administrative cooperation: provision of consumer information and advice, support of the activities of consumer representatives, support of consumers' access to justice; collection of statistics, the results of research or other information relating to consumer behaviour, attitudes and outcomes.

In conclusion - what progress has been made with the 2004 Regulation?

CPC Regulation - the most extensive piece of Community law legislation focusing on enforcement of consumer law undoubtedly strengthens public enforcement[22]. The Regulation seen as complementary to the Injuntions Directive adds to the remedies available under it.
The major purpose of the CPC Regulation is to create a network of national authorities responsible for enforcing EC consumer law and to oblige them to work together. These mechanisms until now remained unexplored in the consumer law context. Therefore we can perfectly say that the Regulation cuts out a potential avenue to harmonised consumer protection that could work better than the wholesale harmonisation of private law. Having come to such a conclusion we shall wait for the first Member States' reports to the Commission on the aplication of the Regulation.

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[3] Freeman J., Private Parties, Public Functions and the New Administrative Law, 2000, 52 Administrative Law Review 814, 817

[22] While the EC Commission is searching for a suitable 'mix' of public and private enforcement (see: e.g. EC Commission Green Paper – Damages actions for breach of the EC antitrust rules COM (2005) 672) some authors consider public enforcement of consumer law to be potentially more valuable than private enforcement. In the UK context in particular, the Office of Fair Traiding has been very active in policing unfair terms (over 6,000 contract terms have been deleted or amended after 1000 cases) see: Monti G., The Revision of the Consumer Acquis from a Competition Law Perspective, speech at the conference: The Common Frame of Reference and the Future of European Contract Law, Amsterdam 1-2. 06. 2007, p. 5.

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