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**Transposition,
implementation and
enforcement of
Consumer Law**

PE 416.221 (IP/A/IMCO/NT/2009-02)



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

INTERNAL MARKET AND CONSUMER PROTECTION

**Transposition, implementation and
enforcement of consumer law**

NOTE

Abstract:

The note has been prepared as a background for the IMCO interparliamentary committee meeting on consumer law and intends to provide some ideas for a joint discussion and present an overview of the problems and challenges faced in transposing and implementing EU consumer legislation. It discusses transposition problems in general and looks at the transposition, implementation and enforcement of the Unfair Commercial Practices Directive and the Misleading and Comparative Advertising Directive in detail.

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Table of Content

| | |
|--|-----------|
| I. Introduction..... | 1 |
| II. Transposition, implementation and enforcement of EU law | 2 |
| II.1. National transposition approaches and techniques..... | 2 |
| II.2. Problems and challenges in the transposition, implementation and enforcement of EU law..... | 2 |
| III.2.1. State of play | 3 |
| III.2.2. Factors contributing to incorrect or delayed transposition and implementation..... | 3 |
| III.2.3. Suggestions to improve transposition, implementation and enforcement | 5 |
| III.2.4. European Parliament's recommendations to improve transposition, implementation and enforcement..... | 6 |
| III. Transposition and implementation of consumer law and the MCA and UCP Directives | 9 |
| III.1. Transposition and implementation of consumer law | 9 |
| III.2. Transposition and implementation of the UCP and MCA Directives | 11 |
| III.2.1. Transposition and implementation of the MCA Directive | 11 |
| III.2.2. Transposition and implementation of the UCP Directive | 11 |
| III.2.3. European Commission follow-up..... | 13 |
| III.2.4. European Parliament work on TIE of UCP and MCA | 13 |
| IV. Questions for debate | 14 |
| Bibliography | 15 |
| Internet links | 17 |
| Annex I. List of European Parliament own-initiative reports related to transposition, implementation and enforcement (work carried out in the 6th legislative period, 2004-2009) | 18 |
| Annex II. Progress in notification of national measures implementing all adopted Directives | 20 |
| Annex III. Proposals of the Working Party on Parliamentary Reform concerning transposition and implementation of Community Law | 21 |

I. Introduction*

This note has been prepared as a background for the inter-parliamentary committee meeting on 'EU Consumer Law, its transposition and implementation' and intends to provide some ideas for a joint discussion and present an overview of the problems and challenges faced in transposing and implementing EU consumer legislation. It discusses transposition problems in general and looks at the transposition, implementation and enforcement (TIE) of the Unfair Commercial Practices (UCP) Directive¹ and the Misleading and Comparative Advertising (MCA) Directive² in detail.

Proper transposition and application of EU law in the Member States is crucial in achieving the EU's objectives. Incorrect or late transposition on the one hand might suggest a need to improve national procedures, on the other hand it could point to the necessity to apply different legal instruments and legislative techniques at EU level.

Transposition and application of EU law is the primary responsibility of the Member States. The European Commission as guardian of the Treaties ensures and monitors the uniform application of Community law. With the conclusion of the Inter-institutional Agreement on Better Law-making on 16 December 2003 better transposition and application of Community law has become a commitment for all institutions. The European Parliament (EP) already called on the Commission in 1983 to better monitor the transposition process³ and numerous EP resolutions have been prepared or are in preparation on this subject (See Annex 1). In its resolution in response to the 24th annual report from the European Commission on monitoring the application of Community law in 2006 the EP called for a *'closer cooperation between the European Parliament and national parliaments with a view to promoting and increasing effective monitoring of the application of Community law at national, regional and local levels'*⁴.

This note is structured as follows. Chapter II provides an overview of the problems and challenges of transposing and implementing EC law in general. Chapter III analyses transposition and implementation problems in the field of consumer law, focusing on the UCP and MCA Directives in particular. Chapter IV lists questions for debate.

*I would like to thank Agneta Sturesson, Tarvo Kungla and Guillaume Rey for their helpful comments and assistance

¹Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market

²Directive 2006/114/EC concerning misleading and comparative advertising,

³Sieglers Schmidt report (JURI) on the 'Responsibility of Member States for application of Community Law', adopted on 9 February 1983, PE 77275

⁴Geringer de Oedenberg report (JURI) in response to the '24th annual report from the European Commission on monitoring the application of Community law in 2006', adopted on 21 October 2008, P6_TA(2008)0494, PE 407.906

II. Transposition, implementation and enforcement of EU law

For the purposes of this paper the following **definitions** are used⁵:

Transposition is defined as the process whereby European Directives are incorporated into national law in order to make their objectives, requirements and deadlines directly applicable in Member States.

Implementation is defined as the process whereby EU law is applied at national and subnational levels.

Enforcement is defined as the process whereby full compliance with EU law is monitored and secured, and non-compliance is systematically sanctioned by national and supranational courts.

II.1. National transposition approaches and techniques

The **transposition approaches followed by Member States** in terms of involvement of national parliaments and governments **varies widely**⁶. Legislative measures for transposing EC law are mainly subject to two major decision-making processes: standard legislative procedure, where government's proposal is adopted by the parliament or the transposition may be delegated for adoption by the national government. Beyond acts adopted by parliament and governmental regulations, transposition is also achieved by governmental decrees, ministerial or administrative decisions and public bodies measures. Federal or decentralised Member States have specific transposition procedures.

Member States also apply **different techniques** in transposing Directives. Global transposition, i.e. the transposition of various Directives – without any necessary link between the subjects – in one single legislative instrument is used by Greece and Italy. Another technique applied by some Member States under certain circumstances (Czech Republic, France, Germany, Latvia, The Netherlands and Slovenia) is transposition by reference, whereby the national transposing measure makes reference to the EC Directive, without reproducing its content in any further provision in national law. **Consultation of stakeholders** and civil society (experts, representatives of sectors concerned, NGOs, social partners) during the transposition process is a standard practice in the majority of Member States. In Belgium, Denmark and Sweden EC law in certain fields may be implemented by collective agreement between social partners.

II.2. Problems and challenges in the transposition, implementation and enforcement of EU law

This chapter focuses on problems in the TIE of EU law and suggestions for improvements, nonetheless it needs to be noted that significant progress has been made in the past years in increasing the number of transposed Directives and improving the quality of legislation.

⁵Allio et al. (2006)

⁶Batta (2007)

II.2.1. State of play

The percentage of notification of national measures implementing all adopted Directives⁷ increased from 96,82% to 99,3% between November 2004 and March 2009 and has been consistently around 99% since mid-2005 (see Annex 2). The average **transposition deficit** of Internal Market Directives⁸ has **decreased** from 3,6% to 1% between November 2004 and November 2008⁹. While the total number of newly detected infringement cases has risen in the past years¹⁰, this is likely the effect of the increasing number of Directives to be transposed and enlargement from 15 Member States to 27¹¹. An analysis of infringement proceedings between 1978 and 1998 finds that the steady increase in the number of proceedings can be explained by the change in the Commission's enforcement strategy, the increasing amount of legislation and several enlargements, and that non-compliance in the EU has not significantly decreased over the period analysed¹².

Progress in the past years in increasing compliance might be explained by **efforts by Member States and the European Commission** as well as by **better involvement of national parliaments**. The European Commission undertook a wide range of actions in order to improve TIE (e.g. improving legislative instruments; organising transposition workshops, conformity evaluations, committee and expert group meetings, package meetings; providing information to citizens on the application of EU law; prioritising infringements; including review clauses and concordance tables in proposals)¹³. Since September 2006 national parliaments are consulted on all Commission communications and proposals¹⁴. **Inter-parliamentary cooperation** and **cooperation with the EP** is fostered *inter alia* through the IPEX database¹⁵.

II.2.2. Factors contributing to incorrect or delayed transposition and implementation¹⁶

Incorrect or delayed transposition and implementation in the Member States could have different reasons. Below we provide an overview of the possible contributing factors:

Contributing causes at EU level:

- Sometimes complex, ambiguous, or overly technical language, extensive use of recitals.
- Rushing legislation ('we have to act' - EU legislation is problem-driven), short transposition deadlines.

⁷ Directives for which measures of implementation have been notified by the deadline for implementation

⁸ Percentage of Internal Market Directives not yet communicated to the Commission as having been transposed, in relation to the total number of Internal Market Directives which should have been notified by the deadline

⁹ European Commission (2008a)

¹⁰ European Commission (2008b)

¹¹ Newly detected infringement cases rose from 2709 to 2993 between 2003 and 2004, however if only EU15 is taken into account we see a decrease from 2709 to 2146. Similarly, infringement cases increased from 2518 to 2666 between 2006 and 2007, but for the EU25 countries a decrease from 2518 to 2345 is reported

¹² Börzel (2001)

¹³ European Commission (2008c), Allio et al. (2006)

¹⁴ European Commission (2008d)

¹⁵ <http://www.ipex.eu/ipex/>

¹⁶ Sections II.2.2 and II.2.3. are based on the following sources: Allio et al. (2006), Batta (2007), Kaeding (2007) and Steunenberg (2006)

- Overreaching policy goals - reformist policy (one step ahead of most Member State policies).
- Detailed Directives (almost Regulation-like) leaving Member States little discretion.
- Politically controversial Directives (legislative Directives as opposed to non-legislative Directives and often dossiers reaching third reading).
- Limited attention for main stakeholders - neglecting domestic political realities (see clash between 'policy' and 'legal' interests).
- Insufficient feedback on policy outcomes. No learning based on previous policy.
- No attention to national transposition and implementation processes - insufficient assessment of policy alternatives, *ex ante* legal review or impact assessment (IA).

Contributing causes at national level:

- Often not a political priority (clash between 'policy' and 'legal' interests).
- Many transposition actors, limited administrative coordination within and between ministries and other implementing authorities at local/regional level.
- Limited anticipation of EU policy.
- Limited involvement of National Parliaments and often at a too late stage.
- 'Gold Plating'¹⁷ encouraged by minimum harmonisation.
- Transposition requires several legal instruments, especially in countries that prefer incorporation into existing law. EU Directives can 'mismatch' with national legal orders, obligation to consult many socio-economic groups.
- National legal drafting techniques, translation of legal terminology.
- Negotiations at EU level and subsequent implementation at the national level are handled by different units.
- National elections.

Concerning enforcement (monitoring and securing compliance and sanctioning non-compliance) we can note that there is a lack of capacity for monitoring at EU level. When conducting investigations, the Commission must rely on information provided by complainants and national authorities. Infringement procedures launched by the Commission lack transparency, are too cumbersome and slow to take effect¹⁸. Between 1999 and 2006 the average time taken to process infringements (i.e. from opening the file to sending the letter of referral to the European court of Justice) was 23 months. Referral under Article 228 took place only in ten cases in 2006 and seven cases in 2007¹⁹. At national level enforcement is often not a priority and the focus tends to be mainly on registration rather than enforcement. There is also a lack of a sense of belonging to a single legal area and a sense of 'disconnection' between national administrations and supranational institutions²⁰.

¹⁷ Transposition of EU legislation, which goes beyond what is required by that legislation, while staying within legality

¹⁸ Allio et al. (2006)

¹⁹ European Commission (2008c)

²⁰ Allio et al. (2006)

II.2.3. Suggestions to improve transposition, implementation and enforcement

The following steps could contribute to a better implementation and enforcement of EU law.

Suggestions for improvement at EU level:

- Greater consideration of national politics when making policy, setting transposition deadlines taking into account the complexity of transposition.
- Determination of a suitable level of discretion in Directives, use of Regulations or Lamfalussy process where appropriate.
- Improving the quality of drafting legislation.
- Broader consultations of stakeholders and interest groups.
- *Ex-post* evaluations ('what did not work?'), *ex-ante* (impact) assessments ('will it work?').
- EU-wide, independent research on compliance with community *acquis*.
- Fostering exchanges of information through expert committees and networks of the European Commission.
- Encouraging a systematic dialogue between the EP and national parliaments.
- Inclusion of 'transposition/implementation question time' in EP Committee sessions and devoting more resources to producing EP reports on TIE.
- Trainings for national administrations and judges.

Suggestions for improvement, national level:

- Giving more priority to TIE; implementing written, government-wide mandatory guidelines for TIE.
- Defining the role of actors in the process, provision of training and adequate financial and human resources for enforcement authorities.
- Early choice about the selection of national instrument(s).
- Appropriate use of national transposition packages.
- Improving cooperation between national administrations and between national parliaments.

II.2.4. European Parliament's recommendations to improve transposition, implementation and enforcement

The **European Parliament** has made a number of **recommendations** to improve TIE of EU legislation²¹:

Drafting legislation

- EC institutions should take into account, from the drafting stage, the potential difficulties linked to the application and monitoring of Community law.
- Regulation should be in certain cases the standard way to legislate.
- EC institutions should refrain from making use of options, exceptions or derogations which diminish the coherence and effectiveness of a Directive and opens the door to Member State 'Gold Plating' and differing standards.
- Lamfalussy process is a good example of involvement of regulators and practitioners in the implementation process.
- All Directives should include a legally binding time limit for their transposition which should be as short as possible and, as a general rule, not exceed two years and should include compulsory correlation tables.

Transposition and implementation

- Commission should be more proactive and dedicate more resources to the effective and correct implementation of existing EU legislation, EP should support the Commission via increased budget appropriations.
- Each MS should draw up its formal transposition strategy in order to clearly define roles and responsibilities of regional and national governments.

²¹- Frassoni report (JURI) on the 'Commission's 21st and 22nd report on monitoring the application of Community law (2003 and 2004)', adopted on 16 May 2006, P6_TA(2006)0202, PE 367.694

- Doorn report (JURI) on 'Better law-making 2004: application of the principle of subsidiarity - 12th annual report', adopted on 4 September 2007, P6_TA(2007)0364,

- McCarthy report (IMCO) on 'The implementation, consequences and impact of the internal market legislation in force', adopted on 16 May 2006, P6_TA(2006)0204, PE 367.670

- McCarthy report (IMCO) on 'Specific problems in the transposition and implementation of public procurement legislation and its relation to the Lisbon Agenda', adopted on 20 June 2007, P6_TA(2007)0273, PE 288.489

- Wallis report (EQUI) into the 'Crisis of the Equitable Life Assurance Society', adopted on 19 June 2007, P6_TA(2007)0264, PE 389.520

- Mulder report (CONT) on 'Minimising administrative costs imposed by legislation', adopted on 10 July 2007, P6_TA(2007)0316, PE 374.082

- Lévai report (JURI) on 'Better Regulation in the European Union', adopted on 4 September 2007, P6_TA(2007)0363, PE 388.369

- Toubon report (IMCO) on the 'Single Market Review: tackling barriers and inefficiencies through better implementation and enforcement', adopted on 4 September 2007, P6_TA(2007)0367, PE 386.697

- Geringer de Oedenberg report (JURI) in response to the '24th annual report from the European Commission on monitoring the application of Community law in 2006', adopted on 21 October 2008, P6_TA(2008)0494, PE 407.906

- Frassoni report (JURI) on the 'Commission's 23rd report on monitoring the application of Community law(2005)', adopted on 21 February 2008, P6_TA(2008)0060, PE 394.229

- Specific structures (e.g. coordination points) dealing with implementation in the Member States should be encouraged; MS should strengthen capacities and training.
- ‘Gold Plating’, fragmentary transposition through multiple acts should be avoided.
- MS should adopt a common reference methodology.

Monitoring and enforcement

- Commission should improve reporting by focusing not only on quantity but also on quality, reporting on implementation and enforcement in practice, preparing *ex post* IA (or ‘follow-up IA’) on the application of individual Directives and giving information on Directives which have the worst record in terms of their implementation.
- Conformity checks should be improved and published.
- Registration of relevant complaints should be systematic and more swiftly handled, information on the criteria for prioritisation criteria should be made public and EP should be consulted.
- Faster infringement proceedings are called for notably through shorter internal procedures in the Commission.
- More sanctions for non-compliance should be taken in infringement proceedings (real use of Art. 228), recommendation to consider the opportunity to investigate, prosecute and penalise MS for past infringements of Community law.
- EP should be more active, in particular the rapporteur responsible, possibly setting up an implementation task force within each committee.

Cooperation

- MS and Commission should cooperate more with regional and local authorities to facilitate the transposition and implementation process.
- Infringement proceedings should be complemented by more sophisticated cooperation mechanisms with domestic authorities and a stronger emphasis on capacity building.
- MS should actively exchange knowledge and best practice of transposition under Commission supervision, with the EP rapporteur associated; MS should make full use of the Commission's assistance.
- National courts in the MS should cooperate better.
- EP should cooperate more closely with the national parliaments to enhance the effectiveness and legitimacy of EP scrutiny.

In the same spirit the Working Party on Parliamentary Reform²² identified a number of proposals that aim at improving the quality of drafting legislation and enhancing procedures for the monitoring and transposition of Directives and implementation of EU legislation (see Annex 3). Following these recommendations the Conference of Presidents decided in its meeting of 18 September 2008 that the following practices should be introduced by the start of the 2009-2014 legislative period:

²²The working party consists of one personal representative of each political group chairman and is mandated to scrutinize EP working methods and identify the scope for improvement

- designation of rapporteurs(s) for implementation
- holding of regular question times on transposition and implementation
- systematic insertions of provision for correlation tables into draft Directives.

The decision to introduce the practices listed above was also endorsed by the Conference of Committee Chairs on 25 March 2009. Parliamentary committees are already involved in a number of TIE related activities²³. Questions on transposition and implementation of the existing legislation are frequently raised during Commissioners' visits and the ENVI Committee²⁴ holds regular 'implementation sessions'. EP committees are keen on pushing for the inclusion of follow-up mechanism in the legislation (e.g. correlation tables, report-back clauses). The Committee on Petitions considered several cases where infringements of Community law were suspected. As the competent committee for the application of European law as a horizontal issue, the JURI Committee²⁵ has been drafting resolutions in reply to Commission's annual monitoring reports. Other committees are also active in preparing reports on the TIE in their respective fields of competence (see Annex 1 for a list of reports). Studies, workshops, public hearings, committee delegations and discussions with national parliaments all feed into the work of committees in their work on TIE.

²³ Committee's initiatives towards enhanced parliamentary supervision of transposition and implementation of Community law, Conference of Committee Chairs, European Parliament.

²⁴ Committee on Environment, Public Health and Food Safety

²⁵ Committee on Legal Affairs

III. Transposition and implementation of consumer law and the MCA and UCP Directives

III.1. Transposition and implementation of consumer law

The transposition and application of eight Directives²⁶ in the field of consumer protection has recently been analysed by a group of researchers as part of the 'Consumer Law Compendium' project. The most recent update²⁷ of the report covers all 27 Member States and an on-line database²⁸ gives access to the national legislation, the case law and bibliographic sources concerning the eight Directives. A short briefing note by one of the researchers²⁹ has been also prepared on this subject that provides a quick overview of the transposition process.

The analysis concludes that the **Directives** in question have been **transposed in the Member States in very different ways**. The general legislative approach varies from incorporation into Civil Codes (e.g. CZ, DE, NL, LT), incorporation into the Consumer Code (e.g. BG, FR, FI, IT, LV, LT, SL), adoption of specific laws (e.g. CY, IE, PL, PT, RO, SE, UK) to mixed approach (e.g. AT, BE EE, EL LU, MT, SK, ES). A common minimum level for consumer protection has been established through the transposition of the Directives. The harmonisation of national legal systems and the creation of an internal market, which is the other aim of the aforementioned Directives, has been achieved only in part, as **Member States made use of the available options and frequently went further than the minimum clauses**. For example, the differences in the definition of 'consumer' and 'business', the content of information requirements, the various time limits for withdrawal (cooling-off periods), formal requirements and the rules governing the legal effects of withdrawal may all be cited as transposition and/or implementation related problems.

TIE of EU legislation is also assessed by the Commission services; reports providing a sectoral overview of the application of community law are prepared on an annual basis. The most recent report³⁰ describes a number of **transposition problems in the field of consumer protection**:

- The late transposition of the UCP Directive is highlighted.
- Concerning Directive 90/314/EEC on package travel, package holidays or package tours a reasoned opinion has been sent to Italy for having limited in time the possibility to obtain, in the event of insolvency of travel organization, the refund of payments made.

²⁶ Doorstep Selling Directive (85/577/EEC);
Package Travel Directive (90/314/EEC);
Unfair Terms in Consumer Contracts Directive (93/13/EEC);
Timeshare Directive (94/47/EC);
Distance Selling Directive (97/7/EC);
Price Indication Directive (98/6/EC);
Injunctions Directive (98/27/EC); and
Consumer Sales Directive (1999/44/EC).

²⁷ Schulte-Nölke, H et al. (eds.) (2008)

²⁸ http://www.eu-consumer-law.org/index_en.cfm

²⁹ Schulte-Nölke, H et al. (2007)

³⁰ European Commission (2008e)

- Varying degrees of transposition problems were identified in nine of the ten new Member States concerning Directive 93/13/EC on unfair consumer contracts and pre-infringement letters were sent.
- With regards to Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services a number of potential transposition problems were identified and pre-infringement letters were sent to nine Member States.
- According to the Commission Communication on the implementation of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, the transposition of the Directive in the Member States raises a number of problems. Many of these may be due to regulatory gaps in the Directive, but according to the Commission others can already at this stage be considered as incorrect transposition of the Directive. The transposition checks have revealed significant divergences between national laws as a result of the use of the minimum clause and the various regulatory options provided by the Directive.

In order to enhance **enforcement** of community law the European Commission started so called 'Sweep actions' in 2007. This is a new kind of enforcement action which involves a systematic check carried out simultaneously and in a co-ordinated fashion in different Member States to investigate breaches of consumer protection law.

The first such investigation brought together 15 Member States plus Norway and involved an analysis of misleading advertising and unfair practices on airline ticket selling websites. The investigation was launched and co-ordinated by the Commission under the Consumer Cooperation Regulation³¹. Lengthy procedures were noted as causing difficulties in the work of the Enforcement Network³².

The second EU Sweep on mobile phone content services such as ring-tones, and wallpapers was carried out between 2-9 June 2008, by enforcement authorities in all 27 Member States as well as Norway and Iceland, and it was coordinated by the European Commission³³. A 'health check' report on the airline websites sweep action is expected in May 2009.

Regarding the **Consumer Protection Cooperation Network**, the European Commission report³⁴ notes that the first assessment of the start up of this network is not entirely positive. Of the 256 requests for action created in 2007, only 95 were closed by the relevant national authorities in the same year. There is a large and growing backlog of request for action and the average time taken to handle a case is increasing. The pressure on this network is likely to increase still further as a result of EU wide initiatives such as 'sweep actions'.

DG SANCO³⁵ intends to raise at the political level the need for Member States to give adequate priority and resources to consumer protection cooperation and it considers that launching infringement proceedings may also be necessary if there are persistent patterns of non-compliance by certain Member States.

³¹ European Commission (2008f) IP/08/722

³² European Commission (2008g)

³³ European Commission (2008h)

³⁴ European Commission (2008e)

³⁵ European Commission, Directorate General for 'Health and Consumers'

III.2. Transposition and implementation of the UCP and MCA Directives

III.2.1. Transposition and implementation of the MCA Directive

The MCA Directive mainly codifies earlier amendments to Directive 84/450/EEC (Misleading Advertising). Given this many Member States have only made minor amendments to national laws regarding this Directive and some Member states simply refer to national legislation which had been enacted already for the transposition of Directives 84/450/EEC and 97/55/EC³⁶.

A concern raised in connection with the implementation and enforcement of the MCA Directive relates to the '**regulatory architecture**' in Member States. Some Member States traditionally combine marketing practices rules protecting consumers and businesses in one single act ('**unified approach**'). The legislative architecture of these states is thus different from the EU '**two-track approach**', where the maximum harmonisation UCP Directive is aimed at consumers and the minimum harmonisation MCA Directive at businesses. This mismatch between the two systems may lead to difficulties and uncertainty regarding the interpretation of national transposition laws and is likely to create obstacles for efficient cross-border enforcement³⁷.

III.2.2. Transposition and implementation of the UCP Directive

The deadline for transposition of the UCP Directive elapsed on 12 June 2007. Whereas in most Member States, the transposition process went without major difficulties, some Member States transposed the Directive late and it is suggested that a few Member States have incorrectly transposed the Directive.

Twenty-two Member States failed to notify transposition measures to the Commission by the deadline for transposition. To date (18 March 2009) all but one country has transposed the Directive, the case of Luxembourg has been referred to the European Court of Justice³⁸.

The Commission has detected inadequate transposition in three Member States: France, Denmark and Sweden. Formal infringement proceedings pursuant to inadequate transposition have not yet been launched against these Member States. The main concerns are whether the concepts and provisions of the Directive have been adequately transposed and whether a proper screening and repealing of more restrictive national rules has taken place.

In addition, four (2 BE, 1 DE and 1 AT) cases have been referred to the ECJ³⁹. The first two cases are on the compatibility with the UCP Directive of the current Belgian legislation prohibiting bundled offers of products and/or services to consumers. These two cases have been joined and the Opinion of the Advocate-General was delivered on 21 October 2008. The third preliminary ruling was referred to the ECJ by the German Bundesgerichtshof and concerns the admissibility of bundled offers, whereas the fourth, Austrian case concerns giving out and announcing bonuses free of charge.

³⁶ Ceponyte et al. (2008)

³⁷ *ibid*

³⁸ C-282/08 *Commission of the European Communities v Grand Duchy of Luxembourg*

³⁹ C-261/07 *VTB-VAB NV .v. Total Belgium NV*; C-299/07 *Galatea BVBA v. Sanoma Magazines Belgium NV*, C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* and C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'-Zeitungsverlag GmbH*

A number of **problems** have been identified **concerning the UCP Directive**⁴⁰:

- Member States have chosen different transposition techniques with regard to this Directive. This variety in approaches makes it difficult to identify the applicable transposition provisions and this could create obstacles for cross-border enforcement.
- The combination of maximum harmonisation with vague terms such as 'professional diligence' may cause uncertainty.
- Further ambiguity lies in the regulation of 'taste and decency' issues, which is left to Member States. It is not always clear which cases would fall under this exemption, and which would fall under the prohibition of aggressive marketing practices in article 8 of the Directive.
- It is likely there will be interdependencies between the Directive and national laws on pre-contractual information duties.
- Some Member States have chosen to disaggregate the 'black list' of commercial practices that should be prohibited in all circumstances (annex II of the Directive) rather than transposing it *en bloc*. This creates a lack of transparency, likely to hinder cross-border enforcement.
- Existing differences between national enforcement systems (eg. injunctions, criminal or administrative fines) will create obstacles for cross-border enforcement⁴¹.
- While principle based law seems to offer several advantages (can deal with several harmful practices, does not get out of date quickly and harder to circumvent) it also causes some difficulties for enforcers as it is hard to know what particular principles mean.

Furthermore, **problems** also arise **concerning the interpretation of the Directive** in the following aspects⁴²:

- Ambiguity over the use of the word 'free'
- Concept of material information (characteristics of product and performance)
- Invitation to purchase (definition and information requirements)
- Misleading environmental claims (environmentally friendly, eco)
- Meaning of 'average consumer' and 'vulnerable consumer'

Almost one year after the entry into force of the Directive close to 60,000 complaints on illegal practices have been received and national authorities investigated more than 2,300 cases⁴³.

⁴⁰ Ceponyte et al. (2008), European Commission (2009a)

⁴¹ The report from the Commission on the application of the injunctions Directive (Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumer's interest, COM (2008) 756 final) notes that the use of the Directive in cross-border cases has been disappointing, as only the UK's Office of Fair Trading used this mechanism in two instances.

⁴² European Commission (2009a)

⁴³ European Commission (2009b)

Unfair commercial practices are most **prevalent** in the following **sectors**⁴⁴:

- Telecommunications (premium calls, mobile content services)
- Holidays and travel (airline and car rental sites)
- Internet provision
- Financial Services/insurance (mortgages, consumer credit, banking services)

The **most problematic unfair commercial practices** are as follows⁴⁵:

- Aggressive practices, pressure selling omission of information in timeshare related products
- Misleading or incomplete price in telecommunication services and financial services
- Fake free offers, hidden subscription charges
- Fake lotteries and prize draws
- Unsolicited commercial communications (e-mail, SMS)

III.2.3. European Commission follow-up

The European Commission is currently preparing Guidelines to clarify some of the problematic provisions of the UCP Directive and to facilitate uniform application. Following the EP's resolution⁴⁶ and in order to support the uniform interpretation, the European Commission intends to set up a database that would give access to all legislation, ECJ case-law, relevant national case-law and decisions, and academic sources. In addition to this, three working groups with national authorities have been set up in order to provide guidance on certain concepts (e.g. invitation to purchase, material information and the use of the word 'free'). To improve awareness among consumers a website <http://www.isitfair.eu/> has been launched.

III.2.4. European Parliament work on TIE of UCP and MCA

When taking stock of the state of transposition of the two Directives, the European Parliament's resolution⁴⁷ identified instances of incorrect transposition of the MCA Directive and the UCP Directive. In particular, it regretted the confusion surrounding the consequences of the adoption of the two Directives for national legislation in the area of unfair commercial practices. It also pointed out that splitting-up of the black list of unfair commercial practices of the UCP Directive in different pieces of national legislation created confusion for undertakings and might lead to distortions in the application of the UCP Directive.

The report considered it important that the Commission keeps a close eye on the transposition, implementation and enforcement of the two Directives. It asked the Member States to devote sufficient resources to achieve a proper transposition, implementation and enforcement of the UCP and MCA Directives. The report was also supportive of the Commission's EU Airlines Sweep and EU Ringtones Sweep and asks the Commission, in cooperation with the Consumer Protection Cooperation Network to collect data on the implementation of internal market legislation in other key sectors of the internal market.

⁴⁴ Ceponyte et al. (2008), European Commission (2009a)

⁴⁵ European Commission (2009a)

⁴⁶ Weiler report (IMCO) on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising, adopted on 13 January 2009

⁴⁷ *ibid*

IV. Questions for debate

Below we provide a non-exhaustive list of questions that could be discussed during the inter-parliamentary meeting:

- What are the main problems/challenges encountered in the different phases of the transposition, implementation and enforcement process of EU consumer legislation? What are the main causes of non-transposition, delays in transposition and of incorrect transposition/implementation of Consumer Directives?
- When should the legislator use a Directive and when is a regulation more appropriate? What are the advantages/disadvantages of Directives vis-à-vis regulations in terms of achieving the aims of EU policies?
- What are the advantages and disadvantages of maximum harmonisation vis-à-vis minimum harmonisation approach in relation to transposition, implementation and enforcement of EU consumer law?
- Which parts/articles of the UCP and MCA Directives are most difficult to transpose into the Member States' legislation? Do certain solutions (e.g. maximum harmonisation, general clauses in definitions) cause particular problems?
- Which sectors/areas are most problematic from the point of view of the transposition and implementation of the two Directives?
- Which are the main administrative problems in the implementation of the Directives?
- What are the problems/challenges in national enforcement? Which remedies and sanctions have MS opted for? Are the remedies and sanctions in place effective?
- What steps have been already taken to enhance cooperation in cross-border enforcement? How could cooperation be strengthened? What are the challenges faced in cross-border enforcement?
- Which (if any) lessons from the transposition, implementation and enforcement of the UCP and MCA Directives can be drawn to improve the EU Consumer Law in the future?
- What could/should the role of the national parliaments and the European Parliament be in the transposition, implementation and enforcement process? How could national parliaments be further involved in the EU legislative process? How could cooperation between national parliaments and between the European Parliament and national parliaments be enhanced?

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Internet links

EU Consumer Law Acquis Database: http://www.eu-consumer-law.org/index_en.cfm

IPEX database: <http://www.ipex.eu/ipex/>

Is it fair? website <http://www.isitfair.eu/>

Annex I. List of European Parliament own-initiative reports related to transposition, implementation and enforcement (work carried out in the 6th legislative period, 2004-2009)⁴⁸

- Application of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States (LIBE, ongoing);
- Recommendations to the Commission on financing of actions other than Official Development Assistance in countries falling under Regulation (EC) No 1905/2006 (implementation of DCI Regulation) (DEVE, pending adoption in plenary);
- The implementation of the Structural Funds Regulations 2007-2013: the results of the negotiations on the national cohesion strategies and the operational programmes (REGI, pending adoption in plenary);
- Implementation of Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (JURI, adopted in plenary in March 2009);
- Implementation of Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (EMPL, adopted in plenary on 19 February 2009);
- Review of the European Neighbourhood and Partnership Instrument (AFET, adopted in plenary on 19 February 2009);
- Implementation in the EU of Directive 2003/9/EC on the minimum standards for the reception of asylum seekers: visits by the Committee on Civil Liberties 2005-2008 (LIBE, adopted in plenary on 5 February 2009);
- Transposition and application of Directive 2002/73/EC of the European Parliament and of the Council on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (FEMM, adopted in plenary on 15 January 2009);
- Transposition, Implementation and Enforcement of the Misleading and Comparative Advertising Directive 84/450/EC, as revised by Directive 97/55/EC and of the Unfair Commercial Practices (UCP) Directive 2005/29/EC (IMCO, adopted in plenary on 13 January 2009);
- Progress made in equal-opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC) (EMPL, adopted in plenary on 20 May 2008);
- Implementation of social legislation relating to road transport (EMPL, adopted in plenary on 9 October 2008);
- Application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (LIBE, adopted in plenary on 27 September 2007);

⁴⁸Committee's initiatives towards enhanced parliamentary supervision of transposition and implementation of Community law, Conference of Committee Chairs Secretariat note, European Parliament, PE 405.1687rev

- The Single Market Review: tackling barriers and inefficiencies through better implementation and enforcement (IMCO, 4 September 2007);
- Implementation of the first railway package (TRAN, adopted in plenary on 12 July 2007);
- Specific problems in the transposition and implementation of Public Procurement Legislation and its relation to the Lisbon agenda (IMCO, adopted in plenary on 20 June 2007);
- Report of the Committee of inquiry into the crisis of Equitable Life Assurance Society (EQUI) and the related plenary recommendation of 19 June 2007;
- Member States' efforts during 2005 to achieve a sustainable balance between fishing capacity and fishing opportunities (PECH, based on a Commission's annual report, adopted in plenary on 5 September 2007);
- Application of Directive 96/7/EC on the posting of workers (EMPL, adopted in plenary on 26 October 2006);
- Protecting European healthcare workers from blood-borne infections due to needlestick injuries (EMPL, recommendations based on the identification of problems of implementation of legislation, adopted in plenary on 6 July 2006);
- Application of the postal Directive (TRAN, adopted in plenary on 2 February 2006).

Annex II. Progress in notification of national measures implementing all adopted Directives

| Date | % of notified Directives |
|------------------|--------------------------|
| 15 November 2004 | 96,82% |
| 10 January 2005 | 97,69% |
| 3 March 2005 | 98,12% |
| 2 May 2005 | 98,69% |
| 11 July 2005 | 98,78% |
| 7 September 2005 | 98,88% |
| 4 November 2005 | 98,92% |
| 4 January 2006 | 98,93% |
| 8 March 2006 | 98,71% |
| 17 May 2006 | 98,83% |
| 30 June 2006 | 98,98% |
| 31 August 2006 | 99,16% |
| 7 November 2006 | 99,06% |
| 10 January 2007 | 99,07% |
| 8 March 2007 | 98,65% |
| 2 May 2007 | 99,05% |
| 3 July 2007 | 99,19% |
| 8 October 2007 | 99,49% |
| 26 November 2007 | 99,46% |
| 11 February 2008 | 99,32% |
| 7 April 2008 | 99,24% |
| 9 June 2008 | 99,36% |
| 26 August 2008 | 99,26% |
| 23 October 2008 | 99,34% |
| 5 January 2009 | 99,10% |
| 5 March 2009 | 99,30% |

Source: European Commission database,
http://ec.europa.eu/community_law/Directives/Directives_communication_en.htm

Annex III. Proposals of the Working Party on Parliamentary Reform concerning transposition and implementation of Community Law⁴⁹

Improve the drafting quality and ensure the adoption of 'enforcement-friendly' EU legislation by:

- including 'executive' or 'citizens' summaries and 'report-back' clauses
- avoiding extensive use of options, exceptions and derogations
- foreseeing short transposition deadlines

Strengthen and facilitate the monitoring of the process of transposition of Directives and implementation of EU law in general by:

- Providing internally in the EP for the role of 'Rapporteur for implementation with the task to following closely the process of transposition and implementation of a given EU act
- Systematically including in the Directives under consideration provisions for correlation tables
- Urging the Commission to make monitoring of transposition a strategic priority, inter alia, by providing the necessary resources (human and administrative) and making better use of the possibilities foreseen under the Treaty (infringement proceedings)
- Creating interinstitutional electronic databases containing all relevant information on transposition and implementation
- Initiative reports and studies on implementation, ex post impact assessments, hearings and 'Question Times' in committees, involvement of the national parliaments as well as of their officials seconded to the European Parliament
- Reviewing the role of PETI and JURI in monitoring application of EU law
- Urging the Commission to engage its Delegation in the Member States into the monitoring of the application of EU law

⁴⁹ Working Party on Parliamentary Reform, Second Interim Report on Legislative Activities and Interinstitutional Relations, 21 May 2008, European Parliament

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