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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 consumers' interest

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1. INTRODUCTION

1. Article 6(1) of Directive 98/27/EC on injunctions for the protection of consumers' interests¹ ('the Directive') provides for a report on its application. Publication of this report was initially planned for 1 July 2003 at the latest, but it was delayed so that information on the application of the Directive in the States which joined the European Union on 1 May 2004 and 1 January 2007 could be included.
2. In order to prepare this report, the European Commission sent out a questionnaire on the application of the Directive in 2003/2004, to which the 25 Member States consulted replied. A new questionnaire was sent in 2007 to the 27 Member States in order to update the information previously collected. In parallel, the European Commission also consulted the members of the European Consumer Consultative Group (ECCG) in 2005 and 2007 concerning the application of the Directive. Fourteen national consumer associations replied to the initial consultation, and one European association and eight national ones to the second. In 2006, the European Commission sent letters to the Member States (with the exception of Bulgaria and Romania) to clarify certain points in their national legislation transposing the Directive.
3. In 2006, the European Commission published a study conducted by the *Katholieke Universiteit Leuven* in Belgium on consumer redress² and, in 2007, a Consumer Law Compendium³, which contains sections on the Directive. Lastly, the Austrian Presidency organised a conference on injunctions and collective redress in February 2006 in Vienna.

2. TRANSPOSITION OF THE DIRECTIVE

4. Each Member State amended its national legislation to a greater or lesser extent to introduce the provisions of the Directive on injunctions. The field of application of the injunction procedure has widened over time.

An injunction procedure in each Member State

5. One very important result of the Directive is certainly the introduction in every Member State of an injunction procedure to protect the collective interests of consumers. This procedure is currently the only procedure specifically concerned with protecting consumers that exists in all the Member States. It enables illicit practices to be stopped in the collective interest of consumers, regardless of any harm actually caused. The injunction procedure introduced by the Directive does not provide for consumers who have suffered harm because of an illicit practice to obtain compensation.
6. Under Article 2, each national procedure includes, with certain exceptions, an emergency procedure, the possibility of having a decision or a corrective declaration published and the payment of an amount to guarantee execution of the decision. Two thirds of the Member States opted for a civil or commercial judicial procedure, whilst only a few (Hungary, Malta, Poland and Romania, for instance) opted for a mainly administrative approach. Certain Member States, even though they opted for a

¹ OJ, L 166, 11.6.98, p. 51.

² http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf

³ http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf

judicial procedure, designated administrative authorities to rule on certain infringements (Austria for television broadcasting activities and Finland for advertising for medicines for human use and for package travel, for instance). Finally, certain Member States have designated specific courts to deal with particular practices (for instance, the courts in The Hague and Warsaw have exclusive competence with respect to unfair contractual terms).

7. Article 3 of the Directive defines the qualified entities which can bring an injunction very broadly. It distinguishes two non-exhaustive categories of entities, leaving it to the Member States to set criteria to define which organisations are responsible for protecting the collective interests of consumers. In practice, the idea of a qualified entity includes actual consumer associations, public authorities specifically responsible for consumer protection, medicines agencies, civil aviation authorities, users' associations, family organisations, trade unions, chambers of agriculture, and chambers of commerce and industry. All the Member States have, in accordance with Article 4, notified the European Commission the qualified entities authorised to seek an injunction in another Member State⁴. The list in the Official Journal enables entities included on it to prove their legal capacity to act before the courts or administrative authorities of other Member States.
8. Lastly, Article 5 of the Directive allows Member States to introduce, or not introduce, an obligatory prior consultation procedure between the party seeking the injunction and the defendant. A third of Member States (Ireland, Italy, Cyprus, Lithuania, Malta, the Netherlands, Romania, Sweden and the UK) have established this procedure. In Romania and the UK, independent public entities which are also qualified entities within the meaning of the Directive must be involved in the prior consultation procedure. Of the Member States that have not opted for this prior consultation procedure, proposed in Article 5 of the Directive, several encourage negotiations before any action⁵. Nevertheless, most Member States do not want to make the consultation referred to in Article 5 obligatory. One European consumer organisation has even stated that a prior consultation procedure can drag out the injunction procedure unnecessarily. The Commission does not have sufficient evidence or prior experience in this area to amend the Directive to generalise the prior consultation procedure, pursuant to Article 6(2).

Extending the scope of application

9. The scope of application of actions for an injunction is defined in Article 1 by reference to the directives mentioned in the Annex to the Directive, as transposed into the national legal orders of the Member States. The Annex to the Directive originally listed 9 directives, but now includes 13⁶. Directives 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, 2000/31/EC on electronic commerce, 2002/65/EC on the distance marketing of consumer financial services, 2005/29/EC on unfair commercial practices and 2006/123/EC on services have thus been added to the Annex since it came into force. The Annex to the Directive now includes a large proportion of Community consumer protection legislation. Most of the Member States consulted appeared to be satisfied with the scope of the Directive, although Portugal and Belgium wonder about the

⁴ The last update of this list was published on 8 March 2008. OJ C 63, 8.3.2008.

⁵ e.g. Denmark, Germany, Austria, Slovakia and Finland.

⁶ See Annex.

appropriateness of an exhaustive list and suggest that it be scrapped so that any practice harming the collective interests of consumers can be covered.

10. Article 7 of the Directive also provides for the possibility of Member States extending the scope of application at national level. For example, in the Netherlands and Poland, injunctions can be sought against any practice harming the collective interests of consumers. Portugal and Italy have extended the scope to include any practices detrimental to the safety of products. In Germany and Austria, it is possible to seek an injunction against any anti-competitive practice harming the collective interests of consumers.
11. Some Member States, notably Germany, Slovenia and Sweden, have extended the scope of injunctions, at national level, to include commercial practices (such as misleading advertising) detrimental to the collective interests of companies. However, the majority of Member States consulted are not in favour of extending the scope of the Directive to include the collective interests of companies, arguing that the Community legislation listed in the Annex is primarily there to protect consumers and that it would not be desirable to mix up the interests of consumers with those of small and medium-sized companies, even though the latter may also need protection.
12. In view of the above, the Commission does not consider that it would be justified to amend the scope of the Directive, as allowed under Article 6(2). In particular, it does not consider that it would be appropriate to extend the scope to cover the collective interests of companies. However, whenever justified, it will continue to propose the addition of new Community consumer protection legislation to the Annex.

3. APPLICATION OF THE DIRECTIVE

13. The use made of the Directive to counter cross border infringements has been disappointing. According to the Commission's information, only the UK's Office of Fair Trading (OFT, public authority in charge of consumer protection) has used the mechanism. The OFT brought an action against the company DUCHESNE in Belgium. This Belgian company had sent UK consumers unsolicited sales catalogues saying that they had won a prize. To receive the prize, consumers had to order an article from the catalogue. Consumers ordered an article from the catalogue but did not receive the promised prize. The OFT therefore took the Belgian company in question to court in Belgium on the basis that the information given to UK consumers was misleading and had encouraged them to buy products from the catalogue. The Belgian court of first instance issued an injunction against the practice. This ruling was confirmed on appeal.
14. Similarly, following 300 complaints from UK consumers, the OFT brought an action against the company Best Sales B.V. before the Dutch courts. The facts of this case were similar to the one described above, whereby a Dutch company sent unsolicited mail to UK consumers giving them the impression that they had won a prize. The mail made out that in order to receive a more valuable prize or to receive this prize more rapidly, they needed to order household articles from the catalogue attached to the mail. The Dutch courts considered in a ruling of 9 July 2008 that the advertising at issue was misleading and ordered the Dutch company to stop sending these mails.
15. The OFT also stated that the Directive had been useful as a means of putting pressure on companies in other Member States to have certain commercial practices stopped.

Ten or so matters had thus been resolved by negotiation. Belgium also emphasised the dissuasive effect of injunctions.

16. Whilst injunctions are still used only rarely for cross-border infringements, several Member States and consumer associations consulted stated that they are used fairly successfully by consumer associations for national infringements⁷, often in order to have misleading advertising stopped or to annul an unfair term in a contract.

4. PROBLEMS ENCOUNTERED

17. The main reasons mentioned by both the Member States and the interested parties to explain the small number of injunctions sought in another Member State are the cost of bringing an action, the complexity and length of the procedure and the limited scope of the injunction procedure.

Cost

18. Three quarters of the consumer associations consulted mentioned the cost of bringing an action as one of the main obstacles, in particular in the event of an infringement in another Member State. Several Member States also emphasised how difficult it was for qualified entities to bring actions of this kind because of the associated financial risks. The consumer associations mentioned the administrative costs of preparing the file, court fees and lawyers' fees as posing particular difficulties. If the action is brought in another Member State, it will also entail translation costs, and there is added uncertainty about legal fees in another Member State (for example, citation fees or fees associated with notification of the ruling). The associations also mentioned the risk of duplicating lawyers' and experts' fees.
19. The financial risk is all the greater when the action is brought in a Member State where the losing party has to bear all the costs of the procedure and, in particular, pay the costs of the successful party (in particular, some or all of their legal costs). This principle exists in most of the Member States. Therefore, if it loses, the party bringing the injunction has to bear not only its own costs but also those of the other party. Several consumer associations consulted said that they were not able to bear the costs of introducing procedures of that kind or to assume the associated financial risks. Others said that they act only if the risk is negligible and they are certain to win, thus restricting considerably the number of actions brought. In several Member States, however, injunctions are successfully brought by consumer associations for national infringements.
20. Some Member States have made the principle by which the losing party bears all the costs associated with the case more flexible, or have opted for an approach more favourable to the qualified entities. For example, in several Member States, the courts have a certain measure of discretion⁸ and can, for example, rule out payment by the losing party of the successful party's legal costs. In Hungary, consumer associations do not have to pay court fees. However, these national measures often remain rather *ad hoc*, and the financial risks incurred are enough to dissuade qualified entities from bringing actions.

⁷ e.g. Bulgaria, Czech Republic, Germany, France, Italy, Latvia, Austria, Sweden, Slovakia and the UK.

⁸ e.g. Luxembourg, Portugal, Sweden, the UK.

Complexity and length of procedures

21. The complexity and length of procedures are often invoked as obstacles to cross-border actions. The complexity is the result mainly of different injunction procedures in other Member States, subject to national judicial or administrative procedures. Existing uncertainties as to which law is applicable reinforce this perceived complexity.
22. Whilst the Directive harmonises certain aspects of bringing an injunction in the Member States, it leaves them a certain amount of latitude. It allows them to choose a judicial or an administrative injunction procedure and whether or not to impose a prior consultation procedure and establish the associated arrangements. The Directive also allows Member States to adopt or maintain, at national level, provisions giving qualified entities or any other party the entitlement to take more wide-ranging action. An analysis of the transposition of the Directive in the previous section demonstrated the wide range of choices made by the Member States. Moreover, by not regulating many aspects of the injunction procedure, such as prescription periods or procedural deadlines and fees, the Directive allows the details to be fleshed out in national civil, commercial or administrative procedures, which can vary between States.
23. The combination of these factors leads to the existence of injunction procedures to protect consumers' collective interests which vary widely from one Member State to another. In some Member States, such as the Netherlands or Finland, there are even different types of procedures depending on the area of law in question. This diversity makes it difficult for qualified entities wishing to bring an action in another Member State to gain an overview, as they are often confronted by procedures which are very different from those with which they are familiar in their own country. Each time they bring an action in a new Member State, qualified entities have to familiarise themselves with a new procedure.
24. Lastly, the associations and Member States consulted emphasised the current uncertainties regarding the applicable law. Should the infringement in question be judged on the basis of the law of the Member State where the infringement has its origin or of the Member State where its impact is felt? The Directive (Article 2(2)) is not clear on this issue, but it is very important, as several of the directives referred to in the Annex contain a clause allowing the Member States to provide for or maintain laws which go further than called for in the directives as far as consumer protection is concerned. The issue of applicable law is thus fundamental in all instances where there is a choice between two different bodies of legislation offering different degrees of protection. In the case brought by the OFT in Belgium, mentioned above, both the court of first instance and the appeal court examined this question, and the court of first instance applied British law, whilst the court of appeal decided that Belgian law was applicable. In future, the issue of determining the applicable law could be simplified by the application of Article 6 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations⁹ adopted on 7 July and which will enter into force on 11 January 2009 ("Rome II Regulation").

⁹ OJ L 199, 31.7.2007. p.40.

Limited impact of rulings

25. Lastly, the associations and Member States consulted emphasised the sometimes limited impact of such injunctions. In most Member States, a ruling on an application for an injunction has a mitigated impact. It is mandatory only with respect to the case and the parties in question, i.e. the qualified entity which brought the action and the company which is the subject of the injunction. In practice, this means that if a company commits an infringement identical to that for which another company has already been convicted, a new injunction must be sought to stop the new infringement. In the same way, the annulment of an unfair term in a contract proposed by a company does not prevent the same company from continuing to use this unfair term in a similar contract.
26. However, in some Member States, this principle is applied more flexibly, in particular as far as unfair terms are concerned. For instance, in Poland, when the court in Warsaw rules that a clause in a contract is unfair, this ruling has an *erga omnes* effect. The ruling is published and applies to an identical clause in any contract proposed to consumers. In Hungary, if a court rules that a clause in a contract between a company and a consumer is unfair, it may declare this clause null and void in all contracts concluded by that company. In Austria, a clause which has been declared unfair in a contract between a company and a consumer may not be used again by the company in other contracts. In Germany and Slovenia, consumers can invoke a ruling declaring a clause unfair in order to suppress the application of an identical provision.
27. The injunctions are also limited in terms of the national scope of the ruling, as the UK and Belgium have emphasised. Dishonest companies that are deliberately breaking the law and have been convicted in a particular Member State tend to move to another Member State, where a new injunction is needed to stop the illegal activity in question. Moreover, the national nature of the decision means that, when a company is convicted of an illegal practice to the detriment of consumers in a given Member State, it can still continue to act in the same way towards consumers in another Member State, unless an injunction is brought by a qualified entity in the latter Member State.

5. IMPACT OF THE CPC REGULATION

28. The Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (CPC Regulation)¹⁰ establishes a network of public authorities responsible for protecting consumers and harmonises, to a certain extent, the investigative and enforcement powers of these authorities. Moreover, thanks to the mutual assistance mechanisms created by this Regulation, a member public authority may, at the request of a public authority in another Member State, bring an injunction in its own jurisdiction to stop illegal practices against consumers from the Member States of the requesting authority.
29. Some of the Member States consulted emphasised that the CPC Regulation should facilitate injunctions to stop intra-Community infringements as the mutual assistance mechanisms created by the Regulation allow, among other things, public authorities with specific expertise to pursue injunctions. The Regulation thus deals with one of

¹⁰ OJ, L 364, 9.12.2004, p.1.

the main obstacles highlighted by the implementation of the Directive: the difficulties faced by a national body trying to bring an injunction directly in another Member State.

30. The above-mentioned Member States emphasise that it would be desirable to bring the scope of the Directive into line with that of the CPC Regulation. In fact, the Annex to the Regulation refers to Directive 98/6/EC¹¹ on consumer protection in the indication of the prices and Regulation 261/2004/EC¹² on the rights of air passengers, which are not included in the annex to the Directive. The Annex to the Regulation does not, however, refer to Directive 2006/123/EC on services, which is included in the Annex to the Directive. Bringing the Annex to the Directive and that of the CPC Regulation into line, as proposed by certain Member States, would call for both the Directive and the Regulation to be amended in parallel.

6. CONCLUSION

31. A major benefit of the Directive has been to introduce in each of the Member States a procedure for bringing injunctions to protect the collective interests of consumers. This procedure is being used by the consumer associations with some success for national infringements.
32. However, the mechanism created by the Directive to allow qualified entities of one Member State to act in another Member State has clearly not been as successful as was hoped. The main obstacle, which explains why so few injunctions have been sought to stop intra-Community infringements, is the lack of resources in the light of the financial risks borne by any eligible qualified entity, but also in the light of the expertise required to deal with the different procedures in the various Member States.
33. The CPC Regulation is a partial response to the difficulties raised by the implementation of the Directive, and its application should considerably improve the combating of intra-Community infringements. The adoption of the Rome II Regulation should also have an impact. The Commission takes the view that it would be preferable to await more detailed feedback on the application of the CPC and Rome II Regulations before drawing conclusions as to how to proceed with the Directive.
34. Consequently, the Commission takes the view that it is not the time to propose any amendments to, or the repeal of, the Directive but that, on the contrary, it should continue to examine the application of the Directive. In particular, it takes the view that there is no reason to extend its scope to include the collective interests of businesses, or to generalise the prior consultation requirement.

¹¹ OJ L 80, 18.3.1998, p.27.

¹² OJ L 81, 19.3.2004, p.80.

ANNEX

LIST OF DIRECTIVES IN THE ANNEX OF DIRECTIVE 98/27/EC

- 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 (OJ L 149, 11.6.2005, p. 22).
- Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).
- Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48), as last amended by Directive 98/7/EC (OJ L 101, 1.4.1998, p. 17)
- Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23 as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60)).
- Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).
- Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ L 113, 30.4.1992, p. 13).
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).
- Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).
- Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, p. 16).
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).