



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.01.1996  
COM(95) 712 final

96/025 (COD)

Proposal for a  
**EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**  
on injunctions for the protection of consumers' interests

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(presented by the Commission)

## INTRODUCTION

On 26 October 1992, the report on "The internal market after 1992 - meeting the challenge" was presented to the Commission by a group of independent persons chaired by Mr Peter Sutherland.

This report examined "the issues which need to be resolved to enable Community law to be administered fairly and effectively" and considered "what is required to meet the continuing expectations ... of those involved in the market place - consumers and businesses" (foreword, ultimate and penultimate paragraph).

In this context the report stressed that "it is not enough to pass laws and simply to hope that they will be applied evenly in all Member States" (Summary, page 5) and that "doubts about the effective protection of consumers' rights need to be overcome. The issues should be given rapid consideration by the Community" (page 35, Recommendation No 22).

On 16 November 1993, partly as a response to the Sutherland Group's recommendations, the Commission adopted a Green Paper on "Access of consumers to justice and the settlement of consumer disputes in the single market" (COM(93) 576).

The Green Paper was given very wide publicity and the feedback received confirms the need for a Community initiative in this area - and urgently at that.

The importance of concrete measures to follow up the Green Paper, as well as the results of the consultations, was stressed by the European Parliament (Resolution of 22 April 1994), by the Committee of the Regions (Opinion of 17 May 1994) and by the Economic and Social Committee (Opinion of 1 June 1994).

Several Member States requested the Commission to present a proposal for a Directive to this effect.

In the summary report on the internal market presented to the European Council at Essen on 9 December (COM(94) 553 of 30 November 1994) the Commission confirmed that it would "act on the basis of the consultations undertaken on its Green Paper".

## EXPLANATORY MEMORANDUM

### I. Summary of the procedure to date and the results of the consultations on the Green Paper

- 1.1 Following publication of the Green Paper, the Commission received 110 written replies representing all interests concerned from all over the European Union: apart from "institutional" opinions (Member States and Community institutions), numerous written contributions were submitted by consumer advocacy groups, firms, the legal professions (judges, lawyers, notaries) as well as other bodies responsible for settling consumer disputes out of court.
- 1.2 All parties who replied in writing by the deadline set out in the Green Paper (31 May 1994) were invited to a hearing organized in Brussels on 22 July 1994, at which 74 organizations and bodies participated.

Some of the options aired in the replies received by the Commission were also discussed at the first European Consumer Forum on 4 October 1994, with almost 350 participants from 19 countries representing all parties concerned. Hearings on the Green Paper were also organized by the European Parliament (Legal Affairs and Citizens' Rights Committee, 24 February 1994) and the Economic and Social Committee (1 March 1994).

- 1.3 Generally speaking the Green Paper was very well received, the reactions being unanimous as regards the principles undergirding it, and particularly on the fact that the existence of effective means of redress for consumer disputes is an essential condition for the smooth functioning of the Single Market.

As regards the need for a Community initiative in this domain, a very large majority was in favour of such a move and indeed the Commission was widely criticized for not relying on its right of initiative. For example, in point (c) of its conclusions the Economic and Social Committee "regrets, however, that the Commission has not now used this opportunity to submit concrete proposals for action within the scope of its specific powers, particularly for exploring the potential offered by Article 129a of the Treaty of Rome". In point 8 of its Resolution on the Green Paper, the European Parliament "considers that the scope and scale of the problem of equal access to justice for Community citizens justify Community action and believes that the desired objectives cannot be adequately achieved by the Member States".

Besides the Community institutions and most of the representative organizations, three Member States also expressly invited the Commission to present a proposal for a Directive.

- 1.4 As regards the content of the Community initiative, the great majority agree that, without ruling out other initiatives, the Commission should be urged to propose a priority action.

The idea is to coordinate national provisions relating to actions for an injunction which may be brought in regard to certain unlawful commercial practices, and to secure mutual recognition of the entities entitled to bring such actions.

On this point, the position of the Community institutions is as follows:

The Parliament, in its Resolution of 22 April 1994 on the Green Paper (paragraphs 11 to 14):

- "shares the Commission's concern that a Community solution should be found to the problems raised by unlawful commercial practices, by means of actions of collective interest, since such practices affect both consumers and firms";
- "notes that although these unlawful practices originate in one Member State, they may affect consumers in another Member States";
- "(...) and for this reason it would be appropriate to harmonize the conditions for bringing injunctions against unlawful commercial practices";
- considers that this harmonization should be accompanied by the mutual recognition, between Member States, of the right of organizations of firms and consumer organizations to bring legal proceedings recognized by the law of the Member States".

The Council, in its conclusions on the Green Paper of 17 May 1994:

- "welcomes the introduction in the Member States of swift and simplified procedures designed to put an end to certain unlawful commercial practices, but notes that in some cases these procedures cannot be entirely effective in preventing unlawful transfrontier practices";
- "shares the concern of the Commission and European Parliament to find a solution to the problems which these unlawful practices may pose and which might affect consumer confidence in the Single Market";
- "stresses that, since certain unlawful commercial practices have a transfrontier dimension, it may be necessary at Community level to develop initiatives to eliminate them";
- "requests the Commission to intensify as soon as possible the examination it has begun of the measures which can be taken by public authorities and/or consumer organizations as well as by professional bodies to prevent unlawful commercial practices".

In its unanimously adopted opinion of 17 May 1994 the Committee of the Regions urged the Commission "to ensure that all Member States provide for some form of representative action" to compensate for "the prohibitive costs to individuals of bringing a legal action".

In its unanimously adopted Opinion of 1 June 1994 the Economic and Social Committee considers "that the Commission should rapidly submit legislative proposals on the following:

- (a) definition of common principles and procedures for uniform proceedings for settling transfrontier consumer disputes and actions for an injunction;
- (b) definition of basic rules for the standardization of collective or joint actions relating to consumer conflicts at Community level".

1.5. Finally, the report drawn up for the Commission by the Sutherland Group ("The internal market after 1992 - meeting the challenge") already recommended that "Member States could provide better (and non-discriminatory) rights at court to consumer associations" (Recommendation No 21).

## **II. Legal basis and justification of the proposed measures in the light of the principle of subsidiarity**

### **The problem**

Besides mechanisms designed to settle individual disputes, all Community Member States have passed laws whose purpose is to limit or forestall the harmful consequences which certain unlawful practices are liable to have for consumers and business competitors<sup>(1)</sup>. An "inventory" of these means of redress, whose objective is to ensure the smooth functioning of the national markets, is summarized in the table annexed to this explanatory memorandum.

The inventory shows that the notion of an action for an injunction exists in all the Member States.

Generally, such actions are designed to enjoin the cessation of practices which the law declares to be illegal. Since their objective is mainly preventative, the effectiveness of such actions depends very much on the speed of the procedure<sup>(2)</sup>. This is also an essential aspect of legal certainty both for the economic system as a whole and for the sector in which the challenged practices have occurred.

The completion of the internal market, as well as the development of new distance selling techniques (Minitel, teleshopping and other possibilities offered by the information superhighways, alongside traditional mail order selling) in principle allows products and services to move freely without the intermediary of a local operator who could address potential problems occurring in the target country.

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<sup>(1)</sup> From the point of view of firms that respect the "rules of the game", the infringement of consumer law also leads to distortions of competition: one very obvious example is misleading advertising.

<sup>(2)</sup> The decision ordering "discontinuation" of misleading advertising is of little use if it is delivered only after the advertising campaign has ended.

In certain sectors (for example Directive 89/552/EEC on "television without frontiers") Community law has established the principle of home country control. The corollary is that, in the interests of prevention, actions for an injunction will increasingly have to be brought in a country other than that in which the plaintiff is domiciled.

In this context, existing actions for an injunction provided for in the national legal orders in the domain of consumer protection have two quite specific and particular limits.

The first limit is bound up with the fact that in most Member States the right to bring such actions is reserved to certain entities which are "qualified" to represent the collective interest protected:

- consumer associations "accredited" at national level (examples: France, Belgium);
- a specific national authority responsible for consumer protection within the country (examples: United Kingdom, Ireland).

The second limit arises from the fact that in certain Member States the very admissibility of the action is predicated on the infringement of a provision of national law (example: Germany); in other words, an infringement of substantive "foreign" law, even when an domestic equivalent rule exists, can never be grounds for action.

As a result, the effectiveness of existing actions for an injunction is compromised whenever an unlawful practice originates in country B but has its effects in country A.

In this case the "judicial" frontier of country B is often insurmountable, either because standing to sue is the privilege of national representative entities (which means that an entity in country A is not entitled to sue) or because the admissibility of the action is predicated on the applicability of national substantive law (which means that the action cannot be brought by the entity in country B). In many cases of misleading advertising exclusively addressed to French consumers from a post office box in Germany, the action for an injunction brought in Germany by a German organization has thus been declared inadmissible "since the practice does not affect the German market"<sup>(3)</sup>.

This frontier also reduces the effectiveness of actions for an injunction in Member State A (unless immediately executed): such actions can only be effective if they are brought in the country in which the judgment is to be executed.

Therefore, the coordination of national rules governing actions for an injunction is essential to make these rules as effective in the context of the Single Market as they are at national level.

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<sup>(3)</sup> See, for example, Landgericht München, 2 April 1994, Case 4 HKO 21 509/91, and Landgericht Aachen, 10 December 1993, Case 43 0 175/93.

## Legal basis and subsidiarity

The legal basis is Article 100a since the provisions the application of which this proposal is designed to improve, derive from Community acts the legal basis of which is also Article 100a.

The choice of legal basis is also based on the fact that the provisions of this Directive establish the principle of mutual recognition of bodies qualified to bring actions for an injunction as well as the coordination of national rules governing such actions.

The first paragraph of Article 100a of the Treaty establishing the European Community provides for the "approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

While the establishment of this single market involved the approximation of certain minimum "rules of the game", its functioning now depends on the measures that make it possible to prevent and/or punish infringement of the rules of the game laid down at Community level.

In principle, it is up to the Member States to implement these measures on the basis of Article 5 of the Treaty, pursuant to which, as the Court of Justice recalled in its judgment of 19 November 1991 (Cases C-6/90 and C-9/90, ECR 1991, p. 5357) "Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law". The Court went on to say that "[a]mong these is the obligation to nullify the unlawful consequences of a breach of Community law".

In principle, appropriate means of redress should exist in the legal orders of each Member State and, in general, there would seem to be no need to harmonize them.

However, in the context of the single market the notion of an "appropriate" means of redress must be assessed also with an eye to the intra-Community dimension of infringements: when the "unlawful consequences" of an infringement affect the nationals of a Member State and when the Brussels Convention has established that the court of another Member State has jurisdiction, the means of redress provided for in this second Member State should be accessible to claimants in the first Member State.

However, the absence of coordination between national rules governing the access to certain means of redress may in certain areas have effects which are incompatible with the abovementioned requirement.

This is the purpose of this proposal: bearing in mind the intra-Community dimension of the infringements in question, as well as the "compartmentalization" of national means of redress, the coordination of national rules governing these means of redress is crucial for the effective and non-discriminatory application of the underlying Community law and, hence, the smooth functioning of the single market.

This coordination can only be realized by the Community lawmaker, as was the case for Council Directives 92/13/EEC of 25 February 1992 and 89/665/EEC of 21 December 1989, which coordinated national rules relating to the application of review procedures to the award of public contracts and also Council Directive 93/7/EEC of 15 March 1993 which went so far as to introduce "proceedings" for the return of a cultural object which has been unlawfully removed from the territory of a Member State.

### **Proportionality**

Pursuant to the third paragraph of Article 3b of the EC Treaty "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". Hence, in this particular case the content of the proposed measure will be limited to whatever is strictly necessary to remedy the consequences of the two problems discussed above.

### **III. The content of the proposed measure**

The proposed action is based on the existence, at national level, of entities qualified to protect the interests of consumers and is found in the application of the principle of mutual recognition of these entities: in consonance with the proportionality principle, the establishment of "representativeness" criteria is left to the Member States; the Member States communicate to the Commission the list of entities recognized as representative at national level (and subsequently notify any changes to the list) and furnish these entities with a document certifying their "qualification". This mutual recognition applies to the qualification enshrined in this document. The national lists are published in the C series of the Official Journal of the European Communities. Any subsequent modifications to these lists are to be published in the same way at regular intervals.

The action for an injunction envisaged in this proposal will apply in so far as the substantive law of the Member States has been harmonized via a Community regulation or Directive. The scope of the Directive is hence limited to practices coming within the remit of national laws that have been harmonized under the Directives listed in the Annex to this draft proposal. The draft proposal concerns acts which Community law declares to be unlawful, and hence equivalent provisions must exist in all the Member States: the action for an injunction is nothing but a tool to ensure the effective application of the corresponding provision of Community law.

Whenever a practice which Community law declares to be unlawful has effects in Member State A but originates in Member State B, mutual recognition under the Directive will mean that existing national laws can take effect, while historical and legal traditions will be in no way compromised: the qualified entity in country A may either authorize the qualified entity in country B to institute proceedings before the court or competent authority of that country, or it may itself take action before that court or this competent authority.

The proposed text in no way prejudices established remedies at national level: these rights may be far broader in certain Member States (for example France, Netherlands, Greece) than in others, but their harmonization does not seem warranted given the current state of Community law.



## **IV. Commentaries on the Articles**

### **Article 1: Scope**

The proposal for a Directive is designed to coordinate national provisions concerning actions for injunction of practices which are contrary to Community consumer law and which undermine the interests of consumers.

Article 1 thus refers to the list of Directives featured in Annex 1 to the proposal: hence the scope has been limited to infringements of national provisions transposing the Directives listed in the Annex.

In other words, the proposal does not establish a "general" right to sue but, rather, enshrines minimum review procedures which are specific to a domain of substantive law which has already been harmonized at Community level.

It does not create any "new" obligation for business, but quite simply "recalls" existing obligations emanating from certain Directives which are already in force or are about to be adopted (see Annex).

The abovementioned Directives were selected because of the impact of their infringement on consumer interests and on the smooth functioning of the single market. By reference to this Directive, other Community acts may, in future, extend the scope of this Directive to other specific areas.

In its Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, the Council stressed the importance of ensuring "... that Community rules are uniformly and effectively implemented, in accordance with the conclusions of the Essen European Council" (first recital) and held that "the absence of effective, proportionate and dissuasive penalties for breaches of Community law could undermine the very credibility of joint legislation and affect the situation of citizens of the Union, in certain cases possibly harming conditions of competition and the general interests referred to in the common rules" (fifth recital) (OJ No C 188, 22.7.1995, p. 1).

Already in 1992 in its Resolution of 7 December on making the Single Market work, the Council undertook "to consider as a matter of priority the appropriate initiatives which the Commission may decide to take with the aim of ensuring the smooth running of the Single Market" (OJ No C 334, 18.12.1992, p. 3, point 20).

### **Article 2: Actions for an injunction**

The scope having been defined as a list of Community instruments, the first paragraph provides that any infringement of the national provisions transposing these instruments may give rise to an action for an injunction.

As indicated above, actions for an injunction already exist in all Member States, particularly on the basis of Council Directive 84/450/EEC of 10 September 1984 concerning misleading advertising and Council Directive 93/13/EEC of 5 April 1993 concerning unfair terms in

consumer contracts. It involves a means of redress designed to limit or prevent damage resulting from behaviour which the law defines as illegal, as distinct from actions for damages which are designed to "make good" the consequences.

From this perspective, an action for an injunction can prevent an enormous number of actions for damages. But clearly an action for an injunction can play a preventive role only provided it is part of an effective and rapid procedure.

Member State experience shows that to be effective the procedure must allow the court to:

- take the necessary measures to rectify, where appropriate, the effects of the infringement (for example, Directive 84/450/EEC on misleading advertising provides for publication of the decision);
- accompany its decision with sanctions provided in national legislation to assure respect for the decision.

The second paragraph establishes the principle of access to means of redress covered by this Directive in the event of infringements which have their effects in other Member States. The procedural rules, as well as the technical modalities for bringing an action, remain, of course, those provided for in the lex Fori.

Without prejudice to the rules of private international law, and within the limits of its domain of application, the second paragraph of Article 2 enshrines an elementary principle: the court having jurisdiction, by virtue of existing Conventions, must be able to decide on the law which applies to the substance of the dispute, even if the infringement has its effects only on a market other than the national market.

This second paragraph is the logical consequence of the notion of an "internal" market: when the court having jurisdiction has to rule on the infringement of a provision transposing Community law and when the applicable law is that of another Member State transposing the same Directive, this court will take all the measures provided for in cases of infringement of the "equivalent" national provision.

### **Article 3: Entities qualified to bring an action**

In the domain covered by the proposal for a Directive, actions for an injunction are "reserved", in most Member States, for certain "qualified" entities (see the table annexed to the Explanatory Memorandum).

In the first group of countries (France, Belgium, Luxembourg), these entities are associations "approved" at national level (which would seem to exclude all associations "approved" in neighbouring countries); in the second group (United Kingdom, Ireland, Denmark, Sweden and Finland), the action is normally brought by a national authority specifically responsible for protecting consumer interests in the country in question (which means their hands may be tied when an infringement is committed in their country but has consequences only in other countries); in the third group of Member States (notably Germany, Netherlands and Italy), the action is "open" to all entities which meet certain criteria.

Consequently, when consumers in Member State A are affected by an infringement originating in Member State B and when this second Member State belongs to the first or second of the abovementioned groups the situation is as follows:

- the "qualified" entity in country A is not entitled to bring an action in country B (the action for an injunction being reserved there to "national" entities); and
- the "qualified" entity in country B does not have an "interest" in bringing an action on behalf of interests located "abroad" (or in certain countries has no authority to do so).

In order to permit the entities qualified under national law to act effectively outside their national borders (see Article 4), without however harmonizing the criteria for qualification of these entities, Member States must draw up a sufficiently transparent list of such entities. This Article requires Member States to establish, at national level, a list of entities qualified to bring an action as envisaged in Article 2.

The organizations and bodies featuring in each national list receive a document certifying their "qualification" vis-à-vis the competent authorities (paragraph 2) and the lists of entities thus qualified (as well as any modification thereof) is communicated to the Commission which sees to their publication in the Official Journal (paragraph 3).

The purpose of this final provision is both to facilitate the work of the authorities in concrete cases and to provide transparency.

#### **Article 4: Intra-Community infringements**

This Article establishes the principle of the mutual recognition of qualified entities in the framework of the procedural structures existing at national level (paragraph 1). The establishment of this principle, according to this Article, allows:

- the facilitation of the search for a "correspondent" having equivalent powers and the creation of the conditions for better cross-border cooperation; and
- the creation of the conditions whereby a qualified entity representing interests affected by an infringement originating in another Member State (an "intra-Community" infringement) can bring an action directly to a court or competent authority

In practice, Article 4 provides two possibilities to the latter entity. They may:

- ask a qualified entity in the Member State having jurisdiction to seize that jurisdiction;  
or
- directly seize the court having jurisdiction, in application of the principle of mutual recognition.

Since certain Member States may "prefer" the first option, the second paragraph of Article 4 allows them to provide that the first procedure must be invoked initially.

However, if no national entity is able or willing to act, direct seizure by the "foreign" qualified entity is the only solution.

To this end, the Article makes it incumbent on Member States that stipulate the use of the first option as an initial step to give the qualified entities a reasonable time-limit within which to react, so that the action for an injunction can achieve its objectives.

#### **Article 5: Prior notification**

Article 5 allows Member States to maintain (or introduce) a pre-litigation procedure, with a view to allowing the defendant to terminate the infringement "spontaneously"; depending on the circumstances, this may take the form of a mandatory or optional "prior" warning issued by the party that intends to bring the action for an injunction.

Since the qualified entities in other Member States may not be familiar with the modalities (or even the existence) of such a procedure, the second paragraph provides that the modalities governing prior notifications be published in the Official Journal of the European Communities. To this end, these modalities must be notified by the Member States to the Commission.

#### **Article 6: Reports**

The Report mentioned in this Article will enable an overview of the operation of the Directive, and report on the possible enlargement of its scope by other Community acts, to be obtained.

#### **Article 8: Final provisions**

Article 8 contains the classical provisions concerning transposition.

**Actions for an injunction in regard to the protection of the collective interest of consumers in the  
Member States of the European Union (status: 31 March 1995)**

<b>COUNTRIES</b>	<b>SOURCE</b>	<b>CAUSA PETENDI</b>	<b>QUALIFIED ENTITY</b>
Belgium	1) Act of 14/7/91 (MB 29/8/91) 2) Act of 12/6/91 (MB 9/7/91) 3) Act of 4/12/90 (MB 22/8/90) 4) Act of 21/10/92 (MB 17/11/92) 5) Act of 16/2/94 (MB 1/4/94)	1) All infringements of the law on commercial practices, including misleading advertising 2) Consumer credit 3) Financial services 4) Advertising for the liberal professions 5) Package holidays	All associations whose purpose is to protect consumers' interests and which have legal personality, provided they are represented on the Consumer Council or approved by the Minister for Economic Affairs
Denmark	Marketing Practices Act 1975 (last amendment: 1 June 1994)	All infringements of the law on commercial practices	The consumers' ombudsmen
Germany	1) UWG 1909 (as amended in 1965 and 1987) 2) AGB 1976	1) All infringements covered by Articles 1, 3, 4, 6, 7, 8 of the Competition Act 2) Unfair terms	Associations having legal capacity whose task, as set out in their articles of association, includes protection of consumers' interests by providing information, by providing advice (UWG); + members must include active associations or associations whose membership includes at least 75 natural persons (AGB)
Greece	Act No 2000/91 (ETK 24/12/91) as amended by Act No 2251/94 (ETK 16/11/94)	Any unlawful practice affecting the general interests of consumers (Act No 2251/94 contains a non-exhaustive list of infringements)	Consumers' associations with at least 500 active members which have been registered for at least two years in the relevant register
Spain	1) Act No 34/1988 of 11/11/88 (BOE 14/11/88) 2) Act No 3/1991 of 10/1/91 (BOE 11/1/91)	1) Illegal advertising 2) Any act which is directly in breach of good faith (clausula general : Article 5)	Associations whose purpose, according to their articles of association, is to protect consumers, provided the "act of unfair competition directly affects consumer interests" Article 19)
France	Act No 88-14 of 5/1/1988 (OJ 6/1/88) (for the collective protection of individual rights: Act No 92-60 of 18/1/1992)	Direct or indirect harm to the collective interests of consumers Unlawful actions or unfair terms	Approved associations (see Decree 88-586 of 6 May 1988)
Ireland	Consumer Information Act	"Practices that are, or are likely to be, misleading to the public"	Director of Consumer Affairs

COUNTRIES	SOURCE	CAUSA PETENDI	QUALIFIED ENTITY
Italy	1) Legislative Decree of 25/1/1992 No 74 2) Act 549 of 28/12/93	1) Misleading advertising 2) Protection of the ozone layer and the environment	1) All consumers and consumer organizations 2) All consumer organizations or environmental protection organizations
Luxembourg	1) Act of 25/8/83 2) Act of 27/11/86	1) Unfair terms 2) Unfair commercial practices	Consumer associations represented at the Luxembourg Price Commission
Netherlands	1) Article 6 : 196 of the Civil Code (BW) 2) Article 6 : 240 of the Civil Code (BW) 3) Wet persoons-registratie 4) Articles 3 : 305a and 3 : 305b of the BW (Act of 6.4.1994; entry into force, 1.7.1994)	1) Misleading advertising 2) Unfair terms 3) Protection of privacy (rectification of files) 4) "General" action	Associations having legal personality whose tasks include promotion of consumer interests.
Austria	1) Consumentenschutzgesetz 1979 (§§ 28 and 29) 2) UWG (Act on unfair competition)	1) Unfair terms 2) Unfair advertising, unfair competition	1) VKI (Verein für Konsumenteninformation) and "Chambers of the Social Partners" 2) "Chambers of the Social Partners (consumers being represented in the "Bundesarbeitskammer")
Portugal	Decree No 446/85 of 25/10/1985	Unfair terms	Representative associations of consumers under the terms of the relevant legislation
Finland	Consumer Ombudsman Act	Any practice which infringes provisions designed to protect the collective interest of consumers	Consumer Ombudsman
Sweden	Consumer Ombudsman Act	Any practice which infringes provisions designed to protect the collective interest of consumers	Consumer Ombudsman
United Kingdom	Fair Trading Act 1973	Any practice which is detrimental to consumer interests in the United Kingdom and must be regarded as unfair to the consumer	Director General of Fair Trading

for a  
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on injunctions for the protection of consumers' interests

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**THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,**

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission<sup>(1)</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>(2)</sup>,

Acting in accordance with the procedure referred to in Article 189b of the Treaty,

Whereas certain Community directives, listed in the schedule annexed to this Directive, lay down rules with regard to protection of the economic interests of consumers;

Whereas current mechanisms available both at national and at Community level for ensuring compliance with those directives do not always allow the effects of infringements of their provisions to be corrected in good time to protect consumers' interests;

Whereas, as far as the restraint of unlawful practices is concerned, the efficacy of national measures transposing those Directives is thwarted when those practices have their effects in a Member State other than the country in which they originate;

Whereas those difficulties can disrupt the smooth functioning of the internal market, their consequence being that it is sufficient to move the source of an unlawful practice in order to place it out of reach of all forms of redress; whereas this constitutes a distortion of competition that is harmful to the great majority of firms which comply with the provisions of national law;

Whereas those difficulties are likely to diminish consumer confidence in the internal market and may have discriminatory effects on organizations representing consumers adversely affected by a practice that infringes Community law;

Whereas those practices often extend beyond the frontiers of the Member States, which is, indeed, the reason for approximating the systems of substantive law in question;

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(1)

(2)

Whereas, there is thus an urgent need for some degree of coordination of national provisions designed to enjoin the cessation of the abovementioned unlawful practices, so that the existing means of redress can take effect, irrespective of the country in which the unlawful practice has had its effects;

Whereas the objective of the action envisaged can only be attained by the Community legislature; whereas it is therefore incumbent on the Community legislature to act;

Whereas the third paragraph of Article 3b of the Treaty makes it incumbent of the Community not to go beyond what is necessary to achieve the objectives of the Treaty; whereas, in accordance with that Article, the specific features of certain national legal systems must be respected; whereas that condition can be met by leaving Member States free to choose between different options having equivalent effect;

Whereas one option should consist in requiring an independent public body, specifically responsible for the protection of consumer interests and/or competition matters, to exercise the rights of action set out in this Directive;

Whereas the other option should provide for the exercise of those rights by organizations which have a legitimate interest in protecting consumers, or by organizations representing firms, in accordance with criteria laid down by national law;

Whereas Member States should be able to combine those two options;

Whereas Member States should designate at national level the bodies and/or organizations qualified for the purposes of this Directive; whereas the principle of mutual recognition should be applied to the bodies and/or organizations thus certified by Member States;

Whereas it is incumbent on the Member States to communicate to the Commission the list of bodies and/or organizations thus qualified for the purposes of this Directive, as well as any changes to these national lists; whereas it is the business of the Commission to ensure their publication in the Official Journal of the European Communities;

Whereas this Directive should be without prejudice to the rules of private international law and the conventions in force between the Member States;

Whereas Member States should be able to require that a prior notification be issued by the party that intends to bring an action for an injunction, in order to give the defendant an opportunity to bring the contested infringement to an end;

Whereas the application of this Directive should not prejudice the application of Community competition rules,



HAVE ADOPTED THIS DIRECTIVE:

Article 1

**Scope**

1. The purpose of this Directive is to coordinate the laws, regulations and administrative provisions of Member States relating to certain remedies designed to protect consumers' interests, so as to ensure the smooth functioning of the internal market.
2. For the purposes of this Directive, an infringement shall mean any act contrary to the directives listed in the Annex and transposed into the internal legal order of the Member States which harms consumers' interests.

Article 2

**Actions for an injunction**

1. Member States shall designate the court or authority competent to rule on the proceedings commenced by the qualified entities within the meaning of Article 3, and seeking:
  - (a) an order, given at very short notice, and where appropriate by way of summary procedure, requiring the cessation of any act that is to be regarded as an infringement;
  - (b) where appropriate, adoption of the measures needed to rectify the effects of the infringement, including publication of the decision;
  - (c) an order against the losing party for payment to the plaintiff, in the event of failure to comply with the decision within a time-limit specified by the authority, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.
2. When the action may, pursuant to a convention, be brought in a Member State other than the one whose legislation has allegedly been infringed, the competent authority hearing the case shall take the same measures as are laid down for infringements of national legislation.

### Article 3

#### **Entities qualified to bring an action**

1. For the purposes of this Directive, a "qualified entity" means any body or organization which, according to national law, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular:
  - (a) an independent public body, specifically responsible for protecting consumer interests, in Member States in which such bodies exist; and/or
  - (b) organizations with a legitimate interest in protecting consumer interests, as well as organizations representing firms or federations of firms, in accordance with the criteria laid down by their national law.
2. For the purposes of this Directive, and without prejudice to the rights granted to other entities under national legislation, each Member State shall draw up at national level a list of entities qualified to bring an action under Article 2. The bodies and organizations included in that list shall receive a document certifying their right to appear before the relevant courts or authorities.
3. The lists drawn up in accordance with paragraph 2, as well as any changes thereto, shall be communicated by the Member States to the Commission and shall be published in the C Series of the Official Journal of the European Communities.

### Article 4

#### **Intra-Community infringements**

1. Member States shall take the measures necessary to ensure that any qualified entity whose interests are affected by an infringement originating in another Member State may seize the court or competent authority referred to in Article 2, on presentation of the document provided for in Article 3(2).
2. Member States may provide that direct seizure referred to in paragraph 1 shall be sought only after a prior seizure of the qualified entity of the Member State having territorial jurisdiction, with a view to ensuring that it brings the action provided for in Article 2; in such case Member States shall give the qualified national entities a reasonable time-limit within which to react.

### Article 5

#### **Prior notification**

1. Member States may introduce or maintain in force a requirement that the party that intends to seek an injunction shall issue a prior notification to the defendant; Member States which rely on this option shall ensure that the rules governing prior notification shall permit an action for an injunction within a reasonable time-limit.

2. The rules governing prior notification adopted by Member States shall be notified to the Commission and shall be published in the C Series of the Official Journal of the European Communities.
3. The limitation period shall cease to run once the prior notification has been issued.

#### Article 6

##### **Reports**

Every three years and for the first time no later than 31 December 2000 the Commission shall present the European Parliament and the Council with a report on the application of this Directive.

#### Article 7

##### **Provisions for wider action**

This Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant representative organizations of consumers or professionals and/or public bodies and any other person concerned more extensive rights to bring action at national level.

#### Article 8

##### **Implementation**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1997. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

#### Article 9

##### **Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 10

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament  
The President

For the Council  
The President

## ANNEX

### LIST OF DIRECTIVES COVERED BY ARTICLE 1(2)

- Council Directive 84/450/EEC of 10 September 1984 (misleading advertising); OJ No L 250, 19.9.1984, p. 17;
- Council Directive 85/577/EEC of 20 December 1985 (contracts negotiated away from business premises); OJ No L 372, 31.12.1985, p. 31;
- Council Directive 87/102/EEC of 22 December 1986 - OJ No L 42, 12.2.1987, p. 48, as amended by Council Directive 90/88/EEC of 22 February 1990 (consumer credit) (OJ No L 61, 10.3.1990, p. 14);
- Council Directive of 89/552/EEC of 3 October 1989 (on the pursuit of television broadcasting activities): Articles 10 to 23; OJ No L 298, 17.10.1989, p. 23;
- Council Directive 90/314/EEC of 13 June 1990 (package travel, package holidays and package tours); OJ No L 158, 23.6.1990, p. 59;
- Council Directive 92/28/EEC of 31 March 1992 (advertising of medicinal products for human use); OJ No L 113, 30.4.1992, p. 13;
- Council Directive 93/13/EEC of 5 April 1993 (unfair terms in consumer contracts); OJ No L 95, 21.4.1993, p. 29;
- European Parliament and Council Directive 94/47/EC of 26 October 1994 (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 No L 280, 29.10.1994, p. 83;
- European Parliament and Council Directive ... of ... (contracts negotiated at a distance).

## IMPACT ASSESSMENT FORM

### IMPACT OF THE PROPOSAL ON BUSINESS AND NOTABLY SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

Title of the proposal: Proposal for a European Parliament and Council Directive on the coordination of the laws, regulations and administrative provisions of Member States relating to injunctions for the protection of consumers' interests.

Document reference number:

#### The proposal

1. Bearing in mind the subsidiarity principle, why is Community legislation necessary in this area and what are its main aims?

Community legislation is necessary in this area because of the compartmentalization of national laws governing available means of redress in the event of infringements of national law transposing certain Community directives.

If an infringement of the law of one Member State originates in another Member States, existing actions for an injunction cannot bite because:

- in certain Member States actions may be brought only by associations that are approved at national level (which excludes representative associations of the "target" country);
- in certain Member States the action is admissible only if domestic law is infringed.

When, in applying the rules of private international law, the contested practice concerns the legislation of another Member State and this legislation constitutes the transposal of one and the same Community directive, this "discrimination" constitutes a barrier to the smooth functioning of the single market: in the absence of measures designed to coordinate national laws in this area, it is sufficient to "shift" the place of origin of an illegal practice to be out of reach of any action for an injunction (Green Paper on consumer access to justice, page 84).

The purpose of the proposal for a Directive is to apply the principle of mutual recognition to entities which (on the basis of the national legislation governing them) may bring an action for an injunction in the event of infringement of national law transposing certain Community directives.

## The impact on business

### 2. Who will be affected by the proposal?

In principle all firms may be affected (irrespective of their size or sector of activity), if they are in a position to infringe national law transposing certain Community directives. But - and above all - they are affected in that the proposal will allow them to react to infringements committed by unscrupulous competitors: the entities "qualified" to bring an action (in the event of intra-Community infringements) include "representative organizations of firms or federations of firms, in accordance with the criteria laid down by their national law" (Article 3, § 1, b).

In fact certain categories of firms (for example mail order firms) are more likely to be affected than others because they more frequently encounter infringements committed via a post office box opened across the border for the sole purpose of circumventing the applicable national legislation.

The representative organization of these firms at European level (EMOTA) has expressed its agreement on the principles governing the drafting of the proposal. This was done in the context of the consultations on the Green Paper which is the source of the Community initiative (see point 6).

### 3. What measures must firms taken to comply with the proposal?

None. The proposal is designed to ensure the effective application of provisions which are already in force and does not introduce any supplementary obligation.

### 4. What economic effects is the proposal likely to have?

The proposal may contribute to a healthier competitive environment and hence help create jobs since it will make it possible to punish certain "marginal" practices which are liable to distort competition, to the detriment of firms which respect the law in force.

### 5. Does the proposal contain measures designed to take into account the specific situation of small and medium-sized enterprises (different or reduced requirements, etc.)?

None. The obligation to provide a prior warning (Article 5) was however designed with an eye to infringements committed on the basis of lack of information about the legislation in force (or because of an erroneous interpretation of this legislation) to allow the firm concerned to rectify the effects of the infringement of its own accord.

This hypothesis is more likely in SMEs than in large firms (whose "legal service" is normally able to examine the legislation in force before addressing a "foreign" market).

## Consultation

6. Lists of organizations which have been consulted on the proposal and summary of the essential aspects of their position.

The proposal was not the subject of consultation as such, because it represents the result of the consultations in the context of Green Paper COM(93) 576 final. The position statements on the Green-Paper's conclusions include:

EMOTA (European Mail Order Traders Association)

"On this issue we fully support the views as expressed by EuroCommerce, i.e.:

- possibility for consumer associations to bring cross-border actions for injunction (with a clear definition of such an organization),
- the same possibility should be open to trade associations to defend collective interests against unfair practices".

**EUROCOMMERCE:**

In the Green Paper the Commission explains how consumer associations may use cross-border actions for an injunction. The trade associations also would like to be able to defend their collective interests in the event of unfair practices committed by a firm established in another Member State. Hence EuroCommerce is keen to insist that this type of action, which is not designed to recover damages, should be open not only to consumers but also to trade associations.



ISSN 0254-1475

COM(95) 712 final

# DOCUMENTS

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Catalogue number : CB-CO-96-027-EN-C

ISBN 92-77-99737-0

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Office for Official Publications of the European Communities

L-2985 Luxembourg