

**Report of DTI workshop on the effectiveness of criminal
sanctions following transposition of the Unfair Commercial
Practices (UCP) Directive**

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Introduction and Background

1. In June 2005, the Department for Trade and Industry (DTI) held two day-long workshops with members of the Trading Standards Service to assess the impact of the Unfair Commercial Practices Directive (UCPD) on criminal sanctions.
2. The UCP Directive will establish a EU-wide prohibition on unfair business-to-consumer commercial practices by introducing a general duty on businesses not to trade unfairly with consumers. Unlike most previous consumer protection directives, the UCPD will apply maximum harmonisation to all laws on business-to-consumer commercial practices, subject to certain exemptions. This means that all statutory or regulatory requirements not subject to those exemptions and which govern the behaviour of business suppliers towards consumers in connection with the supply of goods and services will have to conform with the UCPD's requirements.
3. At the time of writing, the DTI expects that this alignment will require at the very least the revision of laws which include criminal sanctions. A central element of the UCP Directive is its test of unfairness. This requires that for a practice to be judged unfair, it must impair the average consumer's judgement so that he takes (or is likely to take) a "transactional decision" he would not have taken otherwise. This is not a feature of existing criminal offences where the mere act or omission is generally sufficient to give rise to an offence, irrespective of its likely effect on the average consumer's purchasing decision. The DTI therefore expects that all such offences in existing legislation will need to be amended to replicate, more or less precisely, the test of unfairness in the UCPD, unless the legislation benefits from one of the exemptions in the Directive.
4. The maximum harmonisation aspect of the Directive has long been controversial. Some stakeholders have expressed serious concern about its impact on criminal sanctions in existing consumer protection legislation. Notably, the Law Commission argued that a key difficulty lies with the introduction of the "transactional decision" test. It argued:

"The requirement on the prosecution to prove [to the criminal law burden of proof of beyond all reasonable doubt] that the average consumer has or was likely to have taken a transactional decision he would not have taken otherwise is likely to add to the length of trials and to the number of appeals."¹
5. An additional concern has been that the DTI would use the opportunity of transposing the UCP Directive to decriminalise existing consumer legislation. This was despite DTI reassurances that introduction of the Directive was not *per se* incompatible with the retention of criminal sanctions; or indeed the adoption of new criminal offences. The Government is minded

¹ p. 24, Simplifying Consumer Legislation – A response from the Law Commission to the DTI's Consultative Document on Consumer Strategy, 29 October 2004

to retain as best possible the current civil/criminal mix; and to explore the suitability of introducing criminal sanctions for some of the new provisions contained within the Directive.

6. A final concern has been whether adoption of the Directive would lead to the repeal of substantial amounts of existing legislation. The Directive includes provisions that do not currently exist in the UK, and which will consequently need to be introduced via new legislation. This can most easily be done via the adoption of a single legislative instrument that reproduces all the UCP Directive requirements. The creation of a single new legislative instrument – which is provisionally being called the Unfair Commercial Practices (“UCP”) Regulations – will inevitably create some element of duplication with existing legislation, notably in relation to misleading actions and omissions. The question is how to deal with this duplication. This could be done either through relatively minor amendments to existing legislation that reproduce the core principles of the UCP Directive. Alternatively, the creation of roughly equivalent provisions in the UCP Regulations would allow for the repeal of some or substantial amounts of existing legislation. Concern had therefore been raised in particular about the future of the Trade Descriptions Act (TDA) 1968, which is one of the main piece of legislation under which the Trading Standards service currently bring prosecutions against traders for providing false or misleading information about goods and services. The Government has committed itself to assessing the scope for simplification and rationalisation and consulting on all options before it decides the extent to which existing legislation should change.

7. It was against this background that the DTI held two day-long workshops with members of the Trading Standards Service. The purpose of the workshops was two-fold:

- to raise awareness of the Directive amongst the TS service; and
- to assess the effectiveness of criminal sanctions in either the mock UCP Regulations and in existing amended legislation (such as the TDA)

The outcome of the workshops is summarised in the rest of this report.

8. The DTI is extremely grateful for the time and commitment of workshop participants in producing this report. In addition, the DTI would also like to thank Jo Boutflower and Kath McEwen of North Yorkshire County Council; Donna Sidwell of the Local Authorities Coordinators of Regulatory Services (LACORS); Angela Blair of the Society of Chief Officers of Trading Standards in Scotland (SCOTTS); and Tabitha Bonney of the Office of Fair Trading (OFT) for their help and support.

9. This report, and the mock legislation produced for the purposes of the workshops, are in no way a statement of UK Government policy. Nor are they an indication of how the Government might approach transposition of the UCP Directive.

EXECUTIVE SUMMARY

10. In June 2005, the DTI held two day-long workshops with members of the Trading Standards Service to assess the impact of the Unfair Commercial Practices Directive on existing criminal sanctions. One workshop hosted Trading Standards departments from England, Wales and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI); the other hosted Scottish departments. Their purpose was to raise awareness of the Directive amongst the Trading Standards Service; and assess how effective potential criminal sanctions in mock UCP Regulations and/or amended existing legislation such as the Trade Descriptions Act would be. To this end, the DTI prepared mock legislation (both mock UCP Regulations; and amended UK legislation including the TDA and Part III of the Consumer Protection Act 1987 ("CPA")). Participants were subsequently asked to assess the likelihood of obtaining convictions under either the mock UCP Regulations; or amended existing legislation in relation to a number of specific scenarios based on real complaints to Trading Standards Officers, some of which were successfully prosecuted. The workshops were each attended by around 22 TS representatives from almost all UK nations and regions.

11. In order to provide a fair basis for comparison, it was assumed that existing legislation would only be amended to the minimum extent necessary in order to comply with the UCP Directive's maximum harmonisation requirements. The main consequence of this was to introduce the "transactional decision" test and "average consumer benchmark" into existing legislation; and where appropriate, to amend or repeal certain prescriptive information requirements. It was also assumed that the Trading Standards Service would have the same powers of investigation where they have reasonable suspicion to believe that an offence has occurred as they have under existing legislation. Workshop participants were asked to bear in mind that the mock legislation had been produced solely for the purpose of the workshop in order to test and compare the effectiveness of potential criminal sanctions in existing legislation and the UCP Regulations. The DTI stressed that the laws giving effect to the Directive could look very different following the consultation on implementation of the Directive this autumn. The Government has committed itself to assessing the scope for simplification and rationalisation and consulting on all options before it decides the extent to which existing legislation should change.

12. Participants were asked to consider cases in three areas: misleading pricing (Part III of the Consumer Protection Act 1987); trade descriptions (Trade Descriptions Act 1968); and aggressive commercial practices including high pressure selling techniques and doorstep selling.

13. The main findings of the workshops were as follows:

- groups expressed concern that in certain cases it might be more difficult to secure convictions than at present, because of the need to satisfy additional requirements (notably the "transactional decision test") before a practice could be considered unfair. However, most

groups nonetheless felt that they could obtain successful prosecutions for almost all of the case studies examined. This was largely irrespective of whether they used the mock UCP Regulations; or mock amended existing legislation.

- all groups emphasised the key importance of having appropriate powers to accompany the UCP Regulations (eg TDA powers such as: make test purchases; enter premises and inspect and seize goods and documents). Powers accompanying any changes will be crucial in determining whether the UCPD can be effectively enforced. Similarly, groups emphasised the need for appropriate criminal penalties, particularly in the area of aggressive commercial practices, where the nature of the harm was such that civil offences would be inadequate.
- many groups thought that the UCPD would strengthen the UK's consumer protection regime in certain areas. In particular, they highlighted new provisions to tackle aggressive commercial practices; strengthened protections against prize scams; and the umbrella protection afforded by the general duty itself. Participants also argued that the UCP Regulations would constitute an improvement in relation to false or misleading statements about the provision of services (TDA s(14), if the UCP Regulations did not include a requirement to prove knowledge or recklessness on the part of the trader for an offence to be established. The UCPD does not require any evidence of intention or negligence on the part of the trader.
- however, these findings were tempered by the feeling that the existing framework worked better in other areas. These were: misleading pricing; and false or misleading statements about the provision of goods (TDA s(1)). This argued that across-the-board simplification of existing laws might risk losing some important enforcement tools, at least in the short term.
- Concluding, some groups expressed surprise at the real potential of the Directive to tackle unfair commercial practices, especially in areas where current protections are weak. The Directive clearly had some drawbacks, and some definitions and phrases were less clear than might be desirable. Nonetheless, provided that guidance and powers were appropriately dealt with and the amendment of existing legislation handled sensibly, these groups argued that the Directive should help improve the UK's consumer protection regime.

THE WORKSHOPS - METHODOLOGY

14. This report summarises the discussions and output of two workshops hosted by the DTI. The first event took place at the DTI's London office on 8 June 2005 and was attended by around 23 members of the TS Service from England, Wales and Northern Ireland. The second event took place on 15 June 2005 at Stirling and was attended by around 22 members of the TS Service from across Scotland. Both events were also attended by 3 officials from the DTI; and one official from LACORS and the OFT respectively.

15. The stated purpose of the workshop was to:

- raise awareness of the Directive amongst the TS service; and
- identify problem areas that the DTI should consider in order to inform a consultation paper on UCP implementation – most notably in relation to the effectiveness of potential criminal sanctions in mock UCP Regulations and/or amended existing legislation

16. In preparation for the workshop, the DTI had circulated a background paper on the UCP Directive to workshop participants. It also drafted two sets of mock legislation: mock UCP Regulations; and mock amended legislation (Trade Descriptions Act 1968; Part III of the Consumer Protection Act 1987; Business Names Act 1985; Weights and Measures Act 1985, section 25 and Schedule 5; Business Advertisements (Disclosure) Order 1977 and Fair Trading Act 1973, sections 23 and 25; and the Consumer Transactions (Restrictions on Statements) Order 1976). In addition, it prepared case studies on the areas outlined above based on real-life occurrences.

17. For the purposes of the workshop, the DTI had had to make a number of assumptions when drafting the mock legislation. Firstly, it was assumed that all of the provisions in the mock UCP regulations could be punishable as a matter of criminal law. It was also assumed that (almost) all existing legislation would not be repealed, but would instead be amended to the minimum extent needed to comply with the Directive's maximum harmonisation provisions. The most noticeable consequence of this was to introduce the average consumer benchmark and transactional decision tests for business-to-consumer commercial transactions in (almost) all legislation. The exception was the Business Advertisements (Disclosure) Order 1977, which for illustrative purposes was assumed to be repealed because an equivalent provision is contained in the Annex to the UCPD. Workshop participants were asked to bear in mind that the mock legislation had been produced solely for the purpose of the workshop in order to test and compare the effectiveness of potential criminal sanctions in existing legislation and the UCP Regulations. The DTI stressed that the laws giving effect to the Directive could look very different following the consultation on implementation of the Directive this autumn.

18. The workshops themselves were structured in two halves. The morning was used to ensure that participants had a common level of understanding of

the Directive's purpose, impact and core concepts. In the afternoon, participants were split into four groups and asked to consider how the mock UCP Regulations and mock legislation would apply to specific case studies. Case studies were based on real cases investigated by Trading Standards Officers, some of which were successfully prosecuted and others of which were not. After considering these, participants were subsequently asked to report back their findings to the whole group, and record these on flipcharts.

19. Because of time constraints, not all case studies nor mock legislation were used. In the event, all groups looked at cases on: price indications; trade descriptions; and doorstep selling. One group in Scotland also looked at a case on Weights and Measures. The London event also discussed the Business Names Act. Their findings are recorded overleaf.

MISLEADING PRICE INDICATIONS

20. Some groups were asked to examine a case of providing a false price indication, where a company had provided false information in relation to the front of a photo print processing envelope. Others were asked to examine a case of providing a misleading price indication, where a company had given a misleading (but not false) indication of a price discount. For the purposes of the workshop, these could be dealt with either under the Consumer Protection Act Section 20(1) or Art. 6(d) of the UCPD; or possibly under Annex I (5) or Annex I (6).

21. All groups in Scotland felt that they would be likely to achieve successful prosecutions in both cases. By contrast, London groups felt that they would probably get successful prosecutions for the case involving a misleading indication of a price discount; but were split on the question of whether they would achieve a successful outcome in the photo processing case. The concern was that the additional steps necessary for proving that an offence had been committed – ie the average consumer benchmark and transactional decision test – might prove too much in what was already an extremely difficult case.

22. When asked to compare the UCP Regulations and the CPA, participants mostly argued that the CPA seemed easier to apply in practice because there was less of a need to refer to different sections. DTI commented that this could be addressed by clearer drafting; and training and guidance.

23. Participants raised a number of other issues:

24. Existence of a specific price advantage (Art. 6(1)(d)): many groups felt that the clause referring to a “specific price advantage” could not be applied in relation to a discount (such as “50% off”) because of difficulties in interpreting that phrase.

25. Powers: all groups emphasised that prosecutions under the UCP Regulations would not be able to arise unless these were accompanied by appropriate powers. In addition, Scottish officers emphasised that PACE does not apply in Scotland. Officers are required to follow the Criminal Procedure (Scotland) Act 1995. For this reason, Scottish TSOs can only obtain search powers where a common law warrant is obtained from the sheriff.

26. Disclosure of information to consumers: Similarly, some officers argued that if private actions are enabled, then these will only become effective if enforcers are provided with the ability to disclose information to consumers.

27. Framing of charges: in Scotland, a computerised system is being developed for making recommendations to the Procurator Fiscal to bring criminal proceedings. This is called the ISCJIS System. Every charge for Trading Standards offences has a template and a unique code. The system

consists of mandatory fields which permits only slight adjustments to each charge to personalise them. There was concern that the way in which the offences were created in the mock UCP Regulations (by referral through a number of regulations) would make it difficult to draft the template charge simply and concisely. If Procurator Fiscals did not clearly understand the charge they would be unlikely to proceed with the case. It was suggested that when draft UCP Regulations were drafted we prepare specimen template charges and consult the Crown Office on whether these would fit with their computerised system.

28. Average consumer: groups at the London event argued that they felt confused by the DTI's suggested re-naming of the average consumer – “the typical affected consumer” – as it implied that a real consumer would have had to be affected.

29. Public interest: Scottish groups argued that they would only be able to take action in the criminal courts after consumers had complained of suffering actual loss, and not just where an offence would be “likely” to take place. This was because proof of actual loss was in practice a prerequisite to satisfy a Procurator Fiscal [who prosecutes cases in Scotland] that the cases satisfied the public interest test operating in Scotland, rather than the prosecution of other cases such as public disorder offences. This contrasted with the civil courts. There, Scottish TS can bring cases on their own behalf and need not fulfil a public interest test – and would therefore be able to apply the Directive even where breaches were “likely” to occur. Given the new provisions in the Directive, some argued that the new civil protections in the UCPD could provide Scottish TS with significant extra enforcement tools.

30. Corroboration: In addition, Scottish TS representatives noted the need for corroboration before a case would be taken in the criminal court. This requires witness testimony to marketing practices (such as one-on-one doorstep style transactions or test-purchasing) to be corroborated by some other form of evidence, such as another witness or documentation. This may be a problem for some of the home selling and pressure selling scenarios. However, the difficulty here lies with the Scottish legal principle of corroboration rather than with any defect in the Regulations.

31. Test purchasing: a number of groups asked how the legislation would affect test purchasing. Scottish officers felt that a court might not treat a test purchase conducted by a TSO as being evidential that an “average consumer” had been misled, and might therefore want to see evidence that a real consumer had been misled. Some thought that the clarification of the status of test purchasing might be helpful in the Regulations.

32. Guidance: some groups commented that they would prefer to have statutory guidance accompanying the Directive. This should be inclusive rather than exclusive. They also commented that the Directive might require amendments to the Code of Practice on Price Indications.

TRADE DESCRIPTIONS OFFENCES

33. Some groups were asked to examine a case of providing a misleading description as to the provision of services. In the case in question, a trader had informed consumers that their properties needed damp treatment, when this was false. For the purposes of the workshop, this could be dealt with either under Section 14(1)(b) of the TDA; or under Art. 6(1) of the UCPD.

34. Other groups were also asked to examine a case where action had been taken in a prize scam case for providing a false description as to the provision of services. This could be dealt with either via Section 14(1)(a) of the TDA; or under Annex (31) of the UCPD or its catch-all provision, Art. 5.

35. All groups thought that they would probably get successful prosecutions under either the UCP Regulations or amended TDA Section 14. This was despite the additional hurdle of proving that the offence would cause or was likely to cause the typical consumer to take a transactional decision he would not have taken otherwise. However, a number of groups underlined that Section 14 TDA was currently problematic and hard to apply in practice because of the need to demonstrate knowledge or recklessness on the part of the trader. For the purpose of these workshops, this mens rea requirement was not replicated in the mock UCP Regulations because the UCP Directive does not require any evidence of intention or negligence on the part of the trader.. These groups therefore argued that it should be easier to prosecute traders for false or misleading statements in relation to services through the UCP Regulations rather than through an amended TDA.

36. One group also pointed out that one of the cases – where the trader had failed to provide notification of cooling-off periods – could be dealt with via a separate provision of the UCPD. This was because failure to provide information about cancellation rights where there was an invitation to purchase was itself a breach of the Directive (Art. 7(4)(d)).

37. In addition, all groups commented on the new prize scam provisions in the UCPD [Annex (31)]. Some groups considered possible defences. For instance, some wondered whether courts might entertain arguments that a prize scam fell outside the scope of the Directive as not forming part of the definition “product”. Others wondered if the wording might be too broad to capture all types of scams. Despite this, most groups argued that this provision was a strong additional enforcement tool that should be easier to apply than the corresponding TDA provisions.

38. Participants raised a number of other issues:

39. Transactional decision test: A number of questions were asked with regard to the scope of the transactional decision test. For instance, participants queried whether the Directive would apply in the case of billboard advertising, given that the latter is quite far removed from and arguably has only an indirect impact upon the moment when a consumer actually decides to purchase a particular good.

Similarly, participants asked whether a breach of the Directive had occurred when consumers had clearly not been fooled but the related practices were nonetheless undesirable. For instance, it is currently illegal to sell clocked cars. However, under the UCPD traders might try to sell the car with a zero mileage, on the basis that no average consumer would reasonably think that a used car could have a zero mileage. Would this mean that this practice could never be unfair.

40. The definition of trader: could you prosecute an employee or company directors or only the company itself? Participants argued that it was important to be able to prosecute employees under certain circumstances, such as when they were working on commission.

41. Powers: all groups stressed again that prosecutions for the cases under examination could never have arisen under the UCP Regs unless these were underpinned with appropriate powers (eg TDA powers such as: make test purchases; enter premises and inspect and seize goods and documents). Thus, for instance, any repeal of the TDA would need to be accompanied by attaching existing TDA powers to the UCP Reg's. English officers stressed that these would need to be granted to TS officers rather than civil courts if these were to be effective.

42. Mens Rea : if the decision were taken to retain the TDA, groups commented that the UCPD transposition would be a suitable opportunity to remove the mens rea requirement in s(14).

43. Offences: Some groups asked whether it would be possible to lay alternative charges for the same offence – eg breach of a specific Article and/or breach of the general clause. By contrast, others asked whether it would be possible to lay multiple charges for different offences. These officers considered that it was important to avoid the situation in which current guilty behaviour is less heavily penalised in future. This might arise if the consolidation of legislation meant that traders breached fewer individual offences, and thereby attracted fewer penalties.

44. Criminal and Civil Offences, and the Enforcement Concordat: one group suggested that it would be useful to have criminal and civil sanctions operating together. The former was particularly helpful in seizing evidence of wrong being committed; the latter – via an injunction – was essential in order to prevent the harm from arising again future. However, a fair balance needed to be struck for businesses. This group therefore suggested that criminal powers should only be granted where there was an intention to prosecute, and underlined the importance of the Enforcement Concordat.

45. Annex: one group suggested that it would be helpful to re-order the Annex provisions so that similar offences (eg Annex (19) and (31)) were grouped together.

46. Incompetence: one group asked whether incompetence on the part of the trader could be unfair. The DTI clarified that the Directive is not intended to address issues concerning quality. However, under certain circumstances it was conceivable that quality issues might arise where the trader was deemed not to have acted in accordance with professional diligence, provided that this failure itself caused or was likely to cause an average consumer to take a different transactional decision that they might otherwise have taken.

47. POCA: groups asked whether the Proceeds of Crime Act 2002 would apply to the UCP Regulations. It was noted that it was not possible to undertake a proceeds of crime investigation without first having secured a criminal conviction.

48. Redress: some groups asked for the opportunity for TS to seek compensation for consumers in court.

DOORSTEP SELLING

49. Some groups were asked to examine a case where a trader had used aggressive selling techniques at the doorstep in order to persuade elderly consumers to take out contracts to buy beds. Other groups examined a case where doorstep traders cold-called the elderly and persuaded them to conduct home improvements.

50. Unlike the other cases, these were cases where real-life remedies were either not available; or were inadequate. Thus in the first instance, Trading Standards had been unable to take action as no offences had been committed. In the second instance, Trading Standards had only been able to take action for non-provision of cancellation rights; and for Business Names Act offences. By contrast, action could be taken under Art. 8 of the UCP Directive.

51. Examining these cases, most groups thought that the provisions on aggressive practices within the UCPD could probably be successfully applied in order to achieve a successful prosecution. These groups thought that these new provisions were potentially powerful new protections for consumers.

52. Those that dissented primarily did so for evidential reasons, arguing that the evidence presented in the case studies might not prove robust enough to secure a conviction. In part, this was because of the difficulty in collecting evidence in these types of cases, where witnesses were often elderly and frequently vulnerable and confused. Further, groups questioned what evidence was needed for a court to be persuaded that a trader had acted with “undue influence”. Would this cover loan sharks? This problem is particularly compounded in Scotland, where courts prefer to hear witnesses in person rather than rely exclusively on witness statements. Similarly, some Scottish groups wondered if the facts of the case would persuade a court that there was sufficient corroboration of evidence. However, all groups stressed that these were generic problems of evidence gathering and proving cases, rather than a problem with the UCP Regulations themselves.

53. Some also underlined the difficulties in taking on cases like this in the first place. Trading Standards do not have the power to arrest individuals, and so in these instances would probably rely on the PACE to involve the police. Arrest was often essential as otherwise it would be impossible to get the trader to disclose his identity. Some asked whether the UCP Regulations would contain arrestable offences. Concluding, however, these same groups all agreed that it should be easier to secure convictions under the UCP Regulations provided that issues surrounding powers and offences were adequately addressed.

54. When asked how the vulnerable consumer modulation might apply (UCPD Art. 5(3)), views expressed were mixed. Some groups felt that applying the modulation might help persuade a court that an offence had been

committed where the evidence appeared to be less substantial; others felt that it might be difficult to apply in practice.

55. Participants raised a number of other issues:

56. The definition of “commercial practice”: some groups sought – and received – clarification that a where a trader conducts eg three separate transactions, that would constitute three unfair commercial practices.

57. Penalties: all groups argued that the new provisions on aggressive practices would be ineffective without deterrent criminal penalties, ideally a custodial sanction (the TDA provides for up to 2 years imprisonment). It was argued that the nature of the harm inflicted, and the type of trader involved, made this an instance where civil remedies would be insufficient.

58. Regulation of Investigatory Powers Act 2000 (“RIPA”): covert surveillance could only be authorised where it was necessary and proportionate to prevent or detect a criminal offence or public disorder. Covert surveillance was felt to be particularly important in cases such as these where the affected might be elderly and confused and hence less likely to be robust witnesses. Consequently, this was a further argument for there to be criminal offences for breach of these new provisions.

59. Cost: other officers stressed the cost implications of relying solely on civil injunctions as another reason for introducing criminal sanctions for these new provisions. In part, this was related to Trading Standards’ ability to represent themselves in the magistrates court for criminal cases; but not in county courts for civil cases. In addition, in Scotland costs can be awarded against an Authority for losing a civil case but not a criminal case. This is because it is the Procurator Fiscal who brings the case on behalf of the Crown.

60. Test cases: It was suggested that the DTI should consider the merits of funding test cases or establishing a fighting fund from the Modernisation Fund in order to establish how the courts would interpret certain key concepts.

OTHER LEGISLATION

Business Names Act 1985

61. Groups asked how the Business Names Act would be affected. In particular, groups were concerned that its prescriptive provisions might be undermined by the need to show that a practice caused or would be likely to cause an average consumer to take a transactional decision that he would not have taken otherwise. The Act is viewed as particularly important by the profession, and its amendment would have knock-on implications in existing legislation. DTI promised to explicitly consider this Act in its public consultation document.

Weights and Measures Act 1985, section 25

62. One group assessed a case in which traders were convicted for weights and measures offences. Specifically, they were convicted for having in their possession for sale solid fuel not being in a quantity in which solid fuel is required to be made up in a container for sale; and amongst other things, for failing to display a statement of the name and address of the seller. These offences could be tackled by the Weights & Measures Act 1985, as amended; or by Art. 6(1)(b) or 7(4)(b) of the UCP Directive.

63. The group found that it preferred the re-drafted Weights and Measures Act because the prescriptive nature of its provisions made it easier to prove that an offence had been committed. The Group also questioned, however, the extent to which Weights & Measures fell within the scope of the Directive, particularly requirements relating to prescribed quantities and marking arrangements. Concluding, the Group felt that it could not win the case under either with the amended legislation or the UCP Regulations because of the transactional decision test.

Fraud Bill

64. Some questioned whether the Directive affected the draft Fraud Bill. The DTI stated that the Directive would not affect that Bill.

ANNEX

Background Paper, Criminal Sanctions Workshops The Unfair Commercial Practices Directive

Introduction

1. The Unfair Commercial Practices (UCP) Directive has two main objectives:
 - to achieve a high level of consumer protection by introducing safety net EU consumer protection legislation requiring traders not to treat consumers unfairly (a “general duty” not to trade unfairly); and
 - to harmonise existing national rules in order to encourage greater cross border sales.

The general duty

2. The general duty will apply to all unfair commercial practices in the field covered by the Directive, ie all B2C practices that affect the economic behaviour of consumers. The effect of this should be to fill gaps in existing legislation; and set standards against which new practices will be judged. This is new to the UK: unlike many EU states, we do not currently have a general duty. DTI research comparing the consumer protection regimes of 10 OECD countries identified a correlation between countries with a strong consumer protection regime and the use of a general duty (*Comparative Report on Consumer Policy Regimes*. DTI, Oct. 2003). The Government therefore believes that implementation of the Directive will mark an important step towards achieving our PSA target of having a consumer protection regime that is amongst the best in the world by 2008.

Maximum harmonisation

3. The UCPD introduces a high common level of consumer protection for all Member States. Unusually, and unlike existing EU consumer protection directives, the UCPD does not contain a “minimum clause” which allows Member States to adopt or retain provisions that provide greater protection for consumers on matters within the scope of the Directive. This is in order to ensure that the consumer protection laws in all Member States achieve the harmonisation necessary to give full effect to its market opening potential. The UCPD will thus apply full harmonisation to all laws on business-to-consumer commercial practices, subject to certain important exemptions (such as authorisation regimes or financial services). This means that any statutory or regulatory requirement falling within the coordinated field and its maximum harmonisation provisions must neither fall short of nor exceed the requirements of the UCPD. Transposition of the UCPD will therefore require all such national legislation to be brought into line with the Directive.

Scope

4. The Directive covers all unfair business-to-consumer commercial practices that harm consumers economic behaviour, before during and after a commercial transaction. Amongst other things, the intention is to prohibit all unfair acts, representations, commercial communications including advertising and marketing and courses of conduct including unfair selling techniques such as high pressure selling.

Structure

5. The Directive is structured in the following way:

- It contains a general clause that prohibits all unfair commercial practices. This is the “general duty” referred to above. Simplifying somewhat, an unfair commercial practice is defined as a practice that is contrary to the requirements of professional diligence; and materially distorts or is likely to materially distort the economic behaviour of consumers. This is normally judged by the standards of the “average consumer”, though under certain circumstances the benchmark is adjusted to the standards of the “vulnerable consumer”.
- The vast majority of commercial practices which would be defined as unfair under the general prohibition fall under two categories: these are either ‘misleading’ (actions or omissions) and ‘aggressive’ practices (undue influence, harassment or coercion). To achieve greater legal certainty the UCPD sets out in more detail how commercial practices can be misleading or aggressive.
- Finally, the Directive contains a short “blacklist” of misleading and aggressive practices which will be unfair, and therefore prohibited, in all circumstances. These practices include: ‘bait and switch’ tactics, falsely claiming to be a signatory to a code of conduct; and creating the impression that the consumer cannot leave the premises until a contract is formed.

6. It is worth briefly comparing these provisions with existing consumer protection laws.

7. The provisions on misleading actions and omissions largely replicate existing UK protections, and broadly constitute a re-write of the Misleading and Comparative Advertising Directive. By contrast, the provisions on aggressive commercial practices have no obvious UK equivalents and arguably therefore introduce significant extra protections into UK law. And of course, as noted earlier, the UK does not have a “general duty” that provides for safety-net consumer protection legislation across all business sectors.

Sanctions

8. The whole of the UCP Directive will need to be underpinned by a civil law sanction regime. Concretely, this requires Member States to enable

enforcement authorities to apply to the courts for orders (equivalent to injunctions) to stop unfair commercial practices. In the UK breach of an injunction may be contempt of court punishable by fines and/or a term of imprisonment not exceeding 2 years.

9. In addition, the UCP Directive allows Member States to retain or introduce criminal offences in relation to unfair commercial practices. At the time of writing, the Government is not minded to change the current civil/criminal mix, though criminal sanctions in existing legislation would at the very least require some amendment (see below). One of the other issues that will need to be considered is whether to introduce criminal sanctions for new provisions in the Directive, such as the provisions relating to aggressive commercial practices; or the Annex practices, including the prohibition on prize draw scams.

10. The Unfair Commercial Practices (UCP) Directive was adopted on 18 April and signed on 11 May 2005. It is expected to be published in the Official Journal of the European Communities later this month. The Government has started work on transposing it into UK law and aims to consult twice on how this should be done. The laws implementing the Directive are required to enter into force 2¹/₂ years after publication in the Official Journal (ie around December 2007).

Implications for enforcers

The UCP Regulations

11. The Directive requires all Member States to give effect to its provisions. As the Directive includes new provisions, this will therefore require new legislation. Though the use of primary legislation has not been ruled out, the Government's working assumption is that this should be done via secondary legislation. In all likelihood, therefore, there will be one legislative instrument that covers the whole of the UCP Directive – which we might call the UCP Regulations.

12. At the time of writing, we believe that these Regulations will largely resemble the current Directive. That is to say, it will include the general clause (the general duty); the specific categories of misleading and aggressive practices; and the Annex provisions. Because the Directive sets a standard which has to be applied uniformly across all Member States, the language in the Regulations may well replicate that in the Directive. However, there are some areas where we may find it more appropriate to clarify certain provisions, or to rephrase existing provisions into more user-friendly language.

13. As noted above, the Regulations will be underpinned by a civil law sanctions regime. This means that any breach of the Directive will give rise to

actions for injunctive relief.. What is open to question is the extent to which the Regulations themselves will include criminal offences.

14. One final word on enforcement. When establishing whether a particular practice has breached the Directive, the Regulations should be treated like an inverted pyramid. That is to say, enforcers should first see whether the practice has breached specific Annex provisions. Failing that, they should look to the specific categories of misleading and aggressive practices. Only then would we expect them to have to look to the general clause. The vast majorities of cases should be capable of being dealt with via the Annex or specific categories of misleading and aggressive practices; with only a very small minority of cases requiring use of the general clause.

The role of existing legislation

15. The creation of the UCP Regulations will inevitably create some element of duplication with prescriptive rules in existing sector specific legislation, notably in relation to misleading actions and omissions. The question is how to deal with this duplication.

16. The Directive's "maximum harmonisation" approach requires the UK to ensure that overlapping legislation conforms with the principles in the UCP Directive, especially the test of unfairness. However, transposition of the Directive also provides an opportunity to consider the merits of wider simplification and rationalisation. At its starkest, therefore, this could mean the repeal of some or lots of existing legislation. There are, however, legal constraints on what can be achieved without primary legislation. Similarly, until the Government has completed its analysis identifying and examining the laws affected, it is hard to know the merits or otherwise of wide-ranging simplification. The Government therefore intends to assess the scope for simplification and rationalisation and consult on all options before it decides the extent to which existing legislation should change.

17. If the "minimum change" option was pursued – ie merely amending existing legislation – then we would at the very least expect existing legislation to be affected in two ways:

(1) the revision of laws which include criminal sanctions. A central element of the UCPD's test of unfairness is a requirement that for a practice to be judged unfair, consumers have to be take (or be likely to take) a "transactional decision" that they would not have taken had they had the information necessary to make a free and informed choice. This is not a feature of existing criminal sanctions where the mere act or omission is generally sufficient to give rise to an offence, irrespective of its likely affect on the average consumer's purchasing decision. All such offences in existing legislation will need to be amended to replicate, more or less precisely, the test of unfairness in the UCPD, including the "transactional decision" requirement, unless the legislation benefits from one of the exemptions in the Directive.

(2) a re-assessment of prescriptive mandatory pre-contractual information requirements (including labelling requirements). Apart from certain exemptions, these will have to be amended where the information requirements differ from those contained in the Directive.

18. It is because we want to look at how re-drafted laws and mock UCP Regulations would work in practice that we have asked for your help at our workshops.

End

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