

MARKETING PRACTICES LEGISLATION AND THE CONCEPT OF UNFAIRNESS TOWARDS CONSUMERS*

I. INTRODUCTION

An adequate legal framework defining the standards to be observed in the marketplace and setting out the basic rights (and responsibilities) of consumers must be a cornerstone of consumer policy. In the absence, for example, of legislation prohibiting misleading advertising effective legal action to prohibit such advertising will scarcely be possible, for provisions of the ordinary criminal law and civil law have usually been found to be quite unsuited to regulate such conduct in any but the most blatant cases. Many jurisdictions provide a means of abstract control of deceptive and other unfair marketing practices, this being found either in their unfair competition law or in more recent legislation specifically concerned with consumer protection (and, in some cases, also competition or anti-trust) policy. The enforcement of such measures is generally aimed primarily at deterrence and prevention of future harm, though provision will often be made for redress of losses suffered by individuals.

Control over advertising and other marketing practices has generally concentrated attention on conduct that is misleading or deceptive. Of course, many provisions will usually be found controlling various specified types of conduct which are judged to be unfair even in the absence of proved deception, but the question arises as to whether the law should go further and provide a general prohibition on conduct which, while truthful and not otherwise specifically prohibited, is nonetheless considered to be unfair to consumers (and to competitors). Conduct may, for example, be considered as unfair to consumers in taking advantage of their lack of knowledge and bargaining power, inhibiting in other ways their ability to choose freely or as being otherwise contrary to community standards.

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In laying down such standards for marketplace conduct governments are helping to achieve one of the basic objectives of consumer policy recognized by the United Nations Guidelines for Consumer Protection, namely "to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers".¹ This is an important aspect of the promotion and protection of consumers' economic interests, which is dealt with in the Guidelines document at somewhat greater length than any other topic. It should be noted that while the regulation of marketplace activity must figure prominently in any scheme of consumer law, such legislation cannot in itself guarantee the satisfaction of the most fundamental needs of consumers (defined by the International Organization of Consumers Unions (IOCU) as the right to basic goods and services which guarantee survival: adequate food, clothing, shelter, health care, education and sanitation). Marketplace regulation does, however, have an essential role to play among policies which "seek to enable consumers to obtain optimum benefit" from those economic resources which are available to them.²

II. SOME TECHNIQUES OF CONTROL

In some countries the basic law concerning unfair trade practices is a general provision prohibiting unfair competition. Such a prohibition is a matter of civil law in the sense that enforcement relies not on public officials but on private actions brought by affected parties (usually competitors) or by interested organizations (usually restricted to organizations of entrepreneurs, employees or consumers) to obtain an injunction or damages. Perhaps the best known example of such a provision is to be found in the German Law against Unfair Competition of 1909 which provides that "a person who in the course of business for purposes of competition commits an act which is contrary to honest practices (*guten Sitten*) may be sued for an injunction

¹Art 1. The Guidelines were adopted by the UN General Assembly on 9 April 1985 (Resolution No 39/248). For a discussion see D Harland, "Implementing the Principles of the United Nations Guidelines for Consumer Protection" (1991) 33 *Journal of the Indian Law Institute* 189.

²UN Guidelines for Consumer Protection, art 13.

and damages".³ It is characteristic of countries having such a general concept of the law of unfair competition that this branch of the law was originally conceived of as protecting competitors, any protection to consumers following as a secondary effect. Typically, however, judicial decisions and amendments to the law have resulted in the effect of unfair practices on consumers being increasingly taken into account in the application of the law.⁴ In the Scandinavian countries a general prohibition on improper trade practices, focusing specifically on consumers, has been enacted in marketing legislation and jurisdiction conferred on a specially created court or a specialist division of one of the established courts (in both cases containing representatives of commercial and consumer interests) to issue, principally at the request of a public official such as the Consumer Ombudsman, orders forbidding the continuation of such action.⁵ In Finland, for example, the Consumer Protection Act of 1978 provides that "no method which offends against prevailing standards of decency or which is otherwise unfair from the point of view of consumers may be used in marketing".⁶

A number of countries which have not traditionally used the concept of unfair competition in their civil law have enacted provisions prohibiting in general terms misleading or deceptive and unfair (or "unconscionable") trading practices. Examples

³See eg N Reich & HW Micklitz, *Consumer Legislation in the Federal Republic of Germany* (Wokingham, Berkshire: Van Nostrand Reinhold, 1981) pp 95-101, 111-118.

⁴See eg *ibid*, pp 65-7; F Beir, "The law of unfair competition in the European Community: its development and present status" (1985) 16 *International Review of Industrial Property & Copyright Law* 139; A de Elzaburu, "Unfair competition as regards the commercialization of goods and services, with particular reference to Spain" in *Asian Regional Symposium on Protection against Unfair Competition* (Geneva: World Intellectual Property Organization, 1990) p 29.

⁵For a useful brief discussion see K Graver, "A study of the Consumer Ombudsman institution in Norway with some references to the other Nordic countries" (1986) 9 *Journal of Consumer Policy* 1, 119.

⁶See T Wilhelmsson, "Control of unfair or unconscionable marketing practices in Finnish consumer protection legislation" in K Buure-Hagglund (ed), *The Finnish National Reports to the Twelfth Congress of the International Academy of Comparative Law* (Helsinki: Institutum Iurisprudentiae Comparativae Universitatis Helsingiensis, 1986) p 27.

will be found in, *inter alia*, Australia⁷ and the United States⁸ and, more recently, the Philippines.⁹ In addition to providing for enforcement by public officials, such legislation will often also provide the possibility of private civil actions for damages or an injunction.

Another approach is to adopt much more specific legislation setting out more or less detailed descriptions of the type of conduct objected to. This is perhaps a characteristic of the legislative styles of some countries, examples of which (based on the earlier United Kingdom Trade Descriptions Act 1968)¹⁰ can be seen in Malaysia's Trade Descriptions Act 1972 and Singapore's Consumer Protection (Trade Descriptions and Safety Requirements) Act 1975.

A major advantage of a general clause, such as the German and Scandinavian provisions referred to above, is that the very width of the law permits action to be taken against new forms of marketing conduct as they emerge without the need to resort to the frequently very slow process of legislative amendment. The more specific a statutory provision the greater the risk of unintended omissions and the greater the scope for marketing practices to be devised which fall just outside the scope of the provision. As one recent commentator has put it, there is a danger that such detailed provisions will be "trying to hit a moving target, imposing a burden on legitimate traders while their sharper competitors [are] always one step ahead".¹¹ On the other hand, those dealing with traders will often find that their ability to negotiate settlements and to bring court proceedings will be enhanced where the conduct complained of fairly clearly falls within prohibited

⁷Trade Practices Act 1974, ss 52, 52A and similar legislation in the states. See D Harland, "Consumer law in Australia: some recent developments" [1988] *Tijdschrift voor Consumentenrecht* 13; D Harland, "The impact of marketing practices law on the general law of contract the Australian experience", [1992] *Tidskrift, utgiven av Juridiska Föreningarna i Finland* 351. The Australian provisions have influenced recent legislation in Fiji: see Fair Trading Decree 1992, ss 54, 55.

⁸Federal Trade Commission Act, s 5 and similar legislation in many states. See P Blumberg, "Consumer protection in the United States: control of unfair or unconscionable practices" (1986) 34 *American Journal of Comparative Law (Supplement)* 99.

⁹Consumer Act of the Philippines 1992, arts 49-52.

¹⁰For a discussion see M Whincup, *Consumer Legislation in the United Kingdom and Ireland* (Wokingham, Berkshire: Van Nostrand Reinhold, 1980) p 43 ff.

¹¹G Borrie, "Trading malpractices and legislative policy" (1991) 107 *Law Quarterly Review* 559 at 570.

conduct which is defined in some detail. Voluntary compliance with the law is likely to be enhanced if at least the more important types of objectionable behaviour are spelt out in the legislation.¹² Among the reasons for the enactment of specific prohibitions is a belief that the courts and business should be given some guidance as to the types of behaviour made unlawful and a fear that courts faced with a broad and rather indefinite prohibition may be unduly cautious and will fail to respond to current community attitudes towards what is acceptable marketplace behaviour. Consequently countries having a general prohibition will usually supplement that by more specific provisions (in the same legislation or elsewhere) dealing with particular defined practices (eg bait advertising, pyramid selling, door-to-door sales), and with particular types of goods or services (eg food, drugs, consumer credit), which experience has shown give rise to particular problems.¹³ In countries which place some emphasis on criminal sanctions in their consumer law, such sanctions are much more likely to be applied to contraventions of specific provisions than to contraventions of more general clauses.

III. "UNFAIR" CONDUCT

The concept of conduct which is "unfair" is necessarily broad and indefinite. (The same is true of such other words and phrases as "improper", or "unconscionable", or "*contra bonos mores*", or contrary to the principles of "good faith", or contrary to "honest practices" which are often used more or less interchangeably with "unfair" but which also have their own nuances.) The concept is better described than defined. Indeed the very vagueness of the concept leads some to question its utility as a specific, coherent legal norm, seeing it more as a legal label or, in the context of

¹²Whitford, "Structuring consumer protection legislation to maximize effectiveness" [1981] *Wisconsin Law Review* 1918.

¹³See further D J Harland, "The legal concept of unfairness and the economic and social environment: fair trade, market law and the consumer interest" in E Balate (ed), *Unfair advertising and comparative advertising* (Brussels: E Story-Scientia, 1988), p 15.

"unfair competition", as the name of a legal discipline.¹⁴ Certain approaches designed to overcome this problem at least in part and to give greater specificity to the concept are discussed later.

A principal plank in any effective consumer policy must be the protection of the public against deceptive and other unfair trade practices. This is essential for the effective exercise of consumer choice and the avoidance of misallocation of resources. Thus control may be justified on the basis of rendering the marketplace more competitive and efficient and thereby, in making the notion of "consumer sovereignty" closer to a realistic description of the operation of the marketplace, increasing consumer welfare. Of course, there is much argument as to when such action will be justified and as to when it will be capable of producing the desired effects.¹⁵ In this context particular attention may be given to problems caused by consumers lacking important information about many complex goods and services (and also about the terms on which these are supplied).¹⁶

However, an analysis of consumer policy based purely on market efficiency obscures the fact that such policy also has in many instances the object of promoting social goals and community values such as important ethical values, the general interest in health and safety, and the promotion of social justice and prevention of exploitation. In the writer's view the control of unfair trading practices should not be seen simply in terms of correcting market defects but must be regarded in a wider context. Thus, for example, when the frequent lack of real bargaining power of consumers prompts action to control one-sided standard conditions of contract such action is likely to be based at least partly on social goals. Likewise attempts to control practices which are regarded as exploiting particularly vulnerable groups have a wider base than merely market efficiency considerations.¹⁷

There has been a tendency for control measures over unfair trading practices to concentrate on practices which are misleading or deceptive, practices which, in other words, involve some

¹⁴See U Bernitz, "The legal concept of unfairness and the economic and social environment: fair trade, market law and the consumer interest" in E Balate (ed), *ibid* at 13, p 53.

¹⁵For a useful review see A Duggan, *The Economics of Consumer Protection* (1982) (Adelaide Law Review Research Paper No 2).

¹⁶See further Harland, *supra* n 13, at pp 28, 38-40 and references there cited.

¹⁷See further Harland, *supra* n 13, pp 28, 41-43.

element of factual misrepresentation. This concentration is partly because such practices are seen as particularly harmful, both in terms of distorting consumer decisions and resulting in misallocation of resources, and also in terms of the detriment to honest traders of unrestrained deception. Despite arguments sometimes made on economic grounds, the judgment has generally been made based on experience that market forces and the general law of obligations and the criminal law are insufficient, standing alone, to correct many forms of deception in the marketplace. Another factor behind such regulation is the principle that, irrespective of economic consequences, the law should recognize certain basic ethical values of society (such as honesty and fair dealing).¹⁸

There will usually be little argument about the importance of controlling deception (though there will be disagreement as to the types of claim which justify enforcement action), but consensus will often be much more difficult to achieve on whether action should be taken against non-deceptive practices which are seen as being in some other way unfair. Indeed, it is not possible to draw a rigid distinction between the two concepts,¹⁹ as shown by the fact that failure to disclose certain information likely to be of particular importance to consumers is sometimes regarded as an example of deception through non-disclosure while others will regard this as a situation involving unfair withholding of information.²⁰ It is also worth noting in this context that deceptive conduct should be seen as but one aspect (though perhaps the most important aspect) of the broad category of unfair trading conduct. Thus countries which have a general clause forbidding unfair competition or marketing conduct will often also have another "little" general clause specifically prohibiting misleading conduct. Sometimes through court practice and sometimes through legislative provision, a number of im-

¹⁸See generally Duggan, *supra* n 15, p 22 ff; I Ramsay, "Framework for regulation of the consumer marketplace" (1985) 8 *Journal of Consumer Policy* 353. See also R Schlechter, "The death of the gullible consumer: towards a more sensible definition of deception at the FTC" [1989] *University of Illinois Law Review* 571.

¹⁹See Bernitz, *supra* n 14.

²⁰See Harland, *supra* n 13, p 40. See also J E Karns, "The federal unfair trade practice standard after *International Harvester*: when is a marketing practice a pure omission?" (1991) 40 *Drake Law Review* 61.

portant approaches have been widely accepted. These approaches, which cannot be discussed here, are designed to overcome problems often experienced under the general law in establishing that conduct is misleading or deceptive.²¹

The difficulty in controlling unfair as opposed to deceptive conduct stems from the fact that the latter is a relatively objective concept whereas the former is inherently subjective and elusive. The difficulty is particularly great with regard to advertising, as advertising tends to be approached with a great variety of attitudes, assumptions and ethical viewpoints. Likewise, although the case for controlling unfair trading practices is perhaps strongest where those practices are seen as exploiting particularly vulnerable groups of consumers, difficult questions arise as to when conduct becomes truly exploitive and as to when such efforts amount to excessive government paternalism. Ultimately, a judgment that any particular practice is unfair is one based on ethical assumptions and attempts to reduce such decisions to purely economic criteria seem to be misconceived. A 1980 policy statement issued by the US Federal Trade Commission²² appears to come close to such an attempt. The statement was concerned with the exercise by the Commission of its jurisdiction under the Federal Trade Commission Act to take action in respect of "unfair acts or practices". The statement emphasized "unjustified consumer injury" as the primary focus of the Act. To justify a finding of unfairness the injury "must be substantial; it must not be outweighed by any countervailing benefits to consumers or compe-

²¹See Harland, *supra* n 13, pp 20-21; D Harland, "The control of advertising a comparative overview", forthcoming in *Competition and Consumer Law Journal*; G Kunze, "Misleading advertising" in Asian Regional Symposium, *supra* n 4, p 79. See also Evan Eeden, "Deceptive trade practices" in D King (ed), *Commercial and consumer law from an international perspective* (Littleton, Colorado: Fred B Rothman, 1986) p 79.

²²Letter from the Federal Trade Commission to Senators Ford and Danforth (17 December 1980). The letter is reproduced as an appendix to N Averitt, "The meaning of 'unfair acts or practices' in Section 5 of the Federal Trade Commission Act" (1981) 70 *Georgetown Law Journal* 225 at 288-296. There is a considerable literature on the "unfairness" concept under the US Act: See eg Blumberg, *supra* n 8; J Braucher, "Defining unfairness: empathy and economic analysis at the Federal Trade Commission" (1988) 68 *Boston University Law Review* 349; C Crawford, "Unfairness and deception policy at the FTC: clarifying the Commission's roles and rules" (1985) 54 *Antitrust Law Journal* 303; J Maher, "The rule of law and FTC: thesis and antithesis? Some proposals" (1981) 86 *Dickinson Law Review* 403; D Rice, "Toward a theory and legal standard of consumer unfairness" (1985) 5 *Journal of Law and Commerce* 111.

tion that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided... . Emotional impact and other more subjective types of harm ... will not ordinarily make a practice unfair." The Commission also indicated that it would not in future rely on a previously enunciated criterion, namely "whether the conduct was immoral, unethical, oppressive, or unscrupulous", but it did state that another factor is whether the conduct in question "violates public policy as it has been established by statute, common law, industry practice, or otherwise". However, even the factor of public policy was seen primarily as a means of providing additional evidence on the degree of consumer injury. Although the new approach appears to have received widespread acceptance,²³ it appears to the writer that a fundamental difficulty with its emphasis on injury is the failure to establish the unfair nature of the conduct causing that injury.

Comparative studies can be of great value to policy makers concerned with the control of unfair marketing practices, but obviously what is acceptable and what is not will vary greatly according to the cultural, ethical and social traditions of each country. Such differences are likely therefore to be reflected both in the way laws are framed and in their application. One commentator on advertising regulation has discerned a tendency for many countries to reflect concern over the local cultural heritage and a reaction against foreign cultural influences in their approach to advertising.²⁴ Similarly, a recent commentator on consumer protection law in India has argued strongly for the need for advertising to be in conformity with traditional Indian values and public standards of taste.²⁵ In Thailand legislation which specifies types of statement which will be caught by a prohibition on unfair advertising includes a statement which "adversely affects the national culture", or which "will cause disunity or adversely affects the unity among the public"²⁶ and in China

²³Sheldon J, *Unfair and deceptive acts and practices*, 2nd ed (Boston: National Consumer Law Center, 1988), pp 108-112.

²⁴J Boddewyn, "Advertising regulation in the 1980's: the underlying global forces" (1982) 46 *Journal of Marketing* 27 at 32.

²⁵R K Nayak, *Consumer protection law in India: an eco-legal treatise on consumer justice* (Bombay: N M Tripathi, 1991) pp 178-184.

²⁶Consumer Protection Act 1979, s 22.

recent regulations in some districts introducing regulation of acts of unfair competition define such acts as including those which are inconsistent with socialist orientation.²⁷

Although, as noted previously, legal controls over unfair trading practices increasingly take account of the consumer interest, a number of difficulties which have not yet been mentioned do arise. Discussions of consumer policy sometimes assume that it is possible to identify a unified, monolithic consumer interest, whereas in fact one of the recognized difficulties in developing consumer policy and ensuring effective consumer representation in decision making processes is the diffuseness of the consumer interest. While the difficulty should not be exaggerated, situations do arise where the interests of different groups of consumers will conflict (eg policies designed to ensure availability to rural consumers of goods and services at reasonable prices may conflict with the interest of urban consumers in lower prices and greater diversity of choice). It is also important to realize that just as different groups of consumers will have some conflicting interests, this is equally true of producers and merchants. Approaches which are sometimes seen as promoting the interests of business at the expense of consumers may often equally be seen as preferring the interests of one sector of business at the expense of others. This may be seen in the context of the protection of "small business" ("the middle class"). While there may be valid social and economic reasons for taxation and other policies designed to assist the continuance of a viable small business sector, certain policies concerning marketing practices may be very dubious in terms of the interests both of business at large and of consumers. This appears to the writer to be the case in respect of restrictions sometimes imposed, often in the name of preventing unfair competition, on various pricing and discount practices and on the use of premiums in marketing.²⁸

Legislation dealing with acceptable marketplace practices is frequently limited to communications and practices directed to

²⁷Wen Xikai, "The emerging unfair competition repression regulations in certain areas of the People's Republic of China" [1991] 1 *European Intellectual Property Review* 21.

²⁸For examples of such restrictions see Committee on Consumer Policy, *Premium offers and similar marketing practices*, (Paris: OECD, 1977); Reich & Micklitz, *supra* n 3, pp 101-103.

consumers. It is in the writer's view difficult to justify such a limitation in policy terms, at least so far as general clauses are concerned. (Some specific practices may perhaps be judged objectionable only when directed at consumers.) In other cases, although new legislation (especially that dealing with misleading conduct) may have been motivated primarily by the wish to protect consumers from unfair trading practices, no "consumer" limitation appears in the legislation, presumably because the view has been taken that this policy will best be effectuated by means of a general ban on improper conduct in the marketplace, whether or not the interests of any individual consumer are directly affected in any particular case. Legislatures have frequently experienced difficulty in defining who is a "consumer" and, no matter what definition is adopted, difficult borderline cases will arise. To introduce such issues into litigation designed to insist on minimum standards of marketplace conduct can only complicate the litigation and divert attention from the central issues. Misleading or otherwise unacceptable conduct is objectionable whether directed at other traders or at consumers and insistence on minimum standards in marketplace conduct generally is in the writer's view the best way to attempt to ensure that consumers are adequately protected.²⁹ This is not by any means to deny the relevance of the extent of the impact of particular conduct on consumers when enforcement agencies make decisions as to the allocation of resources; nor does it deny that in particular cases the consumer or trader status of those affected can be very relevant in determining whether particular conduct is in fact unfair or even misleading.

However, whether or not any general control over unfair practices should be limited to conduct directed at consumers, it is in the writer's view essential that it be recognized that regard is to be had to the interests of consumers as well as of business. If this is not done there is a real danger that consumer interests will be insufficiently taken into account by decision makers. For example, in Belgium article 54 of the Law on Trade Practices of 1971 prohibited acts contrary to honest business prac-

²⁹See further Harland "The impact of marketing practices law on the general law of contract", *supra* n 7.

tices ("*usages honnetes en matire commerciale*") by which a merchant or tradesman prejudiced or tended to prejudice the professional interests of one or more other merchants or tradesmen. The provision was applied principally to respond to the interests of merchants and injury to consumers alone was insufficient. Consequently the new Law on Trade Practices and the Information and Protection of Consumers of 1991, while reenacting (in art 93) the old provision, contains in addition a new article (art 94) forbidding acts contrary to honest business practices by which a merchant prejudices or tends to prejudice the interests of one or more consumers. (Some concern has been expressed that even this formulation may involve "honest" being interpreted as referring to usages acceptable as honest from the viewpoint of traders rather than from a broader perspective.)³⁰

IV. IMPLEMENTING CONTROLS OVER UNFAIR MARKETING PRACTICES

A system of control of trade practices which dealt solely with misleading or deceptive practices would be seriously inadequate from the viewpoint of the interests of consumers. Of course, most jurisdictions have an array of specific provisions controlling various types of conduct which are more or less clearly defined and which have been judged to be unfair whether or not accompanied in any particular case by deception. Examples include provisions requiring the disclosure of information in certain cases; controls on harassment and abusive debt collection practices; provision of "cooling-off periods". Despite the difficulties involved the writer believes that it is desirable that legislation dealing with specifically controlled practices be supplemented by some form of general control over unfair practices, though this should be accompanied by attempts to limit the uncertainty necessarily thereby involved.

³⁰See Th Bourgoignie, "Le contr le abstrait des abus dans les rapports de consommation" in *Rapports belges (vol 1) au XIIe Congres de l'Academie internationale de droit comparé* (Anvers: Kluwer, 1986), p 135 at 156 ff. See also J Stuyck, "The legal control of unfair advertising in Belgium" in Balate (ed), *supra* n 13, p 111 at 119-20; J. Stuyck, "L'acte contraire aux usages honnetes en matiere commerciale", in J-L Fagnart et al, *Les pratiques du commerce et la protection et l'information du consommateur depuis la loi du 14 juillet 1991*, (Bruxelles: Editions du Jeune Barreau de Bruxelles, 1991), p 125.

In Germany the courts have used the general clause of the unfair competition law to control a variety of practices which are regarded as constituting unfair marketing conduct. Examples include practices impeding the consumer's freedom of choice (eg street canvassing for sales, unsolicited sales approaches by telephone to a consumer's residence) and, more controversially, "psychological compulsion to buy" (eg certain types of premium offers and promotional competitions, and certain types of advertising excursions). The concept seems to have been applied principally to practices involving a more direct approach to individual consumers but the courts have intervened in some instances of mass advertising not involving deception eg some extreme cases of advertising exploiting fear, abusing pity or exciting prejudices.³¹ A Finnish commentator³² gives various examples of action taken against unfair marketing practices under the general clause of the Consumer Protection Act of 1978 eg requiring a merchant who alleges certain facts about his products to show sufficient grounds for such statements, controlling certain marketing practices directed at children, the prohibition of a promotional film using very violent scenes having no natural connection to the goods being marketed.

Very often a general control over unfair marketing practices will be accompanied by an attempt to give some guidance as to the types of conduct to be prohibited. This is partly because, whereas making the judgment that particular conduct is deceptive or misleading involves a relatively objective judgment, determining conduct to be unfair is usually seen as involving a much more subjective and value-laden judgment and may indeed give rise to considerable controversy. The attempt by the US Federal Trade Commission, described above, to define a standard for conduct to be considered as unfair under section 5

³¹See generally V Emmerich, *Das Recht des unlauteren Wettbewerbs*, 3 Aufl (München: C H Beck, 1990) pp 161-98; Reich & Micklitz, *supra* n 3, pp 81-83, 95-101; K Tonner, "The legal control of advertising in the Federal Republic of Germany" in Balate (ed), *supra* n 13, p 93.

³²Wilhelmsson, *supra* n 6. See also B Dahl, *Consumer Legislation in Denmark* (Wokingham, Berkshire: Van Nostrand Reinhold, 1981), pp 41-59 (discussing the application of the Marketing Practices Act, s 1).

of the Federal Trade Commission Act was at least in part a response to such controversy. Critics had argued that the failure of the Commission and the courts to develop specific guidelines left the Commission's unfairness authority so broad as to be largely unsupported by theory or systematic rationale, made prediction as to what was lawful and what was not virtually impossible and provided insufficient restraint to avoid the danger of unduly burdensome or misguided regulation.³³

The practice of regulatory authorities issuing policy statements concerning the factors they will consider in exercising their authority will give some guidance to business as to the types of conduct likely to offend and will also assist agency staff in setting priorities for allocation of resources. In some cases there will be a procedure whereby binding regulations defining particular types of prohibited conduct can be developed. For example, such a procedure exists in the US under a 1975 amendment³⁴ to the Federal Trade Commission Act. In exercise of its rule making power the US Federal Trade Commission has issued a variety of rules dealing with marketing practices in particular industries and requiring disclosure of specified information deemed to be particularly significant for consumers.

A procedure for establishing binding rules defining specified practices can result in guidance being given as to the most objectionable types of practice (and also where necessary help to overcome judicial reluctance to apply a general prohibition to practices not previously expressly prohibited), while still enabling the law to keep pace with ever-changing market conditions. A particular advantage of a rule making procedure is that it may, while ensuring opportunities for public debate, help to overcome the problem of governmental reluctance to introduce new legislation into what is often an overcrowded legislative timetable. It may finally be noted that where objectionable practices are common in a particular industry, industry specific rules may be more effective than more generally framed rules, while at the same time establishing a standard binding all participants in the industry, thereby achieving greater fairness than where reliance

³³See Blumberg, *supra* n 8, pp 99-105.

³⁴Magnuson-Moss Warranty - Federal Trade Commission Improvement Act.

is placed on case-by-case proceedings against individual defendants.

Another approach is to rely heavily on the ability of a public official to give specific content to general prohibitions on practices which are unfair to consumers by negotiating agreements with industry groups. This approach has been adopted in Sweden, such negotiations resulting in the issuing of guidelines by the National Board for Consumer Policies. These guidelines are not binding as a matter of law but nonetheless have great persuasive effect, recourse to the courts by the agency being necessary only relatively rarely in cases where the guidelines have not been followed or in cases on matters where agreement has not been possible.³⁵ This approach gives greater certainty by affording guidance to business as to what is required while retaining the flexibility of a general clause. Such an approach depends for its effectiveness on many local factors which may often make it unsuitable for adoption in other countries.

The Swedish approach appears to have influenced a technique provided for recently in the fair trading legislation of some Australian states.³⁶ Under this procedure a code of practice for a particular industry is to be drawn up either by an industry association or by the Commissioner for Consumer Affairs in consultation with industry, in both cases consultations also being carried out with consumer organizations. When approved by the Minister for Consumer Affairs following this procedure a code may be prescribed in a regulation under the Act. Once this is done the code may be enforced against all traders coming within its scope. It may be possible in this way to preserve some of the advantages of voluntary codes (such as less formality in language and the sense of commitment by business to a set of norms in the drafting of which it has been involved), while at the same time overcoming some

³⁵See U Bernitz, "Guidelines issued by the Consumer Board: the Swedish experience" (1984) 7 *Journal of Consumer Policy* 161; S Wikstrom, "Bringing consumer information down to earth. Experiences from a Swedish experiment" (1984) 7 *Journal of Consumer Policy* 13. As to somewhat similar approaches in other Scandinavian countries see also Graver, *supra* n 5, pp 122-3; Wilhelmsson, *supra* n 6, pp 32-4.

³⁶See *eg* Fair Trading Act 1987 (New South Wales), ss 74-79.

of the recognized difficulties where voluntary self-regulatory codes are relied upon to regulate trading conduct, namely difficulties with respect to the enforcement of codes and their non-applicability to traders who are not members of the association adopting the code. It remains to be seen how effective this approach will be.

We should finally note an approach which has been adopted by some common law jurisdictions which have enacted legislation prohibiting "unconscionable practices" directed at consumers. As well as enabling individuals to obtain redress, this legislation allows public officials to obtain injunctions to prohibit the continuance of unconscionable practices, the more important factors to be taken into account in determining whether a particular conduct is unconscionable being spelt out in some detail in a "shopping list" of relevant considerations. Such factors include, for example, that the consumer is not reasonably able to protect his or her interests because of physical infirmity, ignorance, illiteracy *etc*; that the price grossly exceeds that at which similar goods or services are readily available to similar consumers; that the proposed transaction is excessively one-sided in favour of someone other than the consumer. Such legislation usually applies to promotional practices irrespective of whether it can be shown that any consumers entered into contracts as a result of such conduct, and also to post-contractual conduct (for example, blatant disregard of obligations, unconscionable debt collection practices). Legislation of this type has been adopted for some time by some American states³⁷ and Canadian provinces,³⁸ and has more recently been enacted in Australia.³⁹ The "shopping list" approach attempts to give some indication of the type of conduct at which the legislation is aimed, while not unduly restricting its scope. A further purpose may also be an attempt, based on past experience with similar phrases in other statutory contexts, to avoid a narrow interpretation by the courts.

³⁷See *eg* Blumberg, *supra* n 8. See also S Macaulay, "Bambi meets Godzilla: reflections on contracts scholarship and teaching vs state unfair and deceptive trade practices and consumer protection statutes" (1989) 26 *Houston Law Review* 575; Sheldon, *supra* n 23.

³⁸See Belaboa, "Unfair trade practices legislation, symbolism and substance in consumer protection" (1977) 15 *Osgoode Hall Law Journal* 327.

³⁹See Harland, *supra* n 7.

In Australia a committee appointed to review the operation of the Trade Practices Act considered suggestions that the existing general prohibition on "misleading or deceptive conduct" should be extended to cover also "unfair" conduct. The Committee concluded that "a general prohibition of 'unfair' conduct, as contained in the US Federal Trade Commission Act, could, under Australian conditions, result in a considerable degree of uncertainty in commercial transactions"⁴⁰ This perhaps reflects in part a general tendency in at least many common law systems to relatively precise and detailed legislation and less reliance than in civil law systems on abstract general principles. Nonetheless, the same committee did in fact recommend the introduction of a prohibition on unconscionable conduct and this recommendation was ultimately implemented. While the distinction may seem a fine one, the word "unconscionable"⁴¹ tends to suggest, at least to a common law lawyer, that only relatively extreme instances of unfairness will be covered. It may be that in time the distinction between the two concepts will in practice prove to be slight, but in the meantime a conscious attempt to restrict the scope of intervention against practices which might well previously not have been unlawful allowed immediate progress to be made by a compromise solution. This approach has influenced recent reform proposals in the United Kingdom, where it was considered that "the disadvantage of words like 'unfair' or 'improper', however, is that they may be so wide and so subjective as to place excessive discretion in the hands of the enforcement authorities".⁴²

It is appropriate finally to note that the problem as to how far society should prohibit unfair practices which have not traditionally been regarded as illegal arises in a particularly acute form in the context of advertising. Much criticism of advertising is that it is not necessarily false or misleading but rather unfair to consumers because it is uninformative or relies on irrelevant

⁴⁰Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Canberra: Australian Government Publishing Service, 1967), p 67.

⁴¹See generally SR Enman, "Doctrines of unconscionability in Canadian, English and Commonwealth contract law" (1987) 16 *Anglo-American Law Review* 191.

⁴²*Trading malpractices a report by the Director General of Fair Trading following consideration of proposals for a general duty to trade fairly* (London: Office of Fair Trading, 1990), p 48.

or objectionable appeals (such as associations with sex, fear or status, portrayal of stereotyped roles). Advertising is also criticized by some as distorting cultural values or promoting inappropriate products.⁴³ While there may be general community consensus that misleading and deceptive advertising should be controlled, such a consensus is likely to be much more difficult to achieve in relation to the types of issue now under consideration, especially as greatly differing perceptions will be held in this context on such issues as the importance to be attached to values like freedom of expression and the degree to which the law should seek to be paternalistic in seeking to limit the use of persuasive techniques in advertising. The writer has discussed elsewhere approaches which may be taken towards the regulation of unfair advertising.⁴⁴

V. CONCLUSION

The protection of consumers against unfair trading practices is an essential concern of consumer policy. Indeed the importance of this topic has if anything grown in recent years, because moves in many countries towards privatisation of publicly-owned trading enterprises and liberalisation of many markets from detailed industry specific regulation underscore the importance of a general framework law laying down minimum standards of fair trading applicable to all enterprises.⁴⁵

This article has attempted to outline a variety of methods which have been employed in combatting deceptive and unfair trading practices. No list of such practices could hope to be comprehensive, both because of the variety of techniques employed in the modern marketplace and because of the dynamic and constantly changing nature of that marketplace. A general

⁴³On the latter concept see R Kerton, Lim Siang Yin and R Vermeer, *Appropriate Products* (Penang: IOCU, 1982).

⁴⁴See Harland, *supra* n 13, pp 33-40; D Harland, *supra* n 21.

⁴⁵See eg paper by the Ministry of Trade and Commerce, Government of Fiji, in Federal Bureau of Consumer Affairs, *Working Papers of the South Pacific Consumer Affairs Workshop - Sydney, Australia, 4-7 February 1990* (Canberra: Australian Government Publishing Service, 1990).

prohibition may be difficult to apply and may give rise to considerable uncertainty, whereas reliance merely on specific prohibitions will fail to control some practices which would be generally agreed to be objectionable, and will almost certainly result in the law always remaining to some extent out-of-step with current commercial practices. It has been here argued that it is desirable that there be some form of general control over unfair practices, but that this should be accompanied by specific controls and other attempts to limit the uncertainty necessarily thereby involved.

This article has not dealt, except incidentally, with the enforcement of provisions concerned with marketing practices, but the general point does need to be made that legislation is likely to have little effect if there are inadequate sanctions and remedies and that provisions dealing with enforcement are of at least equal importance with those defining the types of conduct which are prohibited.

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