EEC Perspectives: Brief Reports

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EEC Initiatives in the Consumer-Producer Dialogue

The second (1981) consumer programme of the EEC[1] did not introduce the idea of consumer-producer dialogue either as a panacea or as a "red herring." The words "soft law" do not appear anywhere in the text of that programme. What the programme text did say (Paras. 5/7) is as follows:

> 5. . . . . In particular the Community should try to encourage a dialogue and consultation between representatives from consumers and representatives from producers, distributors and suppliers of public or private services with a view, in certain cases, to arriving at solutions satisfactory to all the parties in question.
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> 6. Although legislation both at national and Community level will still be needed in many cases in order to ensure that the consumer may exercise the fundamental rights listed above and that the market operates properly, the application of certain principles might also be sought by other means, such as the establishment of specific agreements between the various interests held, which would have the advantage of giving consumers additional assurances of good trading practice.
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> The commission will endeavour to facilitate the elaboration and conclusion of such agreements, on an experimental basis, for example, in certain fields of after-sales service and in areas involving aspects of professional ethics.
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> 7. Obviously, the use of this voluntary formula should in no case prejudice the application of existing laws and regulations, nor exclude the adoption of statutory and administrative provisions at either national or Community level.[2]

Put more succinctly, the Commission was ready to experiment with dialogue, particularly in certain fields, as an *additional element* of strategy in pursuit of consumer welfare, but not as a *substitute* for law-making activities. Quite clearly, one had to proceed with caution and not to hope for too much too soon.

To place this element of strategy for consumer protection in true perspective, I should enumerate briefly the full repertoire of such elements as practised at Community level. I have already referred to two, namely,

1. Community legislation which harmonises or approximates member state laws;

2. Voluntary agreements, negotiated through dialogue between representative producer and consumer bodies at Community level and subsequently ratified and implemented at member state level by national affiliates.

The other elements are as follows:

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3. Harmonisation or coordination of product standards established, respectively, by European standard-making bodies (CEN/CENELEC) or by national standards institutions (such as AFNOR, DIN, BSI). These standards, though voluntary, are widely used in manufacture and can be quoted in EEC legislation (for example, the "low-tension" Directive, adopted by Council in 1973,[3] or the draft Directive on Toy Safety, sent to Council by the Commission, in amended form, in 1983[4]) as satisfying general principles of security specified in such legislation.

4. We also have a process of "negative" harmonisation, whereby national laws which purport to protect consumers, can be tested in the Court of Justice and either rejected as unnecessary for that purpose, in which case they should be struck out, or upheld, in which case Community action would be strongly indicated to bring other member states laws into line, so eliminating, in one sense or the other, the technical barrier to trade created by the national law in question. The classic case in this context is the REWE ("Cassis de Dijon") affair.[5]

The Community has resorted to elements (3) and (4) particularly in latter years, most recently by the adoption of a Council Directive on the convergence of national standards and technical regulations in March 1983.[6]

It is unlikely that element (2), which is our present concern will assume a major role in the currency of the second programme, for various reasons.

– Dialogue is likely to yield agreement only when there is strong motivation, such as the threat of imminent proposals for legislation. Even then, results will tend to ensue from dialogue only when those proposals are likely to be adopted, i.e., when there are strong indications that the political will exists on the part of member states to adopt them. In fact, we have suffered for years in the Community from the absence of such will.

– Another circumstance which might induce agreement would be that "framework" legislation already existed which permitted action to counter abuse of consumer rights. Thus, for example, if the EEC Directive on misleading advertising came into force in all member states, there could be an advantage for advertising practitioners to adhere to a code or codes in particular sectors, such as advertising to children or advertising of medicinal products, since such adherence might constitute a defence against claims that particular advertisements are misleading. Similarly, a Community law on unfair terms in consumer contracts could result in voluntary agreements on standard form contracts for particular product categories such as automobiles or electro-domestic durable goods. However, neither of these laws

yet exist at Community level, so the conditions for dialogue in the interests of negotiating voluntary codes of conduct are not yet present.

If we assume that the environment for negotiation develops progressively, over coming years, due to the circumstances just outlined, then dialogue may become an important element of strategy for the late eighties and could be retained in a third consumer programme to be adopted at EEC level for that period.

However, even if it so transpires, there will need to be a structure of administration favourable to the implementation of voluntary codes. Such a structure exists in Sweden and, as we have learned from Bernitz (1984), the practice of negotiating guidelines with producers in that country still continues though in a state of evolution from the original practice. We do not have such a structure at EEC level, nor does it exist typically in our member states. It is not therefore clear how the use of Community-negotiated guidelines would be assured at member state level. Nor have we any assurance that Community-level producer and consumer representatives have a mandate to negotiate on behalf of any or all of their affiliates. So far, the contrary seems to apply on the producer side.

Perhaps in the end, the Commission will have to be a direct party to negotiations wherever these seem to hold promise of useful outcomes. In that case, whatever "code of conduct" may emerge would be promulgated as a recommendation by the Commission under Article 155(4) of the Rome Treaty.

The auguries are not particularly favourable at present to the development of effective "soft law." But there is one silver lining to the cloud. The first-ever Council of Ministers responsible for Consumer Affairs will take place on December 12, 1983. It may well set a pattern of regular meetings of such Ministers and may thus serve to raise the political profile of consumer policy in Europe. We must be ready to use any tools we can find to advance the course of consumer welfare. Negotiation leading to "soft" law is one of them. Despite its difficulties, conceptual and practical, it is too early to dismiss it as a potentially-effective element of strategy. Let us wait and see and be ready to act when we can.

NOTES

[1] Official Journal of the EC (O. J.), No. C 133/1 of 3 June 1981.
[2] O. J. No. C 133/3 of 3 June 1981.
[3] O. J. No. L 77/29 of 26 March 1973.
[4] O. J. No. C 203/1 of 29 July 1983.

[5] Case 120/78, Decision of 20 February 1979, European Court Reports 649.
[6] O. J. No. L 109/8 of August 1983.

REFERENCE

Bernitz, U. (1984). Guidelines issued by the Consumer Board: The Swedish experience. *Journal of Consumer Policy*, 7, this issue, 161–165.

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Tony Venables
European Codes: A Red Herring

Practical experience in Brussels with "dialogue" and "codes of conduct" has simply underlined the conclusions made by the Consumers' Consultative Committee (CCC) in its opinion on the second consumer programme that the approach put forward by the Commission would not work. Similarly, the report by the European Consumer Law Group on non-legislative means of consumer protection (1983) "does not see much value in the idea of 'voluntary agreements' put forward by the Commission" and recommends consumer organizations not to negotiate codes on this basis.

THE PRACTICAL EXPERIENCE

After two years of "dialogue" with the Union of Industries of the European Community (UNICE), the European Advertising Tripartite (EAT), the distributors, and manufacturers, this experiment has been an embarrassing failure:

– The role of the Commission was never proposed as an active one. Indeed, part of the problem is that at the European and international levels, the amount of work which has to go into producing a voluntary agreement is underestimated, as is the role of governments and public institutions, such as the Office of Fair Trading (OFT). For the Commission, it looked like an attractive way out of the legislative impasse but – in deciding not to invest the necessary resources and

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