

The Impact of EU Legislation on the Marketing of Goods and Services in the European Union

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Abstract: This paper examines the major contribution made by the European Union (EU) to the regulation of marketing activities in the Single European Market. EU legislation is examined along eight dimensions in which marketing managers must make strategic decisions and which unite the firm in its attempt to deliver value to its customers. The argument put forward is that through careful examination of EU legislation and anticipation of incremental change in policy regimes, marketers within the European Union can gain a clearer understanding of their operational environments and establish a platform for more competitive marketing strategies.

Keywords: European Union, international business, international marketing, legislation

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Introduction

Since the 'completion' of the Single European Market (SEM) in 1992, opportunities for pan-European marketing have been considerable. A decade on, and the conditions for such efforts are more fertile than ever before. The strengthening of SEM rules, EU harmonisation initiatives, and the arrival of a single European currency (the euro), have all increased the scope for pan-European marketing. An increasing number of national-scale undertakings are acquiring European-scale or scope and foreign market entrants are increasing their weight and presence inside the Single European Market. Given the diseconomies of scale of individualised single-country marketing strategies, marketers are giving emphasis to regional and/or global strategies and are

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attempting to maximise the integration of their marketing activities across national borders.

Whilst it is already a challenge to promote and distribute products and services successfully within a single European country, to do so across Europe or across the EU-15 is an even greater challenge. The EU marketplace itself is marked by economic, legal and regulatory variations that tax even the most experienced of marketers. Language, culture and custom also vary across the EU states and though consumer tastes and behaviours may be converging at some level, it is unrealistic to expect millions of 'Euro-clones' with the exact same tastes and purchasing styles. Any understanding of marketing in Europe must rest with account of these differences and with appreciation of their operational and psychological effects.

The legal and regulatory dimension deserves particular attention. In the European Union (EU), government and regulatory authority exists at three discernable levels, with varying powers and responsibilities at each level. These are the (supranational) level of the European Union, the level of national government, and the regional government level. These divisions in political authority in EU-Europe and limits to Community competence in many fields, ensure a complex order in which legal aspects remain fractured but in which marketers confront a degree of integration between national systems, some harmonisation of standards, and a common body of Community law.

The present paper examines features of this situation and demonstrates the major contribution made by the European Union to the regulation of marketing activities in the EU. The principal aims are to evidence the relevance and importance of EU legislation to marketing processes and to promote a proactive approach to EU legislative auditing on the part of marketers. The implications of EU policy and legislation are identified along eight dimensions in which marketing managers must make strategic decisions and which unite the firm in its attempt to deliver value to its customers. The argument put forward is that through careful examination of EU legislation and anticipation of incremental change in policy regimes and legislation, marketers within the European Union can gain a clearer understanding of their operational environments and establish a platform for more competitive marketing strategies.

In this sense, the paper contributes to a small but growing literature featuring significant contributions from Hildebrand (1994) and Thorne LeClair (2000). The collective effort is to correct a paucity of studies of the EU policy environment from a marketing perspective and to examine the detail and character of EU regulation as relevant to marketing transactions inside the European Union.

The European Union - Some Marketing Considerations

It is unsurprising that marketers attach strategic importance to the EU market. The European Union is a vast and growing marketplace with some 378 million consumers, many of whom have high disposable incomes. Already covering fifteen countries - Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom – the EU is shortly to expand its membership to a total of 25 countries and to a population of in excess of 450 million. Many of its rules extend to other European economies including Norway, Liechtenstein, and Iceland.

Inside the Union, provisions for the freedom of movement of goods, services, capital and labour have resulted in a more unified (and competitive) marketplace in which it is ever easier to deal and trade in other EU states. The arrival of the euro has eliminated foreign exchange rate risk exposure on internal euro-zone transactions and consumers are ramping up their online purchasing activity aided by the greater transparency of prices. Morgan Stanley Dean Witter estimates that roughly 35 percent of European adults will be using the Internet by 2004, providing a market of more than 100 million potential online consumers (Brewer, 2000).

The implications of these changes for marketing strategies have been widely examined but few studies have provided careful account of EU policy inputs to international marketing decisions or have systematically investigated the contribution of EU legislation to the evolution of marketing conditions inside the EU. How then can we develop understanding of the implications of EU legislation for the marketing of products and services in the European Union (EU)?

EU Legislation – the Basics

A first step for marketers and analysts is to establish basic appreciation of the Community system and of the principal forms of Community legislation. It should be added here that the European Community (EC) is the main pillar of the European Union (EU), which also encompasses structures for co-operation in matters of foreign and security policy, justice and home affairs. The Community system is established by the European Community Treaty (1957), which has been amended and updated by The Single European Act (1986), The Treaty on European Union (1992), The Treaty of Amsterdam (1997) and The Treaty of Nice (2000).

It is under the Community system (and pillar) that EU law is composed. A number of key players are involved in this process including four governing institutions - the Council, the Commission, the Parliament, and the Court of Justice. The role and powers of these Community institutions is defined in the Treaties and is profiled

elsewhere (see Mercado et al., 2001 for summary). Consumer groups, trade associations, experts and advisory committees also play a role in the EU legislative process (see, Wallace & Wallace, 1996; Nugent, 1999).

Community law takes three principal forms. Primary legislation includes the Treaties and other agreements having similar status. Secondary legislation is based on the Treaties but is introduced under agreed procedures defined in the Treaties. The main forms are Regulations, which are automatically applicable from the moment they are published, and Directives, which are binding as to the result to be achieved, but which must be transposed into national law. Other forms of secondary legislation include Decisions, which are addressed to defined parties (i.e. companies or member states) and are binding in all aspects, Recommendations and Opinions, which are not binding. Case-law includes judgments of the European Court of Justice and of the European Court of First Instance, often in response to referrals from the Commission, national courts of the Member States or individuals (<http://europa.eu.int/eur-lex/>).

Marketers should note that regulations are mandatory, take precedent over national law and are effective as law without any intervention/action on the part of Member States. Some analysts have compared them to legal statutes highlighting their binding nature and immediate effect. Most regulations are adopted by the Commission, and concern adjustments to established regimes, including agricultural (CAP), competition and commercial policies. Directives need to be introduced into national law by action of the Member States and will often place only a minimum standard on the member nations. A time limit is included in the directive by which time it must be fully implemented. One consequence of this is that marketers should not only be cognisant with the terms of an EU directive but must be sensitive to the implementation of that directive in individual EU states, so that they comply with national law. Directives are issued by the Council acting independently or by the Council in conjunction with the European Parliament (co-decision). Most legislation of interest to marketers is at the directive level but marketers must not fail to pay attention to the decisions, recommendations and opinions established at EU level. This point is impressed by Thorne LeClair (2000, page 197):

‘Recommendations and opinions can be used by marketers to better understand the general business environment and hypothesise about future legislation in the regulation and directive category...[I]ndividual decisions are instructive to marketers because they indicate a specific interpretation and remedy of law.’

EU Legislation and the Marketing of Goods and Services in the European Union

It is at this point that we move to address the laws and regulations of the European Union that are of certain or likely consequence to marketers. In the following sections, the implications of EU legislation for the marketing of goods and services in the European Union are addressed along eight dimensions:

- the research and segmentation of markets;
- the development and assessment of products;
- the packaging and labeling of products;
- the advertisement and promotion of products;
- methods of sale;
- the distribution of products and services;
- contractual terms; and
- pricing.

The result is a broad view of the EU policy environment, though not an exhaustive one, and a detailed assessment of the consequence of EU legislation for marketing planning. Readers may question the form and identification of these eight dimensions but the separations are forwarded as a useful alternative to the 4Ps and are constructive for the purpose of present investigation. It must be noted that the analysis is far from exhaustive and assumes a basic knowledge of the 'main-frames' of both the SEM and EMU regimes which are not characterised here. Of course, the fabric of the SEM regime has major implications for marketers, who are able to take advantage of the freedom of movement (cross-border) provided for both goods and services. Developing issues surrounding patent registration, copyright and intellectual property are also not addressed in the present paper. Marketing concerns and issues of this type may constitute a further 'dimension' and form the focus of ongoing research and additional papers.

It should be noted that the development of Community law is continuous and that the absence of effective monitoring may lead to competitive disadvantage and to legal embarrassment.

Market Research and Segmentation

The analytical and creative processes of defining markets in Europe and of identifying the customer groups at which product(s) can be aimed are likely to be appreciated by the reader. In essence, marketing research and segmentation concerns the efforts of marketers to gather information about customers, to gain insight into the

types of person most likely to purchase certain products, and to act on that information in the design and delivery of products. Marketers may look to establish key differences between national consumer groups so that product and service offerings can be adapted or to identify common tastes and requirements across national boundaries, so that transnational customer groupings can be targeted with more standardised product and service offerings. All marketers require information if they are to segment the market (with national or transnational emphasis) and issues of personal data and access to personal data are thus of paramount importance. On this note, the importance of EU legislation should not be overlooked, as it continues to shape legal provision on personal data in the EU states and to harmonise national rules.

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, aims to remove potential obstacles to flows of personal data throughout the European Union whilst ensuring a high level of individual protection. Under the Directive, data subjects are granted a number of important rights. Individuals have the right of access to personal data and a right to rectification of personal data that is shown to be inaccurate. Data must be collected for a specified, explicit and legitimate purpose and not further processed in a way incompatible with those purposes. Consumers may also opt out of allowing their data to be used for direct marketing campaigns, and details on their ethnic or racial origin, religion, health or sexual life can only be processed with their explicit consent unless there is an important public interest. The Directive also establishes rules to ensure that personal data is only transferred to countries outside the EU when its continued protection is guaranteed. As Brewer (2000) explains:

‘Marketers that have developed a list of email addresses in a specific EU member country, such as France or Germany, can transfer that personal data outside the EU only if they have disclosed such a transfer (or ‘export’) to both the consumer and the government, and only if the country to which the personal data is transferred has equivalent laws protecting the personal data’.

As a consequence of this legislation, marketers now have increased responsibilities and face new restrictions on data storage, processing and transfer. Companies or marketers guilty of unlawful storage of personal data, the storage of inaccurate personal data, or the abuse or unauthorised disclosure of such data, run the risk of legal prosecution. Marketers must ensure compliance with each country’s detailed laws governing data protection, which should meet the expectations of the EU Directive but which will not be fully standardised.

The personal data issue continues to attract the attention of the Community institutions and as new advanced digital technologies develop, they give rise to

specific requirements concerning the protection of personal data and privacy of the user. New telecommunications services, video-on-demand and interactive television for example, all demand the protection of users. Legislation continues to develop so that the privacy of users and personal security details will not be at risk. Future legislation is anticipated in relation to consumer information gleaned from web-based transactions.

The Development and Assessment of Products

With respect to the development and conformity assessment of products, marketers confront a basket of EU rules and principles, many of which have been given expression in secondary legislation. Indeed, the stages of product development and conformity assessment must be journeyed with mind to EU rules and the legal and quasi-legal conditions applying in EU states. Strategically, if those requirements are integrated in an early stage of the product development cycle, high adaptation costs may be avoided and strategic advantage may be gained (see Hildebrand, 1994).

Issues of product safety and product liability require central examination. Marketers must be conscious that the Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC) makes manufacturers and importers into the EU responsible for any damage or injury caused by a defect in their products. The purpose of the Directive (commonly referred to as the Product Liability Directive) is to ensure consumer protection against damage caused to health or property by a defective product and to reduce the disparities between national laws. Article 1 of the Directive says that the producer shall be liable for the damage caused by a defect in its product, whether or not there is negligence on its part. Article 3 states that any person who imports into the Community a product for sale, hire, lease or distribution, shall be deemed to be a producer within the meaning of this Directive. Thus an injured party can recover compensation from a manufacturer, supplier or importer. Action would be taken through the appropriate national court. Significantly, Article 4 of the Directive places the burden of proof on the injured party. In practice, the injured party must prove damage, the product defect, and a causal relationship between defect and damage. Directive 1999/34/EC extended the scope of Directive 85/374/EEC to primary agricultural products, including meat, cereals, fruit and vegetables. Few product categories fall outside of the scope of the Directive, although the Directive does not apply to services.

With respect to product defects, marketers should also note that under Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees, EU consumers will come to enjoy two years of legal guarantee on all purchases of

consumer goods in the EU. Under the terms of this Directive, consumers get initial rights to repair or replacement of defective items. Under special conditions, they can demand price reduction or refund. The directive applies to any defective movable consumer product. Significantly, if a defect appears during the first six months following the purchase, the consumer does not have to prove that the product was defective at the moment of delivery.

The Council Directive on General Product Safety (92/59/EEC) requires manufacturers to provide customers with full information on the potential risks from their products. This is a general directive, which leaves the detailed coverage of specific product categories to additional directives. Indeed, essential health and safety requirements for specific categories of product have been defined in a series of 'New Approach Directives' such as Directive 90/396/EEC (Appliances Burning Gaseous Fuels) and Directive 88/378/EEC (on the safety of Toys).

Under the terms of the CE Marking Directive (93/68/EEC), products covered by new approach directives require CE marking for legal sale in the EU/EEA. A CE marking is an EU compliance or conformity symbol indicating that a product meets the requirements of relevant new approach directives. Affixed by either the manufacturer or, in cases of high product risk by an authorised representative, the marking (CE) appears on the product itself, its packaging, or in the documentation attaching to the product. The CE marking has been described as a type of European passport for industrial products. Delaney & van de Zande (2000, page 17) comment:

'CE marking a product, like carrying a passport when entering a foreign country, is not an option. All manufacturers, European, American, Japanese, or other, are required to affix the CE mark to products that are governed by New Approach Directives.'

The essential point is that CE marking on a product indicates to all authorities that the product is in compliance with the essential health and safety requirements of all directives that apply to the product. As a consequence, they can be placed on the market in any country within the European Union or wider European Economic Area (Tricker, 2000). The marketability of these products may be enhanced if manufacturers voluntarily adopt those harmonised standards mandated by the European Commission to address the essential requirements of New Approach Directives. The manufacturer is presumed in conformity with EU law when using harmonised standards.

Of course, not all products are the subject of EU harmonisation initiatives. In fact the majority of products marketed in the EU are not directly regulated at the EU level but by member state laws (Delaney & van de Zaande, 2000). In theory, any product that can be legally marketed in one member state can be legally marketed in other

member states on the basis of 'mutual recognition'. However, national governments are free to ban any product for which they can legitimately assert a health or safety risk, and the mutual recognition principle has not prevented complaint from marketers that their efforts to sell in other Community markets are sometimes frustrated by technical differences and 'local requirements'. Marketers should monitor this complex situation, check for local (minimum) requirements and for the existence of Community Directives tied to their product lines.

The Packaging and Labeling of Products

The Community has also adopted directives aimed at the harmonisation of packaging and labeling requirements (see Bailey, 1999 for detailed assessment). These measures have contributed to the harmonisation of a disparate set of national rules on labeling, packaging and packaging waste. Foremost here is the European Parliament and Council Directive 94/62/EC on packaging and packaging waste, which covers all packaging marketed in the EU and all household, commercial and industrial packaging waste. The Directive directs marketers to consider their role in contributing to reuse, recovery and recycling of packaging and packaging waste. Packaging must be manufactured in such a way as to enable the recycling of a certain percentage by weight of the materials, in compliance with Community standards for producers and the member states. Packaging is allowed on the market only if it complies with certain 'essential requirements', which include minimisation of packaging weight and volume to the amount needed for safety and consumer acceptance. Packaging must also be manufactured so that the presence of hazardous substances is minimised.

The Packaging and Packaging Waste Directives directs marketers to assess packaging and labeling from an environmental perspective. Under Council Regulation 880/92 on a Community eco-label award scheme, products with a reduced environmental impact may be entitled to carry a Community eco-label, if satisfying minimum requirements in relation to pollution, waste generation, energy and resource consumption. The EU's eco-label scheme is designed to reduce confusion in the EU market by providing an authoritative and independent label to identify those goods, with the lowest environmental impact in a particular product group. All products, excluding food, drink and pharmaceuticals are eligible for an eco-label. Marketers should consider the value of an eco-label, which has emerged as a significant marketing tool. EU accreditation for a product can be a useful complement to accreditation under national schemes. Those applying for an EU eco-label will have to undertake a product life-cycle assessment. Marketers

succeeding with their applications can only use the eco-label in advertising the specific product for which it was awarded.

Another concern for manufacturers and marketers in the EU should be the basic information requirements for the labeling of products in the EU market. These are quite straightforward and include: a clear product name; a shelf-life date; and the name and address of the producer, packer or importer within the EU. Special labeling requirements apply to food and beverage products (Directive 2000/13/EC). Ingredients and food additives should be formally detailed with reference to weight or volume. Foods containing genetically modified organisms (GMOs) should be marked accordingly.

Directive 1999/103/EC amending Council Directive 80/181/EEC on the approximation of the laws of the Member States relating to units of measurement also demands that products sold in the European Union (EU) and its associated countries must be specified and labelled only in metric measurement.

The Advertisement and Promotion of Products

Marketers of goods and services in the European Union confront a patchwork of rules and regulations tied to advertising and promotions-related activities. National laws vary with respect to advertising restrictions (e.g. limits on the number of hours available for television advertising), comparative and misleading advertising, advertising complaints, and the advertisement of specific products. As illustration, in Greece and Sweden, toy advertising aimed at children is outlawed. In Belgium it is prohibited from children's programming slots. In other member states there are no equivalent restrictions (Mercado et al., 2001, page 418).

Marketers would be forgiven for believing that legislation in this domain was framed strictly at the national level but the EU has issued a number of relevant Directives. Directive 84/450/EEC concerning misleading advertising establishes minimum standards of protection against misleading claims addressed to consumers within Community Member States. In order to control misleading advertising, the Directive directs Member States to give courts or administrative bodies, powers to order the withdrawal of misleading advertising or to institute proceedings to that end. The same authorities can demand that an advertiser provides proof of the material accuracy of the facts contained in an advertisement, where a complaint has been registered.

Directive 97/55/EC, which amends the Misleading Advertising Directive, introduces the concept of comparative advertising. Comparative advertising is defined as 'any advertising, which explicitly or by implication identifies a competitor or goods or services offered by a competitor'. The Directive states that comparisons

must not be misleading and must concern goods or services meeting the same needs or intended for the same purpose. The Directive prohibits any denigration of the trademarks, trade names or other distinguishing signs of a competitor.

Overall, the body of EU communications legislation remains limited and concentrated on the establishment of minimum requirements. Current evidence is of an *ad hoc* approach to regulating advertising and of a failure on the part of EU institutions to tackle the major differences in national laws and treatments. In this context, a multiplicity of rules and provisions both on the national and regional planes, will have to be checked when a European advertising campaign is being developed.

Methods of Sale

A deal of Community legislation relates to methods of sale. For example, Directive 97/7/EC on the protection of consumers in respect of distance contracts, establishes a series of EU-wide rules in relation to distance selling. Distance selling involves contracts facilitated through the telephone, fax, mail or the Internet, where there is no face-to-face contact between buyer and seller. One consequence of this Directive is that prior to the conclusion of any distance contract, the consumer must be provided with clear and comprehensible information concerning: the identity of the supplier; the characteristics of the goods or services and their price; delivery costs; and the arrangements for payment, delivery or performance (Article 4). Under this Directive, orders must be executed within thirty days (unless parties agree to an extension) and the consumer has the right to withdraw from the contract within seven days (Article 6).

Legislation on Distance Selling has now reached financial services with a new Directive on the distance selling of financial services and products, including credit cards, insurance policies and pension plans. The Directive imposes an obligation on financial service providers to provide consumers with comprehensive information before a contract is concluded and gives the consumer the right to withdraw from a contract during a cool-off period. Significantly, the Directive prohibits unsolicited sales calls by fax/telephone ('cold calling') and by e-mail ('spamming'). Marketers in other industries should anticipate similar prohibitions in the near future.

An EU Directive also applies to personal selling (or door-to-door selling). Personal selling involves person-to-person communication and is therefore at one extreme of the marketing communications continuum. In general terms, sales people call on customers and customer organisations in their homes or businesses, to present their products and services and to conclude sales. Goods are then supplied directly. Council Directive 85/577/EEC to protect the consumer in respect of contracts

negotiated away from business premises, stipulates that the consumer has the right to cancel a contract within seven days. An exemption applies if the contract has a value of less than €60.

The Distribution of Products and Services

Agreements between undertakings that prevent, restrict or distort competition are blocked under TEC Article 81. Horizontal agreements between undertakings at the same level of activity and vertical agreements between undertakings at different levels of activity may be subject to this prohibition. Agreements between manufacturers and distributors fall under the category of vertical agreement, but may escape the prohibition laid down in Article 81(1). Agreements which improve the production or distribution of goods and which allow the consumer a fair share of the resulting benefit, may qualify for an individual or block exemption. Thus, as Hildebrand (1994) advises, '[w]hen becoming a party to a distribution agreement, companies should check whether it is compatible with the conditions of Article [81] or for an item which falls under exemption'.

Exclusive distribution agreements and franchise agreements are covered by block exemption but these too can fall foul of Community rules. For example, in the terms of the block exemption for motor vehicle distribution, any direct or indirect hindrance of parallel trade is strictly prohibited. Equally, no dealer may refuse to supply a consumer simply because he/she is a resident of another Member State or hinder the activities of intermediaries authorised by consumers. Marketers in the European Union will have to be in line with these rules and the wider demands of EU competition law.

Pricing

Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, concerns the indication of the selling price and the price per unit of measurement of products offered by traders to consumers. The Directive states that the selling price and the unit price must be 'easily identifiable, legible and unambiguous' (Article 4). The EU's competition rules also prohibit any form of price-fixing and the imposition of unfair prices.

Contracts

Council Directive 93/13/EEC on unfair terms in consumer contracts, states that contractual terms offered to the consumer must always be drafted in plain, intelligible language. The Directive also articulates rights to pre-contractual information. According to Article 6(1) of the Directive, the consumer need not be bound by unfair terms within a contract. A term of contract shall be regarded as unfair if 'it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. A number of sectoral Directives, including Directive 90/314 on package travel, package holidays and package tourism, have given further definition to these rights. The European Commission is currently examining how it might increase the coherence of Union law in the area of contracts and marketers should follow developments carefully.

Conclusion

This paper has assessed a range of EU rules as relevant to marketing activity in the European Union. Not all fields of Community legislation have been covered and marketers must pay attention to emerging rules in relation to patent registration, copyright and the protection of trademarks not covered here.

It is clear that companies are still confronted with differing national legislation in most fields relevant to their marketing activities but harmonisation of laws and standards is helping to reduce the legal and regulatory barriers which have traditionally partitioned European markets. Marketers confront an expanding body of EU law, which provides minimum standards and legal guidelines in many fields of direct relevance. Marketers must be cognizant with this law and the way in which it is introduced in different EU states. Even if companies do not market their goods throughout Europe, they need to stay informed of EU legislation as it can have a huge impact on the laws controlling marketing in their home country. Failure to comply with EU laws can result in time-to-market delays, unnecessary costs, heavy fines, legal expenses and poor public relations. Through monitoring of legislative developments and anticipation of incremental change, marketers can establish a platform for more competitive marketing strategies, securing competitive advantage over rivals.

NOTE: Whilst every effort has been made to ensure legal accuracy, the author takes no responsibility for any inaccuracies or misrepresentations in relation to statements on Community law.

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