



ST. PAULS CHAMBERS

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Regulatory Breach

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Welcome.....

2008 has seen the introduction of two important European Directives, which will have a dramatic effect on much consumer compliance in the UK over the next few years. The new Toy Safety Directive will come into effect later this year, following further consultation, and will introduce many of the new concepts of division of responsibility between manufacturers and distributors, first seen in the General Product Safety Directive. The other piece of legislation to appear is the Unfair Commercial Practices Directive, which overhauls a number of practices presently covered by the Trades Descriptions Act. The Directive also introduces a number of new areas of protected transactions and new concepts such as that of 'Aggressive Commercial Practices.'

In this month's edition of Regulatory Breach, we introduce for the first time a section on employment law, which we feel is an associated area of practice to those who advise businesses in relation to matters of regulation. The first article deals with the controversial subject of the rights of agency workers, considered in the 2008 decision of *James v London Borough of Greenwich*.

Chambers Regulatory group continues to expand, principally in the areas of health and safety and disciplinary hearings. In this edition we look at exemptions to piercing the corporate veil in the Corporate Manslaughter Act 2007 and a report of an interesting case in Teeside.

Our team regularly prosecute on behalf of FACT (the Federation Against Copyright Theft), in this edition we have an interesting article dealing with sentence issues that often arise.

We will continue to develop new areas of interest to practitioners and are pleased to offer seminars and training in the above areas when asked to do so.

Please do not rely on this document in place of legal advice. Please note the date when the document was authored, as its contents may be out of date.

Toy Safety

2008 has seen the publication of an important new Toy Safety Directive, which revises the 1988 Directive. The intention of the new Directive is to address safety issues, improve implementation and enforcement throughout the EU, clarify the scope and concepts of the Directive and ensure consistency with other general measures, i.e. the new General Product Safety Directive. The Directive concentrates on the following new areas:

New Definitions.

'Safety'

Paragraph 19 of the Directives sets out a new general requirement of safety as the legal base for taking action whereby safety should be determined by reference to the intended use of the product while taking into account foreseeable use, bearing in mind behaviour of children, who do not generally show the same degree of care as the average user.

'economic operators'.

By para 8. all 'economic operators' intervening in the supply and distribution chain should take the appropriate measures to ensure that they make available on the market only toys which are in conformity with the Regulations. The Directive provides a clear and proportionate distribution of obligations which correspond to the respective role of each operator, i.e. the **Manufacturer**, who having detailed knowledge of the design and production process is best placed to carry out the complete conformity assessment procedure and has the sole obligation to do so. **Importers and Distributors** have lesser obligations as they have 'trading functions' and don't have an influence on the production process. They have obligations to ascertain whether the manufacturer has fulfilled his obligations, such as verifying CE marking etc, but they do have a new duty of care when placing or making available products on the market.

Other Definitions

Other expressions in common usage are now defined, such as placing on the market, withdrawal, recall, activity toy, suffocation, harm [the physical injury or damage to health], hazard [a potential source of harm] and risk [the probable rate of occurrence of a hazard causing harm and the degree of severity of the harm].

New Obligations

The various obligations of all economic operators have now been set out in detail. Important matters now include the obligation of the manufacturer to carry out an assessment of the various hazards and an assessment of the potential exposure and also to keep a technical file to allow market surveillance authorities to efficiently perform their tasks.

Annex 2 of the Directive sets out various obligations

- Toys must not be flammable.
- Chemical Properties. Toys should be designed and constructed so that there are no risks of adverse effects on human health, including a new list of banned chemicals and definition of allergic fragrances
- Permitted electrical properties are now defined
- It is now necessary to be able to trace the Toy through the entire supply chain to ensure that the Regulator can identify the economic operator responsible for supplying non compliant toys.

Practical Measures.

Although the Directive is intended to set out the precise obligations of all parties in the supply chain, it seems that there are still some areas which are ripe for confusion. Manufacturers now have a clear obligation to ensure that proper batch testing is carried out, together with identification procedures, on each batch supplied. Distributors and importers however have a specific obligation to maintain safety whilst the goods are in their control, it would seem however that they must still embark on their own safety and batch testing to comply with the general duty of care under the Directive.

It is also clear that modern new quality management procedures are now needed, even by small operators. New corrective action obligations are imposed, to identify dangerous products, and to ensure that practical recall procedures are quickly and effectively put in place. It seems that they must also keep copies of the technical file with compliance certification and product alterations otherwise any due diligence defence will be likely to fail.

The Directive, which should come into effect this year following further consultation, was the subject of a seminar, held by Equitoy on 1st April 2008, in conjunction with St Pauls Chambers. Speakers included David Southerland from BERR, who explained the UK government's approach to the new Directive which is to create a harmonised approach to compliance in Europe, **Clive Shelton** a product safety consultant who dealt with the new obligations, stressing the need to keep good and proper records of all procedures, **Christian Wetterberg** Chair of EN71 toy committee, who dealt with a number of new technical issues that have arisen from a leading test, **Malcom Horner** who dealt with risk assessments, **Ian Axford**, a chemist who dealt with CMRs, the REACH regulations, and the author, who dealt with legal issues that arise from the new Directive.

What is the cost of a 'Red Dot'?

Alun Jones, St Pauls Chambers

St. Pauls Chambers are currently retained by Russell-Cooke LLP to prosecute cases in North of England on behalf of the Federation Against Copyright Theft (FACT). These prosecutions are brought when Sky Television live sporting fixtures are broadcast and televised in the public areas of pubs and bars when the licensee does not subscribe to the appropriate commercial agreement which permits the showing of such fixtures in public.

It is an offence contrary to s. 297(1) of the Copyright Designs and Patents Act 1988 to dishonestly show such television programmes to the public with the intention of avoiding payment of the relevant fee.

The cost of commercial agreements is dependent on the rateable value of the public house and can often be as much as £5000 per annum. Such agreements require a publican to enter into a 12 month agreement. Domestic agreements for use in ones home often cost a tenth of the commercial rate. One can see the financial incentive for some to commit this offence.

These offences are detected by undercover investigators who enter the public houses and observe what is being shown on the television screens and, if a live sporting fixture, they note the logos visible on the screen. A red dot indicates a domestic agreement is being used (illegal use), a pint pot indicates a commercial agreement

Chambers has a high success rate in prosecuting such case but when it comes to sentencing, there is perhaps little assistance available to the Court when deciding the level of fine to impose. The maximum fine is set at £5000 (level 5) per offence. There are no sentencing guidelines for this offence and there are no Court of Appeal authorities. Whilst figures can be produced to a court describing all of the sentences passed by other courts, this is, of course not binding.

The experience of those in Chambers prosecuting such work has shown a great variation in the manner in which courts approach the sentencing exercise. The usual approach of the Magistrates' Courts to financial penalties is to decide the level of seriousness of the offence and then to decide the level of fine according to disposable income. In s.297(1) offences, this is not appropriate as an individual is avoiding payment of significant sums.

The 'usual' approach of the Courts is to acknowledge the cost of the commercial agreement that has been avoided. The courts often appreciate that if fines are set too low, there is perhaps little deterrence: it will be far cheaper to pay the fine and costs than to obtain the commercial agreement.

The financial means of a defendant are clearly an important factor and this will often have the greatest bearing on the level of fine.

The reduction in the level of fine for a guilty plea can often have the most significant effect on reducing a fine.

The court will also assess the culpability of a defendant. Some cases involve the publican turning a blind eye to the dishonesty of his staff whilst others will actively encourage the offences. Unsurprisingly, those with like previous convictions are more heavily fined.

On occasion, the court has looked at monthly subscription payment and ordering a pro-rata fine for the period of offending. That fails to recognise that the commercial subscription is for a minimum 12 month period.

Whilst compensation orders are open to the court, these are very rarely, if ever, made and certainly never requested by the prosecution. It is perhaps the thought of compensating a large commercial organisation that stops the court from doing so. However, such an analysis is incorrect.

Whilst the broadcast company has suffered loss, it perhaps the legitimate publicans in the area who suffer most. They are commercially disadvantaged by either subscribing to the commercial agreement or by not offering their customers live sport events and being at a competitive disadvantage. The competitive advantage gained is often another factor taken in to account when sentencing. The advantage gained is often considered by reference to the number of customers in the public house when the programme was shown. That is rather a blunt tool for assessing commercial gain as it may simply reflect the timing of the visit and the popularity of the fixture being shown at the time of detection.

An analysis of the last hundred prosecutions demonstrates that fines for these offences have ranged from a few hundred pounds (often a guilty plea and strong mitigation) to a few thousand pounds per offence. If one generalises, most fines were being above the £1,000 level. Unfortunately, until there are reported cases or until an offence guideline is drafted, the variation in sentencing will remain.

Next time you enter a pub, if you notice the 'red dot', you'll at least now know what the red dot represents and how much it could cost the landlord!

The Unfair Commercial Practices Directive

Jeremy Barnett, St Pauls Chambers

The UCP Directive was adopted on 11th May 2005 and comes into force on 26th May 2008. The Directive harmonises unfair trading laws in all EU member states. It introduces a new general prohibition on traders not to treat consumers unfairly, intended as a safety-net consumer protection legislation. The Directive's wide scope and flexible provisions means that it will plug gaps in existing EU and UK legislation and set standards against which new practices will be automatically judged.

The Directive's broad scope means that it overlaps with many existing laws. As it is a 'maximum harmonisation Directive' it aims for regulatory simplification. The result is the new Consumer Protection from Unfair Trading Regulations, which repeal provisions in a number of overlapping laws including most of the Trades Descriptions Act 1968 and Part 3 of the Consumer Protection Act 1987 (misleading price indications).

Article 2: Definitions. Various new phrases are incorporated into law including: consumer, trader, product, and transactional decision. The new phrase 'professional diligence, being 'the standard of special skill and care a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice/the general principle of good faith in the traders field of activity', raises interesting questions of the standard of behaviour generally held in certain business areas ie the second hand car market, which will no doubt be fertile ground for litigation.

Article 5: the general prohibition of (all) unfair practices. This has an extremely broad scope, and sets out two tests for a practice to be unfair. They are broadly that i) the practice is contrary to professional diligence and ii) it distorts or is likely to distort materially the economic behaviour of the average consumer. The offence would be committed where the necessary intent is proved.

Article 6: misleading actions. The prohibition outlaws traders giving false or deceptive information which would impair the average consumers' economic behaviour. It covers the same ground as the present Trades Descriptions Act 1968 and the Consumer Protection Act 1987. Its counterpart in relation to b2b transactions is the prohibition on false or misleading advertisements (representations) in the MCAD, aimed at marketing which causes confusion with any products, trade marks trade names etc.

Article 7: Misleading omissions, ie a failure to provide material information which the average consumer needs, according to the context, to take an informed decision. It is also a misleading omission to hide or provide material information in an unclear, unintelligible, ambiguous or untimely manner. There is also a new obligation to provide certain information where there is an 'invitation to purchase', unless certain exemptions apply, ie similar to present pricing regulation.

Articles 8 and 9: Aggressive commercial practices. This is one that uses harassment, coercion, including the use of physical force, or undue influence to appreciably impair the average consumer's freedom of choice. This is aimed at high pressure selling. Certain aggravating features are set out, such as the timing, nature or persistence, the use of threatening behaviour or exploitation of any specific misfortune or circumstance.

Annex I: practices that are always prohibited. This is a list of 31 practices that are always prohibited without the need to apply the transactional decision test such as displaying a trust mark without authority, bait advertising, falsely stating that a product is only available for a limited time to force a purchase, operating a pyramid promotional campaign or creating a false impression that the consumer has won a prize where that is false.

The OFT powers. These are being considered to monitor specific new areas of interest including, persistent abuse by sole traders, scams which cause widespread detriment to consumers, prize draws with premium rate lines which are fraudulent, mock auctions and aggressive doorstep selling.

Employment Law

Agency Workers: Reform on the Way?

Andrew Sugarman, St Pauls Chambers

Lord Justice Mummery recently invited Parliament to debate what to do about the controversial subject of the rights of agency workers. In *James v London Borough of Greenwich*, [2008] EWCA Civ 35, an eagerly awaited decision that many agency workers hoped would make it easier for them to claim rights as employees, Mummery LJ disappointed them and reiterated that it was not the court's role to extend employment protection. That is a matter for Parliament.

Agency workers find themselves in a triangular relationship with the agency and an "end user". Many work for one end user for a number of years and appear, to anyone looking from the outside, to be employees. Yet the question of their status has been a difficult one. The traditional view was that such workers were, on the whole, not employees and thus not entitled to the protection that goes therewith e.g. the right not to be unfairly dismissed. In *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437, the Court of Appeal (Mummery LJ giving the lead judgment) appeared to open the door to the agency worker seeking rights as an employee, when it directed that the tribunal should consider whether there was "an implied contract of employment" with the end user. Lord Justice Sedley found the prospect of Mrs Dacas, who had worked for Wandsworth Borough Council (the end user) through Dacas for over 5 years, being employed by no-one as "not credible".

Thus, presumably thought Mrs James, I must have a case for unfair dismissal too. She had worked, through two different agencies over the years, for Greenwich Council continuously since September 2001. There was no express contract between her and the Council. Her "Temporary Worker Agreement" with the first agency provided that her work was carried out as a "self employed worker in relation to each assignment" and expressly stated that it did not give rise to a contract of employment with the agency or the "client" (end user). Mrs James went on sick leave in August 2004 and when she returned she was told she was no longer required because a replacement (who presumably was preferred) had been sent by the agency.

Her claim failed in the employment tribunal and before the employment appeal tribunal. The Court of Appeal dismissed it too. It held that a tribunal will only be entitled to imply an employment contract of employment between an agency worker and an end-user where it is necessary to do so to give business reality to the situation. There will be no such necessity where agency arrangements are genuine and accurately represent the relationship between the parties, as was the case here. Such a relationship is not to be inferred simply because the agency worker has been engaged with one client for a significant period of time.

The issue in cases like this is whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between worker and end user. Elias P, in the EAT, had said that it will be more readily open to a tribunal to imply such a contract where the agency arrangements are superimposed on an existing contractual relationship between the parties. That guidance was approved by Mummery LJ in the Court of Appeal.

It is therefore likely to be harder for agency workers to prove they are employed by the end user. Few agency workers will be employees of the agency with whom they are registered (unless there is a very high degree of control and mutuality of obligation) with the result that they are likely to be left without an "employer" and thus the associated rights of employees. This makes them very vulnerable, as Mrs James found out. Whether this is a good or bad thing depends on your point of view. At present, change does not appear imminent. Although there is a debate in Parliament at present over Andrew Miller's (MP for Ellesmere Port and Neston) "Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill", the Bill is aimed at securing equality in working conditions (rather than the right to be treated "as" an employee) and does not currently have Government support.

2 FORTHCOMING REGULATORY SEMINARS

Toy Safety Directive

Jeremy Barnett

St Pauls Chambers, 28th May 5pm - 6pm

1 CPD point

The Unfair Commercial Practices Directive

(Trade Descriptions Act and aggressive commercial practices)

Alun Jones & James Lake

St Pauls Chambers, 4th June 5pm - 6pm

1 CPD point

Please contact Catherine Grimshaw on cjg@stpaulschambers.com if you are interested in attending either of these seminars.

When can the Corporate Veil not be Pierced?

Much has been written about the Corporate Manslaughter and Corporate Homicide Act 2007 (the 2007 Act) and the oft quoted aim of piercing the corporate veil by holding those who are in a position of authority within a business accountable where a death has occurred following a breach of their duty of care.

Contained within sections 3 to 7 of the 2007 Act are categories of cases where organisations and bodies will be; in simple terms, the exemptions relate to the following: public policy and exclusively public functions; military activities; policing and law enforcement; emergencies; and child and probation services.

Public Policy (s.3(1))

Deaths caused by public policy decisions are considered outside the scope of the Act. The explanatory notes provide the example of an NHS Trust not funding a particular treatment. That example is relatively clear cut but it will be interesting to see if public bodies attempt to stretch what constitutes a "policy" decision to afford themselves a defence.

Exclusively Public Functions (s.3(2))

The duty of care in respect of anything done in the exercise of an exclusively public function also falls outside the Act. However, this exemption is not absolute and there are a number of scenarios where the duty of care will be held to arise. Examples of when the duty does arise are in relation to employees or as the occupier of premises or a duty owed to a person in custody.

Exclusively public functions are defined by s.3(4) of the Act and describe those functions within the prerogative of the Crown or, by their nature, flow from the exercise of the prerogative. What acts are considered exclusively public functions and what are not has been and undoubtedly will become in the future the topic of much discussion. The explanatory notes to the Act highlight the difference between the type of activity and the nature of the activity. An example given being holding a person in custody being within the Act despite the fact that there is a statutory basis for such detention.

The Crown Proceedings Act 1947 limited the extent of what is known as "Crown immunity". The 2007 Act (s.11) specifically removes such Crown immunity stating that the duty owed should be treated as if it were not a servant or agent of the crown.

It is beyond the scope of this article to discuss at length the possible scenarios falling within and outside section 3 nor to describe in detail the previous case law (both civil and criminal) regarding the same. Although there are a number of important authorities from which important principles can be taken, this section of the Act will no doubt be subject to much legal discussion in the future.

Military Activities (s.4)

The Armed Forces have the benefit of an exemption from the duty of care owed in respect of "operations" and hazardous training. Additionally, the exemption enjoyed within the "exclusively public function" section of the Act will apply in a great many situations.

The section 4 exemption does not extend to the duty of care owed to employees nor to the duty arising as an occupier of premises. Applying that point, one presumes that if a breach of the duty of care had been found in the 'Deepcut Barracks' deaths, the Commanding Officer (or other directing mind) could not have availed himself of the exemption.

Police and Law Enforcement (s.5)

The Police enjoy an exemption in relation to certain policing operations (terrorism, civil unrest and serious disorder), the preparation for those operations or hazardous training. This is a wide exemption and extends to duties owed to employees.

In respect of other operations, the exemption does not extend to the duty owed to employees, as an occupier of premises and to a person in custody.

The 'custody exclusion' is not currently in force and it will not be in force until an Order is made by the Secretary of State. The Government have suggested that such an order will not be made for until 2010.

Continued Overleaf

When can the Corporate Veil not be Pierced?cont...

Emergencies (s.6)

Certain organisations responding to emergencies such as, but not limited to, the fire and ambulance services enjoy an exemption from their duty of care. The definition of emergency is wide and a large scale incident is not envisaged. Circumstances where imminent death or serious harm occurs is sufficient. Whilst the NHS is named within section 6 as a relevant body, the exemption does not extend to emergency medical treatment. Also excluded from the offence is the manner in which an emergency is responded to.

Child Protection and Probation Services (s.7)

Functions undertaken for the protection of children from harm or in relation to the activities of the probation services are included within the Act's exemptions. The duty of care owed to employees and owed as occupiers of premises are not exempted. Furthermore, the 'public functions' exemption may also apply in many cases. The effect of this section is that cases such as the Victoria Climbié case will be exempted from prosecution under the Act.

Conclusion

The application of the exemptions and how the courts deal with them will be of great interest. Sections 3 to 7 may well provide a means of defending an action before it is even necessary to consider whether there has been a breach of a duty of care. Only time will tell to what extent the corporate veil will be protected.

Hatton not Negligent

WALKER
MORRIS



Robert Crossley and Sarah Hewson, Walker Morris

After a six-year long legal battle, Hatton Traffic Management Ltd, accused of negligently causing the deaths of two of its employees, was acquitted by a jury at Teesside Crown Court after a four-week trial.

Two employees were electrocuted when a nine-metre mobile tower light they were moving touched overhead power lines. Fred Cook and John Crimmins died as a result of the 20,000-volt shock they suffered as they tried to illuminate overnight roadworks on the busy A66 dual-carriageway in County Durham. The men were working for Hatton when the accident happened on 16 January 2002.

Hatton was accused of failing to carry out a suitable assessment of the risk and failing to provide and maintain a safe system of work; the company denied any health and safety breaches in connection with the deaths. At the hearing, the Teesside Crown Court was told the two workers should have dismantled the lighting tower before moving it; it was their own negligence that caused their deaths, not Hatton's.

Marshall Bailey, Hatton's managing director, criticised the Health and Safety Executive for bringing the prosecution, claiming he had supplied them with sufficient evidence to have dissuaded them from doing so. The case has involved numerous legal hearings stacking up legal costs estimated to be in the region of £1 million. The legal issue in this case was, however, an important one. The Health and Safety at Work Act 1974 imposes a duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare of all their employees. The issue concerned the meaning of 'reasonable practicability'. A number of cases had held that an employer could not avoid liability by pointing the finger at the negligence of its employees. The Management of Health and Safety at Work Regulations 1999 provides that "nothing in the relevant statutory provisions shall operate so as to afford an employer a defence in any criminal proceedings for a contravention of those provisions by reason of any act or default of an employee of his". The effect of this appeared to be to prevent employers from relying on the fault of an employee when defending a case on the basis that they had done everything reasonably practicable to ensure the health, safety and welfare of their employees.

However, in the Hatton case, the Court of Appeal held that 'reasonable practicability' was not a defence to a prosecution under section 2 of the Health and Safety at Work Act, but rather was a qualification of the statutory duty and, as such, the employer could adduce evidence to show that what had happened was purely the fault of the employee(s). If the jury were satisfied, as it must have been, that Hatton had done everything reasonably practicable to try and prevent the accident from happening, then it was bound to acquit.

Ultimately, the courts' decisions in Hatton are a return to common sense and are likely to result in more prosecutions brought under the Health and Safety Act being defended.

Mastercard Breaches Article 81

WALKER
MORRIS



Robert Crossley, Walker Morris

The European Commission has determined that the multilateral interchange fees (MIFs) charged by Mastercard breach Article 81(1) of the EC Treaty as they restrict competition between banks. The fees were deemed to pre-determine the price retailers pay for accepting Mastercard and Maestro-branded payment cards.

Additionally the MIFs were not exempted by the application of Article 81(3) as there was no empirical evidence of any positive effects on the market and the MIFs were not necessary to achieve efficiencies and allow innovation in the market.

Background – Article 81

In summary Article 81(1) of the EC Treaty prohibits as anti-competitive, all agreements, decisions and practices between undertakings which may affect trade between EU member states and which have as their object or effect the restriction or distortion of competition within the common market. However, Article 81(3) creates an exemption from this where it can be shown that the agreement, decision or practice actually leads to increased efficiencies, and allows for innovation in the market which will have a beneficial effect on consumers.

Multilateral interchange fees

An interchange fee is a fee charged by the credit card issuer (the issuing bank) for processing payment of a card transaction and is paid by the retailer's bank (the acquiring bank). A MIF binds all banks in a participating payment card scheme relating to a brand of payment card – in this case Mastercard and Maestro. Essentially the acquiring bank charges the retailer a fixed fee, the merchant services charge, for processing the transaction. The issuing bank then pays the acquiring bank the retail price minus the MIFs. Hence the retailer loses out and could potentially pass this loss onto the consumer. Mastercard's EEA MIFs apply to about 45 per cent of all payment cards in the EEA and their charges range between 0.4 per cent and 1.05 per cent of the transaction. Tesco estimates it pays somewhere close to £100 million in fees each year under the MIFs schemes. This equates to fees reaching levels well into the billions.

Decision

The European Commission decided that Mastercard's MIFs had the effect of restricting competition between banks as the fees were already pre-determined. Additionally by fixing the fee level as between banks it artificially increases the merchant service charge and realistically prevents it from being reduced. The Commission deemed this to be a breach of Article 81(1) and rejected arguments by Mastercard that the exemption in Article 81(3) applied. Mastercard had failed to convince the Commission that MIFs were necessary to achieve efficiencies and allow innovation. Additionally there was no empirical evidence provided by Mastercard as to the actual effect of MIFs on the market, the levels of the MIFs were set arbitrarily and were inflated and created no efficiencies for customers. The European Commission has given Mastercard a six-month period to cease the application of the MIFs and refrain from measures adopting a similar effect. If Mastercard fails to do this the Commission will impose a periodic fine of 3.5 per cent of Mastercard's global daily turnover for each day of non-compliance.

Effects for consumers

The decision will be welcomed by retailers who can expect to make considerable savings. It is more of a moot point whether consumers will benefit from the decision. This may have a bearing on the decision of the Court of First Instance (CFI) to whom Mastercard have appealed. Competition law is concerned with protecting consumers and the CFI may need to assess the likelihood of the retailers passing on their gains to the consumer and also the likelihood of the issuing banks passing on their losses to the consumers, in the form of higher or new charges. Regarding the former, a similar regulatory intervention in Australia has not resulted in any benefit to the consumer. Regarding the latter, Commissioner Neelie Kroes rather gave the game away when she said that she 'sincerely' hoped that Mastercard would not offset money lost because of the ruling by increasing prices elsewhere.