

Check against delivery

ELECTRONIC BUSINESS – THE EUROPEAN APPROACH

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Forum on E-commerce and the Brussels Regulation

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Ladies and Gentlemen,

I am pleased to address today a conference which brings together so many **e-stakeholders**, stakeholders in electronic business.

At this critical juncture for electronic commerce in Europe, I express the confidence in our joint ability to shape the regulatory environment needed to make e-commerce a success in Europe. I am convinced that dialogue between e-business stakeholders, regulators, including the EP, companies and consumers alike, will improve understanding and thereby help to alleviate the present difficulties.

Speaking to you on behalf of UNICE, the “*Union of Industrial and Employers’ Confederations of Europe*”, I would like

- *first* to share some ideas with you on the **procedure** for lawmaking, and the need for transparency,
- *second*, to explain industry’s expectations concerning the **content** of e-commerce regulatory environment, and
- *finally*, to conclude with some proposals for a required **win-win solution**.

Ladies and Gentlemen,

UNICE very much agrees that trust and consumer protection are the basis also of electronic commerce. Ensuring consumer confidence through the whole value-added chain of **electronic services**, is a prerequisite for building a successful e-business environment. Trust and confidence-building measures have a key role to play in sustaining demand-led electronic transactions.

Restricting consumer choice through counterproductive barriers to protect consumers would not create the confidence users and providers deserve to make e-commerce a success. Nor would it ensure the protection consumers merit because protective barriers can all too easily be bypassed in the global network. What is urgently needed are new avenues to address the issues constructively and to strive for a win-win solution. This is **the European approach**.

1. The procedure

Many critical and even vociferous comments have been made in recent weeks concerning the way Europe is regulating itself out of e-business. At the tip of the iceberg, the *content* of as well as the *procedure* of the draft Council Regulation on competent forum (the so-called “Brussels Regulation”) have been scrutinised.

Substantial concerns were expressed by UNICE and a large number of sectoral industrial federations, including:

- EU Committee of the American Chamber of Commerce in Belgium,
- UK @lliance for electronic business,
- leading members of the EP,
- lawyers and academics,
- GBDe, the Global Business Dialogue on e-commerce which will publish its opposition to this European draft legislation at its CEO conference in Paris next week (12/13 September).

It is even rumoured that, internally within the Commission four directors general have very exceptionally made a joint submission of their worries. What is at stake?

To focus on the essentials and not to repeat everything which has been written or said, I today reconfirm publicly UNICE’s serious concerns about the **procedure** for the draft regulations in question.

The **lack of transparency** in the legislative procedure surrounding the draft Brussels Regulation, the **lack of public consultation** and, third, the **lack of any impact assessment** on economic development and employment is a case in point of outdated ineffective procedures.

It is this kind of procedure which was mostly criticised by the group of wise men in their report on the outgoing Commission.

These methods should not be repeated in respect of the new Commission and the legislative process concerning the transposition of existing conventions and other legal acts into Community law, under the so-called “Amsterdamisation” procedure. The case we talk about today is not limited to, but concerns in particular, as you know:

- ◆ the draft Council Regulation on the transposition of the *Brussels Convention* on jurisdiction, recognition and enforcement of decisions in civil and commercial matters, as well as
- ◆ the proposal for a Council Regulation on the transposition of the *Rome II Convention* on applicable law, concerning non-contractual liabilities

UNICE considers that the Commission and the Council working group have so far:

- ◆ *omitted* to take account of the major economic impact of said regulations;
- ◆ *disregarded* fallout from the regulations in question on other major EU policies, including electronic commerce and employment;
- ◆ *failed* to ascertain the appropriateness of such regulations through democratic consultation and public scrutiny.

UNICE understands that, following the public concerns, a **public hearing** is now finally under internal consideration within the Commission. Perhaps the hearing will happen some time in late autumn, in any event not prior to, as needed, but after the adoption of the draft regulation by the Commission.

UNICE would like to stress again that the **Amsterdam Protocol** (on application of the principles of proportionality and subsidiarity) now requires the Commission to consult widely before proposing legislation, and a duty to assess the burden falling on economic stakeholders.

UNICE regrets that the business community nor any other community for that matter, has been consulted on either the draft Council regulations in question or any other regulation under preparation.

Therefore, UNICE urges the Commission formally to hold consultations with interested parties prior to legislation. Bearing in mind the probable effects of proposed or planned legal instruments, **transparency is a matter of principle**.

2. The content

As stated and restated in competent comments made in recent weeks, internet business faces increasing risks of being sued in any jurisdiction in which their sites can be accessed following adoption of the so-called **Brussels Regulation** by the European Commission on 14 July 1999, pending formal approval.

A primary goal should be for all e-business stakeholders to develop legal certainty for transacting parties. This is basic. As all of you know, the issue of choice of law and choice of competent forum in particular in the context of electronic business is a very complex issue due to the global and borderless nature of internet transactions on one side and the fragmented national jurisdictions on the other.

UNICE is overwhelmingly in favour of the **country of origin** principle to be applied to international contract law. Therefore, to avoid ambiguity, UNICE believes it necessary to specify clearly and explicitly the conditions for identifying in practice the legal rules applicable to e-commerce transactions.

It would be very short-sighted and dangerously simplistic to believe that the solutions offered by public regulations, standards or directives at an EU level alone would solve perceived problems ensuring needed confidence in e-business transactions through consumers' unhampered free choice.

The draft Council directive on e-commerce, adopted with strong support by European Parliament, therefore, correctly refers to **codes of conduct**. Member States and the Commission are obliged to encourage codes of conduct, involving consumers in the drafting and implementation of such codes.

◆ Codes of Conduct

Codes of conduct and all kind of voluntary but effective guidelines, best business practices, self-regulations or other business arrangements, have an enormous practical impact on daily electronic business.

The “Global Action Plan for Electronic Commerce”, prepared by business for last year’s OECD Ottawa conference on e-commerce enumerates on no fewer than 35 pages selected industry self-regulatory initiatives in all parts of the world.

This inventory includes such important initiatives as the online reliability programme of the Council of Better Business Bureaux, the joint code of conduct on privacy by the Dutch consumer organisation and the confederation of Netherlands industry and employers.

The revised Action Plan (in preparation for the October OECD conference “Towards converging stakeholders’ interests”) will include many new entrants, like the “Which?Webtrader Scheme” by the UK Consumers’ Association and the draft generic Code of Conduct on e-commerce by the Electronic Commerce Platform Netherlands (ecp-nl), just to mention the most topical ones.

- Which?Webtrader Code

The “Which?Webtrader Code” by the UK Consumers’ Association will be presented this afternoon to you. Let me only mention it as a key to successful internet trading (see: <http://www.which.net/webtrader/>). British Airways and Barclays Bank, for example, have subscribed to this Webtrader code.

Just to remind you of what we are talking about: over 50% of UK consumers, for example, believe fraud is a threat on the internet; 68% believe personal details are insecure on the internet! Schemes like the Webtrader logo have the potential to substantially improve these figures.

- Dutch E-Code

The *Electronic Commerce Platform Netherlands* (ecp-nl) is an initiative by an independent organisation open to all stakeholders concerned. The draft Code of the Platform (<http://www.ecp.nl>), to be presented to the said OECD conference, could serve as a **European model**.

◆ Small and medium sized enterprises

These self-regulatory initiatives are of greatest importance for small and medium-sized enterprises because these companies which are key players in the emerging e-business are mostly unknown in the market and do not yet have the required reputation and standing as stand-alone large companies.

SMEs have to rely in particular on codes and schemes approved and certified publicly and/or by consumer organisations. This is what self-regulation is all about: joint or associative governance in the market-place by e-business stakeholders.

We have to be clear about this **European SME asset**. Europe has about 15 million such businesses (far more than the US or Japan). In fact, they account for well over 90% of all EU enterprises and around 66% of all employment. And these are precisely the SME businesses that stand to benefit most from the rise of e-commerce.

Choice could be greatly restricted if businesses are required to comply with a country of destination principle. Europe would again miss the boat of sustainable market growth and employment. Europe cannot afford this.

Compliance with the laws of many different countries would impose tremendous, even unbearable costs for small and medium-sized enterprises. It would not offer businesses certainty for digital transactions via the Internet and may lead them voluntarily to restrict business to limited jurisdictions thereby reducing consumer choice.

• Viewing masks

Technical remedies, for example so-called **viewing masks**, have been proposed to fill the gap and solve the apparent problems which would be created by a country of destination principle. Would they work?

To ask access providers to create viewing masks for certain countries sound more fantasist than real in the global borderless net economy.

Consumers in such countries would be discriminated against by such viewing masks, substantially reducing consumer freedom of choice, and would

inevitably bypass these masks through organised intermediaries or other creative solutions. To shield particular markets against net offers would not only fragment and destroy the internal market, but seems a practical impossibility in a global borderless electronic market.

The lack of certainty would be exacerbated if a consumer uses an intermediary to place purchase orders electronically and pays with digital cash. In such a situation, a business would never know what laws and forum it is subjecting itself to.

Users and providers alike are not helped with formal regulations that do not prove appropriate or even workable in the real world of the borderless digital economy.

- Mutual recognition

Enforcement of foreign judgements through **mutual recognition** of legal titles is another good example. To enforce a judgement against a business located in a foreign jurisdiction would without doubt produce prohibitive additional costs of execution. Is this what the consumer helps?

Again, it would be naive to believe that mutual recognition would be a feasible and in the foreseeable future a realistic avenue to deliver the required protection, thus creating the trust which is essential and which is even more important for online than for offline business. Deserved trust can only be created by co-operative self-regulation, permitting effective flexibility and commitment at the same time.

Ladies and Gentlemen,

Premature conclusions that do not address practical realities and the unique borderless circumstances of electronic commerce could create significant obstacles to the continued growth of electronic commerce and e-employment in Europe.

Co-operative self-regulatory solutions, provided for by joint initiatives of business actors, users and providers alike, offer the flexibility to respond to the dynamic nature of the online environment, including new and evolving online business models.

These solutions are not perfect yet and have to be improved continuously, but they are by far more effective than those provided by regulations only.

Instead of inflexible standards or regulations, e-business, involving all stakeholders, should favour a joint **co-operative approach** by companies and consumers alike. Electronic business might be guided in a much stronger way than offline business by self-regulation and best business practices.

Europe needs a mix of different solutions, a kind of **dual or co-regulation** between public authorities and markets. That is what Europe has to rediscover: co-operative self-regulation, ensuring required effectiveness, flexibility and commitments.

If industry, trade and consumers could develop the provisions of the e-commerce directive along these lines to promote codes of practice without turning them into laws, Europe will have a fruitful way forward and could develop harmonised codes and schemes, applied and observed effectively.

Therefore, to conclude, the following **e-action programme** is proposed:

- **Euro-codes** have to be developed to move the European dialogue process forward. By contrast, the standardisation and regulation approach should not be favoured because of its inflexibility and long-term duration;
 - **Co-operative e-governance** has to associate the various stakeholders since consumers and business alike are involved in e-business transactions;
 - To implement the above, a **European E-business Forum** should be established with the support and active involvement of all e-commerce stakeholders, consumers and companies alike.
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