



Message to the new Commission

on some key

Business Law issues



*As the Voice of European Business,
UNICE has compiled a number of
messages from companies
to the European Commission
on some key*

Business Law issues

*of direct relevance to firms
in their daily operations*

14 September 1999



Business Law issues

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ASSESSING THE ECONOMIC IMPACT OF LEGISLATION

Effective regulation is a key factor for the business environment and therefore for the competitiveness of business. Companies are at risk from complicated legislation, and this is particularly true for SMEs and micro firms. The whole area of regulatory reform is therefore of crucial importance to the business community.

In this memorandum, UNICE would like to address briefly what it sees as an overarching priority in the area of regulatory reform: *effective and transparent cost / benefit assessment*.

In UNICE's view, any legislative proposal affecting business that is not economically justifiable is quite simply bad legislation. It has therefore consistently advocated the use at European level of open and effective mechanisms to assess the economic impact of legislation. In keeping with this policy objective, UNICE strongly promoted adoption of the "Protocol on the application of the principles of subsidiarity and proportionality" annexed to the Amsterdam Treaty.

Now that the Amsterdam Treaty has come into force, UNICE expects the new Commission to implement this Protocol, and it would like to put forward the following, very basic, suggestions:

1. UNICE advocates the setting up of a fully independent "*regulatory impact office*" to which all proposals would be submitted. Its task would be to give an estimate of the costs of a planned measure at an early stage, in order to help the legislator reach a decision on whether to pursue the proposed initiative. It should also assess the impact of amendments proposed by other EU institutions in the course of the legislative process.
2. All proposals which could affect business ought to be the subject of an impact analysis. A simplified procedure could be devised for measures of minor importance.
3. The impact analysis procedures should be fully transparent and business ought to be consulted at the earliest possible stage on available options, methodology, data collection and conclusions.
4. There should be full transparency regarding disclosure of the evidence used, and the weighing of the evidence, in reaching any decision to regulate.
5. The quality of impact analysis requirements should be dramatically improved, and the result of any such analysis should be key in determining whether or not further action is taken.

UNICE urges the new Commission to raise this crucially important issue to the top of its agenda and to consider carefully the above proposals, on which it is ready to give more detailed views. It would also like to take this opportunity to renew its offer of entering into a dialogue with the Commission in order to pursue these matters.

IMPLEMENTATION OF COMPETITION POLICY

UNICE is firmly in favour of developing and sustaining a competitive commercial environment in the European Union and is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice.

As a new Commission is coming into office, UNICE considers it opportune to question what basic changes should be made to the rules and procedures, and to the interpretation of Article 81 in order to achieve a framework of competition rules appropriate to the Community's requirements of today and in the future, and it would like to put forward some suggestions.

1. Competition rules and co-operation agreements

1.1 Scope of Article 81 (1)

Following the approach planned for the field of vertical restraints, an economically more realistic view should generally be taken as regards possible adverse effects on competition.

1.2 Block exemptions

UNICE strongly supports the enactment of broad new safe harbour regulations, especially for the types of agreements mentioned in Article 4 (2) of Regulation 17 and the 1968 Notice on cooperation. This will provide legal certainty for a wider category of agreements and will restore greater freedom of contract for undertakings.

1.3 Legal certainty

In UNICE's view, businesses should be able to obtain from either the Commission or a national authority, a decision regarding the validity of their agreement that is retroactively effective *erga omnes* throughout the EU where there is an objective need for certainty. The decision should be based principally on (and its effects therefore limited to) the information provided by the parties concerned and subject to clear deadlines.

1.4 Decentralisation

UNICE has noted the Commission's White Paper on modernisation of the rules implementing Articles 81 and 82, on which it is ready to give more detailed views.

In the context of this memorandum, UNICE would like briefly to mention the conditions it considers essential for a decentralised application system to maintain the integrity of the Single Market and to be acceptable to business:

- If greater decentralisation proves indispensable it will be of primary importance that uniform application is guaranteed.
- In addition, national courts should not have the power to apply Article 81 as a whole.
- Cases must be allocated efficiently between national authorities and the Commission in order to resolve disputes over jurisdiction.

- Decisions concluding investigations should have retroactive effect *erga omnes* within the whole Union in order to avoid duplication of procedures.
- Lastly, UNICE considers that companies should be able to obtain a decision regarding the validity of their agreement that is retroactively effective *erga omnes* within the whole Union where there is an objective need for certainty.

2. *International aspects of competition policy*

UNICE believes that companies should be able to compete with each other in foreign markets on a level playing-field, taking full advantage of the expansion of international trade. In this context, the international aspects of competition policy are becoming increasingly important and co-operation between the European Union and third countries may prove desirable. Co-operation agreements with third countries, though, must rule out extra-territorial application of competition rules, guarantee protection of confidential information and application of the principle of reciprocity.

UNICE sees clear benefits for business in the prevention of market foreclosure by anti-competitive practices and it therefore would welcome a multilateral agreement on objectives for competition rules which is directed to what is necessary to prevent such foreclosure.

3. *Control of state aid*

Strict control of state aid, on the basis of clearly defined criteria, is necessary to prevent distortions of competition in the internal market. Inasmuch as these criteria are not yet clearly defined this should be undertaken through guidelines and block exemptions. The Commission should ensure that any new specific block exemptions do not undermine the efficiency of state aid controls.

Instead of controlling individually a large number of aid cases whose effect on competition is negligible, the Commission should concentrate on large cases likely to cause serious distortions of competition. To this effect UNICE welcomes the adoption of a block exemption based on a *de minimis* rule.

Control procedures must be transparent and the competing companies affected by the envisaged aid must be allowed to take part in these procedures from the outset.

UNICE considers the inability of the Commission to ensure effective application of its state aid decisions across all Member States and the bad record for recovery of unlawful state aid one of the most important challenges facing the European Union in this domain. UNICE therefore calls for the Institutions, in addition to the Procedural Regulation, to consider means of improving the enforcement of state aid rules in the Union and thus achieve harmonisation in the field of remedies.



UNICE invites the new Commission to consider carefully the above proposals, on which it is ready to give more detailed views. It would also like to take this opportunity to renew its offer of entering into a dialogue with the Commission in order to pursue these matters.

INTELLECTUAL PROPERTY POLICY

Intellectual property remains too often perceived by decision-makers as a technical issue. Consequently, it lacks the overall, coherent policy-making it needs, and does not receive the political support it deserves.

Yet, intellectual property rights are economic assets whose value to companies, and to European economy as a whole, is of *strategic importance*. In the present economic situation, where attention is essentially focused on employment and corporate competitiveness, UNICE wishes to recall the part played by protection of intangible investments.

The economic purpose of intellectual property is to encourage creative activity, notably by fostering an adequate payback on the investments necessary for innovation, which underpins competitiveness. Without adequate intellectual property protection, many European businesses will fail in the face of low-cost foreign competitors, with serious consequences for employment and economies generally in the European Union.

UNICE would like to take the opportunity provided by appointment of the new Commission to spell out once more the crucial need for the European Union to adopt a more coherent intellectual property policy. In this short paper, UNICE briefly mentions business concerns in this field, offers recommendations which it calls on the Commission to implement, and outlines its priorities in this area.

Business concerns

Companies in Europe are worried about a perceived progressive erosion in the level of intellectual property protection in the European Union, a situation UNICE brought to light in 1994 in a memorandum (attached for ready reference) which explains in detail the causes of this erosion and suggests concrete solutions. Its findings remain valid while the urgency is now heightened.

Globalisation of trade is bringing about increased competition which calls for adoption in the European Union of a level of protection equivalent to that enjoyed by American and Japanese companies on their respective markets, and at comparable costs.

UNICE recommendations

1. UNICE regards it as indispensable that the European institutions jettison their fragmented approach to legislation in this area and identify an overall, coherent intellectual property policy.
2. In defining this policy, the EU's top priority should be to ensure that the legislative framework meets rightholders' needs and priorities. UNICE would therefore expect the Commission to set to this task in close cooperation with business.
3. *At practical level*, UNICE believes that Community and international aspects of intellectual property should be regrouped under the responsibility of *one powerful new directorate* dealing with both policy and technical aspects.

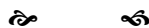
4. The intellectual property directorate must be given the necessary resources and political weight to carry out its tasks efficiently. It should receive full and active support both within the hierarchy and at political level in the Commission.
5. UNICE very much hopes that adoption by the European Commission of an overall intellectual property policy will exert a positive influence on the approach of the other Community institutions to these questions.

UNICE would very much like to discuss with the new Commission the measures it plans to adopt to allay the concerns of European companies and to establish a framework conducive to innovative activities within the Union.

UNICE's priorities

Turning to specific areas, and with the needs and priorities of rightsholders in mind, UNICE calls on the new Commission to:

1. *propose a new Community patent system* granting owners a single patent valid throughout the whole territory of the Union. In order to meet users' expectations, the new system must be offered at low cost and provided with an effective court system to enforce it;
2. *press for adoption of the Community design regulation* creating a single design right valid throughout the whole territory of the Union, in order to offer EU users strong and cost-effective design protection;
3. establish a well balanced and coherent framework to protect intellectual property rights in the context of the *information society*;
4. *press for accession of the EU to the Madrid Protocol*, in order to establish the necessary link between the Community Trademark and the international registration system of trademarks managed by WIPO;
5. *give full support to the Office for Harmonisation in the Internal Market*, making sure that it has all the means to fulfil its basic mission of rendering a direct service to rightsholders; and ensure that enlargement of the Union does not affect the functioning of the Office negatively;
6. reinforce Community action to *combat* the plague of *counterfeiting* within the Union;
7. *assist implementation of the TRIPs agreement* by joining WIPO and WTO in their efforts to provide developing countries with the technical assistance they need to bring their laws in compliance with the agreement. This would help reduce less developed countries' opposition to strong global intellectual property protection.



UNICE calls on the new Commission to address companies' concerns as a matter of urgency.

This is needed to restore the attractive business climate that will encourage companies to invest in research and development activities leading to innovation and further development of new technologies, on which competitiveness relies.



CORPORATE & ACCOUNTING LEGAL FRAMEWORK

The companies UNICE represents look to the Commission to provide them with a corporate and accounting legal framework adapted to their needs, in line with the principle of subsidiarity. UNICE would like to take the opportunity provided by appointment of the new Commission to review briefly the main topics of interest to companies in these fields.

One important element of this area is company law where a real body of EU law is needed to achieve a true single market, and it must be acknowledged that harmonisation has not been successful in achieving this aim. Consequently, UNICE's key message to the new Commission is that the EU's approach to these issues should be re-focused on companies' actual needs both in the single market and in a globalising regulatory environment where the pressure of international competition makes flexibility essential.

In this context, UNICE strongly believes that companies should enjoy as much freedom as possible to devise the corporate form best suited to their needs: statutory law should only provide the general framework while other elements should be governed by the market.

1. Companies see *simplification and deregulation* as one of their most pressing needs. This is why companies have strong reservations about further company law harmonisation. But this is also why UNICE has warmly welcomed the Commission's SLIM initiative on company law, as it will strongly support the group's recommendations intended to improve the situation regarding important issues such as share buybacks and pre-emptive rights, disclosure requirements regarding cross-border establishments, withdrawal of shares, as well as electronic publication and disclosure.
2. Even more urgent is the need to *eliminate mobility constraints* within the single market. Companies in the Union are still deprived of the option of merging across borders (10th directive) or transferring their registered office from one Member State to another (14th directive).

UNICE firmly believes that these desirable objectives should not be hindered because of continuing national differences regarding rules governing employee involvement.

3. UNICE understands that the Commission will present a proposal outlining basic rules opening up the possibility for *cross-border voting*, an initiative companies would very much welcome.
4. Adoption of the *Statute for a European Company* has long been a key demand of the business community because it would facilitate creation of a true single market and also cross-border business integration, thus fostering industrial cooperation in Europe. The Commission should therefore not tire of promoting this project.

However, UNICE has stressed time and again that companies will only opt for this form of incorporation if the proposed statute is sufficiently attractive and corresponds to their needs. Clearly, the present compromise proposals to deal with employee involvement aspects fall short of this basic requirement and, in their current form, offer no added value to companies.

5. In the face of the impasse on this topic, a proposal for a *European Private Company* has been prepared by UNICE's French member federation. This proposal is not intended to replace the

European Company, but to complement it. Its greatest merit is that it was designed by companies for companies, and in particular for SMEs, and is tailored to meet their specific requirements.

UNICE strongly supports this proposal, which it will promote actively, and it urges the new Commission to endorse it, and present it as a proposed Community instrument to the Council and the European Parliament. It is UNICE's hope that this initiative would help refocus the EU's approach to company law on the actual needs of companies in the single market.

6. As the whole issue of *corporate governance* has taken on added importance in recent years, UNICE would like to reiterate its view that this topic is being adequately addressed in OECD and it was its understanding that the Commission did not, in principle, intend to intervene in this area.

However, as the Commission has now adopted an ambitious action plan for implementation of the framework for financial services, UNICE has noted that differences in corporate governance regimes will come under scrutiny. Flexibility here is of the essence, and UNICE would like to voice unequivocally its opposition to regulatory intervention in this area which does not lend itself as well to a regulatory approach as it does to voluntary codes.

It is UNICE's considered opinion that corporate governance systems will develop and progress naturally, under pressure from the financial markets, and that what is really needed to face the challenges of globalisation is international convergence, not an additional layer of EU standards.

7. The Commission initiative in the financial services area, spurred on by introduction of the Euro, will also have an impact on *stock exchange legislation*. UNICE will be speaking out on these issues when it comments on the action plan and on the Commission's forthcoming proposals.
8. Still in the context of the action plan for financial services, UNICE has noted the Commission's intention to update the EU's *accounting strategy* and it would like briefly to make the following points:
 - o UNICE opposes adoption of an additional layer of accounting standards at EU level and therefore supports the Commission's present strategy of promoting European influence in the international standard-making process.
 - o Companies should be able to raise capital on the basis of a single set of financial reporting requirements as indicated in the action plan for financial services. UNICE therefore agrees that IASs are the most appropriate benchmark, provided that IASC can develop into a truly global standard-setting organisation, including acceptance by the US, and in which European countries have sufficient influence.
 - o UNICE would support a Commission initiative introducing the option of fair value accounting into the Accounting Directives, on condition that the use of fair value remains optional.

In this area too, UNICE will be presenting detailed comments on proposals currently under discussion within the Commission services.



In UNICE's view, European company law is already largely harmonised. Shareholder, investor and creditor protection have reached a high standard.

In the overall context of simplification and deregulation, the remaining needs for further action are essentially the elimination of mobility constraints on companies within the single market and the availability of a supra-national form of incorporation.

In seeking to establish an appropriate framework, the new Commission should focus on the needs of business. An excellent starting point for shifting the EU's approach to this area would be for the Commission to promote adoption of the *European Private Company*.

CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE

The highly important and controversial topic of civil liability as a means for remedying damage to the environment has been under discussion since the European Commission published its Green Paper in 1993. Several versions of a draft White Paper have already circulated and, over the last six years, UNICE has on many occasions expressed the strong and clear-cut views it holds on this topic.

UNICE regards further progress in environmental protection as essential and it is not opposed to legislation that provides a sound and sensible basis for cost-effective and reasonable measures preventing further damage to the environment.

However, in its view, civil liability law is an unsuitable instrument for environmental policy. Where the environment is damaged or under threat, the State should act against the wrong-doer through decree, command and coercion, or criminal prosecution, *not* by facilitating suits in a civil court. Experience elsewhere with this approach has resulted in a huge increase in litigation, transfer of ruinous costs to companies which may not have had any connection to the offending pollution, and the development of a vast industry concerned with legal liability rather than desirable substantive environmental protection.

Some of the elements the business community most strongly objects to is the difficulty of defining what actually constitutes “degradation of the environment”, and the loss of effective legal protection. Companies may face the prospect of being held liable for damage on which it is no longer possible to place a figure and against which they will find it very difficult to defend themselves. This would create huge legal and economic uncertainty for businesses.

In UNICE’s view, insurability is an absolute pre-requisite for any form of liability. In situations where the risk cannot be defined or assessed, it is highly unlikely that the insurance sector would be in a position to devise an insurance policy capable of providing adequate cover.

UNICE urges the new Commission to consider changes to the Community legal framework *only* after careful assessment of the costs and advantages, and provided that affordable insurance cover is available.

As a new Commission comes into office, UNICE would like to take this opportunity to repeat its offer of entering into a dialogue with its services in order to define an acceptable regime.

CONSUMER POLICY

The European Commission has made major progress in developing legal instruments to ensure a consumer-friendly environment. A fair number of directives have been adopted, supplemented by national provisions, with the result that European consumers now enjoy a high level of protection.

Competition in the marketplace is the best guarantee of consumer choice. In this context, business recognises the need to take into account the interests of consumers, who remain the ultimate judges of the quality and safety of the products or services offered. UNICE therefore wishes to underscore the commitment of the business community towards consumers.

In recent years, UNICE has noted in the business community a marked tendency, which it strongly encourages, towards self-regulation and dialogue. In this changed environment, UNICE would like to present the new Commission with the following recommendations:

1. Regarding regulation, attention to the following principles is crucially important for business:
 - Priority should be given to *simplification* or proper *implementation* of existing instruments. In addition, more emphasis should be placed on full and even implementation before embarking on a review process.
 - *Over-regulation must be avoided*. It affects the competitiveness of firms, particularly SMEs, and often imposes constraints disproportionate to the benefits accruing to consumers.
 - Where regulation is seen as necessary, it is essential that the regulator's *assessment* of the need to legislate be *based on scientific criteria*.
 - Furthermore, any proposal must pass the tests of subsidiarity and proportionality, and its *economic impact* must be assessed, using effective and transparent methods.
 - In particular UNICE would insist that, when it comes to assessing the need for legislation in this area, *current Commission practices should be dramatically changed*. Any studies commissioned by the relevant directorate-general should be entrusted to organisations or individuals known for their impartiality, based on open and transparent bidding procedures.
2. Self regulation must be supported and encouraged

As mentioned above, UNICE has noted an increasing number of business initiatives in favour of self-regulation, a trend it strongly supports and which it believes the European Commission should encourage. In addition to being a more flexible instrument than legislation, self-regulation encourages responsible attitudes and is often more closely in tune with the actual needs and concerns of those involved.
3. Dialogue must be improved and fostered

Above all, UNICE believes that consumer/industry dialogue should be improved because it fosters better understanding of each others' needs and concerns. It helps prevent conflicts by creating consensus on issues where consumer interests are at stake and facilitates agreement on how best

to manage a specific issue. In UNICE's view, it is not only an alternative to legislation, but an interactive instrument which could serve to clarify interpretation of existing legislation.

Previous Commission initiatives in this area were a first step in the right direction. They were, however, hampered by the breadth of participation. UNICE believes that dialogue needs to be more issue-oriented and restricted to those parties who can effectively contribute to a solution.



UNICE sees dialogue with consumers as a priority and the most efficient way of fostering a culture of mutual understanding, respect and responsiveness, and it has been working hard in this direction for the last couple of years.

UNICE calls on the new Commission to give initiatives in this area its full support and to facilitate the process by identifying and appointing a group of consumer representatives mandated to engage in dialogue on behalf of all EU consumers.



INFORMATION SOCIETY AND ELECTRONIC COMMERCE

The impact on society of the new information and communication technologies is both rapid and far-reaching. All the sectors of activities UNICE represents are or will be involved in the new digitised world created by the information society.

The information society industries are the most dynamic in the EU economy. Information and telecommunication (IT) industries already account for more than 5% of EU GDP.

However, despite these positive developments, with more than 500,000 IT vacancies in the EU there is worrying evidence that the EU is not making the most of the potential of the information society. Europe lags behind the US, Canada and Australia in both business and consumer Internet use.

As a new Commission comes into office, UNICE hopes that it will give fresh impetus to current work in this field and see to it that all initiatives encourage European companies to invest further in development of the networks necessary to create a fast-growing information society.

E-commerce represents a powerful means to create new jobs, to improve competitiveness for European companies, including SMEs, to promote growth and entrepreneurship, and to increase the well-being of society at large. The train should not be missed.

UNICE's recommendations

UNICE would like to stress once more that the global nature of the information society cannot be over-emphasised. E-commerce can only be addressed, and effective solutions can only be found for the numerous problems which emerge, including e-commerce jurisdiction and applicable law, through world-wide dialogue and cooperation between all stakeholders concerned.

The global information infrastructure is intended to cover the whole planet and the business community therefore sees *worldwide cooperation* as absolutely crucial to development of the information society. Consequently, while it acknowledges the need to consider the functioning of the internal market, UNICE urges the European Commission to take an international perspective in this area and to cooperate very closely with the EU's main trading partners.

Problems will have to be tackled by applying analogies of existing solutions. As electronic business continues to develop, effective market-driven solutions through cooperative self-regulation will emerge. This is in the interests of all stakeholders, consumers and companies alike.

E-commerce principles

UNICE would like to draw the new Commission's attention to the following principles which it believes must be respected to ensure successful development of the information society:

- *Confidence* Confidence is a prerequisite for building a successful e-commerce environment.
- *Competitiveness* E-commerce is key to companies' competitiveness worldwide.
- *Co-regulation* Effective co-regulation through common frameworks in cooperation with best business practices and company commitments.
- *Minimal change* New laws should only be adopted where absolutely essential.
- *Taxation* Online and offline transactions must be treated neutrally. Any legal approach should build on existing taxation principles.
- *Privacy* Stakeholders should have fair means to protect themselves.
- *Market-driven* E-commerce should be market-driven with competition as a substitute for government regulation.
- *Global e-services* Constraint-free global transactions should be enhanced, including affordable access to state-of-the-art infrastructures.
- *Cooperation* E-commerce cooperation encompasses providers and users.
- *Intellectual property* A high level of intellectual property protection in the digital environment must be ensured.



A general overview of the many issues at stake in the information society is indispensable and, in this context, UNICE believes that, in order to foster the required measures, all industry-related e-commerce issues should be co-ordinated by the services of a single directorate-general under the political responsibility of the new Commissioner for "Enterprise and information society".

