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28 October 1999

Hearing by the European Commission, 4-5 November 1999

UNICE Preliminary Statement

on proposals to adopt the amended Brussels Convention and the draft Rome Conventions as EU Regulations pursuant to Article 65 of the Amsterdam Treaty

UNICE¹ is extremely concerned about endeavours by the European Commission and the EU Member States in the field of consumer contracts aimed at bringing about a substantial extension of court jurisdiction at the place of the consumer's domicile.

Article 15 c of the 14 July 1999 draft Brussels Regulation² (which mirrors article 13 of the 1968 Brussels Convention³), applies to a contract that "... has been concluded with a person who pursues commercial or professional activities in the state of consumer's habitual residence or, by any means, *directs such activities* to that state ...".

In reaction to proposed amendments to the Brussels Convention, UNICE states the following:

1. Article 15 c of the draft Regulation would expose any supplier operating a website (including public authorities) to jurisdictional risks at the place of the consumer's domicile. The mere operation of a website could be judged an operation directed at consumers in any country. In contrast to the 1968 Brussels Convention, the draft Regulation is no longer limited in scope to transmissions actively aimed at consumers (such as a specific directed offer or advertising). The draft Regulation applies to every website accessible by a consumer in or from the consumer's country.
2. Thus, there would be a virtually unlimited extension of jurisdiction in consumer matters. This would prove to be an obstacle to investment, especially for small and medium-sized enterprises wishing to enter the digital economy. Such enterprises would assess the risks involved in this expansion of jurisdiction as being unacceptable. Therefore, they would decline to provide services or to offer products on the internet. As a consequence, the proposed Brussels Regulation would limit consumer choice since fewer SMEs would enter the digital economy. Technical remedies, so-called viewing masks, would not only be discriminatory but also would fragment and threaten the internal market.

UNICE feels that the Commission has overlooked or at least underestimated these negative ramifications of the proposed Regulation for the development of electronic commerce in Europe and its damaging effects on economic growth and employment.

¹ This Statement is not supported by UNICE's French member federation, Mouvement des Entreprises de France, MEDEF

² Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, COM(1999)348 final, dated 14 July 1999

³ Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, dated 27 September 1998

3. It is to be feared that the proposed extension of jurisdiction in the Brussels Regulation will have direct effects on the pending revision of the Rome I Convention⁴. It can indeed be expected that the revised Rome I Convention (and the intended Rome II Regulation⁵) will apply the law of the consumer's country of domicile when a supplier provides internet transmissions accessible in the consumer's country of residence. This would further add to the negative consequences of the Brussels Regulation.
4. The solution of the proposed Brussels Regulation is inconsistent with internal market principles in the field of e-commerce (as expressed for example in the draft EC directives on electronic commerce⁶ and digital signatures⁷). In addition to the legal risks of the draft Brussels Regulation there is the immediate link with the question of applicable law even if expected effects on the Rome Conventions, as explained above, do not materialise. Experience shows that competent courts are inclined to apply the law of their own country, beyond what is mandatory.
5. The Commission should refrain from amending regulations that have proven their worth over the years. Instead, the Commission should focus on providing low-cost and effective cross-border redress such as arbitration and mediation in co-operation with consumers and other e-commerce stakeholders. Although e-commerce does present new challenges, because changes are more rapid and more profound than ever, the requisite redress mechanisms should build on previous experience. Self-regulation by stakeholders is nothing new in Europe. In fact it is as old as trade itself.

Business is doing its utmost, largely in association with consumer organisations, to enhance co-regulation measures by way of trans-national web trust schemes, best business practices and effective codes of conduct. This process of co-operative governance needs further improvement and thus should be strengthened, not weakened through premature legislation.

In conclusion, UNICE urges the Commission and Member States

- ◆ **to reinstate into the proposed Brussels Regulation the original wording of the 1968 Brussels Convention with a recital stating that websites which do not actively solicit foreign consumers do not fall within the scope of the Regulation (article 13, new article 15),**
- ◆ **to determine an objective characterisation of a website as actively targeting a foreign consumer in a global economy, accordingly**
- ◆ **to postpone any decision on the Brussels and Rome Conventions for at least one year to allow time for clarification.**

These difficult legal questions clearly require further reflection as well as thorough and timely consultation, including regulatory options in the context of the **Hague Conference on private international law**, and in particular its draft Convention on jurisdiction and the effects of judgements in civil and commercial matters.

⁴ Convention on the Law Applicable to Contractual Obligations (Rome I), dated 19 June 1980

⁵ Convention/Regulation on the Law Applicable to Non-contractual Obligations (Rome II), (draft in preparation)

⁶ Draft European Parliament and Council Directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market, COM(1998)586-98/0325 5COD

⁷ Draft European Parliament and Council Directive on a common framework for electronic signatures, COM(1999)195 final 98/0191(COD)