UNICE
The Voice of Business in Europe

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REVISION OF DIRECTIVE 92/59/EEC

ON GENERAL PRODUCT SAFETY

UNICE COMMENTS

I. Introduction

UNICE welcomes the opportunity to contribute views on document 2000/0073 (COD). The detailed comments on the text which follow are made against the background of certain general points:

- There is a need to ensure that the text reflects the true meaning of the Commission and results in clarity for consumers, business and national authorities.
- Supporting guidance should be developed, in consultation with business, across the EU, on key issues to promote harmonised practice and harmonised enforcement.
- Such guidance should be in place and available before the due date for implementation of the revised directive.
- Measures should be adopted only if they deliver a significant increase in the safety of consumer products.

II. Interaction with other Community legislation

The 1992 General Product Safety Directive was adopted to ensure a high level of consumer protection throughout the EU in terms of product safety. Where the safety of consumer products was totally or partially regulated by sectoral legislation, provisions of the Directive sought to fill in the lacunae which existed (in relation not only to safety but also to market surveillance, emergency measures and exchange of information). The resulting system has brought about duplication and confusion not only for business but also for enforcement authorities and consumers. This is unsatisfactory and the Commission has acknowledged that the wording of the 1992 Directive on its relationship with other Community legislation lacks clarity and has led to uncertainty in its interpretation. Hence, clarification is needed on the relationship between the GPSD and the vertical directive.

UNICE does not believe, however, that the wording proposed in the Commission's new text would remove that ambiguity and lack of clarity. "Total safety" new approach directives cover all risks and therefore the GPSD safety requirements do not apply to products included in their scope. For other sectors it is less clear cut whether all the safety requirements are covered and whether therefore some elements of the GPSD are applicable. The proposals do not significantly clarify the position and moreover add extra requirements such as mandatory recall, the duty to

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notify unsafe products and export bans which, if introduced, will increase rather than reduce confusion.

We believe that to remove uncertainty and create a framework within which business can be sure that it is complying with the relevant safety requirements, those sectors which are regulated vertically by sector-specific provisions should be totally excluded from the scope of the GPSD. We recognise that this would involve the sectoral legislation in some cases being amended to ensure that the gaps currently being filled by the GPSD and new obligations agreed under the current proposals are fully covered. But the legislation itself would then be developed in a way which was appropriate to the specific sector and business would be in a position to know that by complying with relevant sectoral provisions, it had discharged its safety obligations. This would achieve much needed clarity for business.

III. Article 2 : Definition of products and services

We are concerned about the proposed extension of the Directive to "products used to provide a service". Where suppliers offer both a product and a service, the product would, in any event, be covered by the GPSD. We do not therefore understand the rationale behind the proposed extension. As it stands, the text raises many practical issues of interpretation and workability. Examples put forward by the Commission include sports equipment in a fitness centre and professional hairdryers used by hairdressers; but it is not apparently intended to cover an escalator in a shop. There are many other examples which are likely to create confusion. For instance the supply of electricity is specifically excluded from the scope of the "guarantees" directive but is not excluded from the General Product Safety Directive. It would be entirely inappropriate because of the characteristics of electricity and the nature of the provisions of the General Product Safety Directive, for instance on recall, that electricity should be covered.

We support the Commission's repeated assertion that services **are** excluded from the scope of the directive and urge that this provision is removed.

UNICE believes that products which are not specifically intended for use by individual consumers should be exempted. These products have not been formulated and manufactured for that purpose.

UNICE suggests adding to the last paragraph of article 2(a) the following sentence: it does not include products which are indicated as for professional use only.

IV. Article 2 : Definition of Risk

The notion of risk pervades the proposal and is the justification of the application of the directive's provisions. The notion, however, is very broad and will create uncertainty as to the protection it offers to consumers. It could cause adverse effects on consumers (in terms of an avalanche of warnings which will have less impact) and on business (in terms of the cost of compliance with obligations relating to information, warnings, notification).

V. Articles 2 and 5 : Definition and responsibilities of distributor

We note that the definition of distributor remains unchanged. There are concerns, however, about the changes to the obligations on distributors in the proposed text. Article 5.2 sets out the obligations on distributor to act with due care. It is not clear within Article 5, however, exactly what distributors will need to do or how the responsibility will be split between producers and distributors. Obligations between those parties should be complementary but not overlapping, to avoid duplicated effort and costs.

For example, a postal operator involved in the delivery of e-commerce will be required not only to act with due care for safety – but also to help ensure compliance with the applicable safety requirements and to "safeguard and provide documentation necessary for tracing the origin of products". We do not believe that this is workable. It is unclear who should be informed of what. Obviously it is vital that everyone should be informed when problems are identified. However, we would question if all participants in the supply chain should be given information on all complaints investigated and/or of all sample tests carried out. This would deluge distributors with

information. It could also lead to conflicts of interest. Who should receive information, how much they should receive and when depends on individual circumstances.

Against this background, we would urge that there should be clarification of the text in Article 5. This should ensure that all in the supply chain have an obligation for due care. Equally the focus should be on informing of identified risks and on requiring co-operation with the authorities.

UNICE proposes the following changes to Article 5:

(i) Clarification of Article 5, para 1 as to whether "them" refers to producers or consumers. (A similar clarification should be made in Recital 19.)

(ii) Replace the last sentence of Article 5, para 1 ("and keeping distributors informed of such monitoring") to ensure that the primary obligation in relation to monitoring and therefore of keeping the records is that of producers, and that producers keep records of all monitoring that can be used to co-operate with the relevant authorities – ("and keeping records of such monitoring"). Combined with the new paragraph 3 this will ensure that the consumer is aware of risks identified and that co-operation is established.

(iii) Addition to Article 5, para 2, stating that:

The Commission shall provide guidance on when distributors may be required to help ensure compliance with the applicable safety requirements and safeguard and provide documentation necessary for tracing the origin of products. This shall be made public before the deadline for implementation of this directive.

VI. Articles 3 and 4 : General Safety requirement and standards

We recognise the Commission's adoption of an approach to standards within the directive which are similar to that under the new approach directives. The legal presumption of conformity with standards is welcome in that there will be greater certainty for those businesses which conform to the relevant standards (and more uniform enforcement against companies which fail to comply with those standards).

In this context, it will be important that:

(i) Compliance with EU standards is voluntary.

(ii) Where the Commission gives a mandate to standards bodies, that mandate is based on sector-specific need. We therefore suggest an amendment to Article 4, paragraph 1, as follows:

"The Commission shall establish the specific sectoral mandates to the European standardisation bodies,……"

Similar amendments will be required to Recitals 16 and 17.

(iii) Co-operation between national and European standards bodies is promoted.

It will also be important to ensure that standards are single-market-driven, rather than being driven by consumer and/or environmental protection goals.

VII. Articles 5 and 8 : Duty to recall

UNICE would like to stress that the majority of manufacturers are vigilant in assuring safety. When problems arise, they recall voluntarily in the knowledge that the reputation of brands and success of products depends on it. They work with authorities in making these judgements, drawing on the good practice guidance governing product recall across the EU. We want to see co-operation encouraged and want to ensure a place for industry expertise.

UNICE is extremely concerned about the proposal in Article 8 paragraph 1(h) that places the power to recall on the competent authorities rather than on the producer. There is no qualification that this should be used as a last resort, longstop power and this raises the issue of proportionality. In principle, we do not believe that a mandatory power is the right way to ensure that all interested parties work together to ensure that serious risks are identified and addressed through swift action. We also believe that such a system raises a number of practical issues. First, what would happen and who would pay if a mandatory decision to recall were proved unfounded and what would be the mechanism for payment of compensation to distributors/producers for any damage sustained? Second, who would take the final decision as to whether and when a recall was necessary and what would their liability be? Third, what would be the sanction if the recall did not take place? Fourth, it is not clear what provisions there are to ensure that the duty is only used in circumstances where business itself has refused to take action over an unsafe product and that the duty is exercised in an even way by all authorities across the EU.

For all of these reasons – UNICE would like to see the references to mandatory recall in Article 8 paragraph 1(h) deleted.

To facilitate recall, UNICE would like to see support at EU level for good practice guidance on product recall. A specific link in the text could act as a safeguard for businesses which had followed current good practice in determining whether, when and how a recall should be carried out. The DTI in the UK has, for instance, recently published an excellent Good Practice Guide on Consumer Product Recall. This was prepared in consultation with representatives of the business community. Similar guidance could be developed by the Commission, with the involvement of business at the EU level. An appropriate reference to such guidance in the text should also ensure that, if any guidance for recall were followed, an order to recall would not be required. This would promote both harmonised practice and harmonised enforcement.

VIII. Article 5 : Duty to notify of dangerous products

There are serious issues of concern to business in relation to the proposals for a duty to notify of dangerous goods. As a matter of principle we question whether, in the light of the central duty on producers to place only safe products on the market, an additional requirement to notify of dangerous goods is necessary. This is an area where significant burdens are being placed on business (and national authorities) without evidence of increased safety for consumers.

It is essential, however, if this provision is introduced that there should be full and objective assessment of the trigger level for notification. There is a danger that business may notify "just in case" to protect themselves and that this could cause an avalanche of notifications of minor safety significance, with enormous attendant cost. The serious cases could well be lost amid the raft of less important notifications.

The trigger for notification must therefore be set at an appropriate level, perhaps linked to the RAPEX definition of serious risk or related to what are "unacceptable" unsafe products. This should be fully examined and debated and further guidance issued by the Commission. Such guidance should be made available before the due date for implementation**.** We would challenge the Commission's view that the trigger level set in Annex 1 of the proposal could be altered without amendment of the Directive. Flexibility is necessary to ensure that the level is appropriate and a mechanism incorporated into the directive so that the trigger can be altered without the lengthy process of amending the directive.

In any event, national enforcement discretion over prosecution for non-notification is essential, drawing on US experience.

iX. Article 12 : Exchanges of Information

All references in this Article should be to "serious risk" rather than simply "risk".

X. Article 13 : Ban on certain exports

UNICE recognises that there are legitimate concerns about the possible dumping in third countries of blatantly dangerous goods. We also acknowledge that the wording of the text now restricts the provision to products where there is a serious risk requiring rapid action. However, we are concerned about this provision being included in a directive which is an internal market measure. Prohibiting export of products meeting different standards from those of the EU would unnecessarily restrict EU exports and damage competitiveness within individual Member States and across the EU. Notwithstanding the apparent intention that the ban should be exercised rarely, a number of members have indicated that serious consideration would be given to the relocation of manufacturing facilities outside the EU because of serious concern over the potential use of this mechanism, which they regard as unjustified.

We have serious concerns about the ability of the EU institutions to be able to introduce an export ban in this way, on two grounds:

- whether there is competence under the Treaty
- and if so, whether there is compatibility with the WTO.

A total ban on export of such products is also a contradiction to the Prior Informed Consent Convention signed by the European Union on 11 September 1998. Among other things, this convention provides that chemical products which are banned or subject to severe restrictions in the country of manufacture may be exported if the importing country gives its consent and is provided with the necessary information about the chemical properties of these products.

We are of the view that there should be a requirement for products to comply with the safety standards of the importing country, but that this should be backed by codes of conduct setting out good practice to cover the position where there is a low level or indeed no product safety legislation in third countries.

XI. Articles 14 and 15 : Committee Structure

As a result of the proposals a number of committees and groups will be included within the formal regulatory structure. There is a Regulatory Committee on Consumer Product Safety, an Advisory Committee on Consumer Product Safety, a proposal for a European Product Safety Network, as well as national administration contact points. The function, structure and membership of each of these bodies need to be clearly defined. It is also important that there should be an appropriate level of business representation on these committees.

XII. Article 16 : Confidentiality

These provisions represent a reasonable balance between the need on the one hand for public access to information relating to product safety and, on the other, for protection for commercially sensitive information.

XIII. Need for an appeal mechanism

UNICE considers that there should be in the directive an appeal mechanism against regulatory action, in the following circumstances:

- a mandatory right of appeal from the judgements of criminal courts

- provision for judicial review of administrative decisions where relevant procedures have not been followed or where regulatory authorities have taken decisions which no reasonable authority would have taken

- provision for review of scientific aspects of decisions by regulatory authorities by similar expert bodies.

Such an appeal mechanism would build on provisions already present in the national laws of individual Member States.

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