

**COMMISSION GREEN PAPER
ON EUROPEAN UNION CONSUMER PROTECTION**

UNICE position paper

EXECUTIVE SUMMARY

- UNICE welcomes the issue of the green paper and endorses its underlying objectives, namely, to simplify and streamline the existing regulatory framework for the protection of economic and legal interests of European consumers and to enhance cooperation between enforcement authorities. It is also supportive of any discussions on how best to integrate consumer protection interests in the EU decision-making process and to help the effective completion of the internal market for all stakeholders alike.
- However, UNICE feels that the Commission fails to offer sufficient evidence of the need for and the workability of the reform proposed. UNICE fears that discussions may focus on the search for big solutions to small problems.
- It is difficult to believe that remaining barriers or obstacles in commercial relations between business and consumers across frontiers are mainly due to the consumer protection regulatory framework and justify comprehensive action at EU level. Furthermore, attention should be not so much on new rules but on proper enforcement of the existing ones, effective access to justice complemented by appropriate instruments for out-of-court dispute resolutions.
- The Commission's favoured approach based on "an umbrella legislative directive" comprising a general duty to trade fairly seems inappropriate when there is no uniform EU-wide definition or common understanding of fair practices. This may create rather than eliminate legal uncertainty and add an extra layer of rules to the existing framework.
- UNICE is particularly concerned about the proposal for "means of ensuring effective EU-wide self-regulation in the field of consumer protection" by adding legal consequence to non-compliance with a self-regulatory code. UNICE is open to discuss further as to how to improve self-regulation. However, it strongly opposes self-regulation becoming an instrument to create statutory requirements since this plainly goes against its voluntary nature and the autonomy of the parties.
- UNICE is not in favour of institutionalised dialogue between stakeholders at European level in the field of consumer protection. Instead, more and better informal dialogue between stakeholders should be promoted.
- UNICE remains sceptical as to whether the green paper's proposals to establish a new comprehensive regulatory framework for B2C (Business to Consumer) commercial practices would improve consumer protection and realise the full potential of the internal market at minimum cost to business.
- Before it takes further steps, UNICE urges the Commission to specify existing problems to tackle and practical means to implement its strategy in the form of a white paper which will enable interested stakeholders to examine ways forward thoroughly. It is equally important that progress on this debate take full account of ongoing discussions, principally in the framework of the white paper on European Governance and the internal market strategy for services.

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I. INTRODUCTION

UNICE welcomes the adoption of the green paper launching a broad debate on the future direction of consumer protection in the EU, in particular as regards protection of consumer economic and legal interests.

UNICE is supportive of any discussions on how best to integrate consumer protection interests in the EU decision-making process and to promote a high level of consumer protection as provided for in article 153 of the EC Treaty.

Business is aware of the new challenges posed by the prospect of an enlarged European Union, introduction of the euro and greater use of new technologies such as e-commerce, and wants to contribute actively in the discussions to find the best ways to maximise the benefits of the internal market for all stakeholders.

UNICE appreciates the fact that the paper presents its strategy in the form of options, not only seeking to discuss ways to upgrade the regulatory and enforcement framework in the field of B2C (Business to Consumer) marketing practices but also reflecting on governance for tomorrow.

Overall, UNICE agrees with the Commission paper in the need to simplify and streamline the regulatory framework already in place and to guarantee effective and consistent enforcement of existing rules.

However, if the outcome of the debate is to be translated into further initiatives in this area and “will set the stage for the next ten years of policy development with respect to business-to-consumer commercial practices and consumer rights” as underlined by Commissioner Byrne, UNICE cannot but question whether this overhaul of consumer protection strategy is based on solid and sufficient evidence. Furthermore, UNICE has strong concerns and doubts about the means and concrete mechanisms proposed to attain the afore-mentioned objectives.

UNICE does not conceive the internal market as a dichotomy, as business- or consumer-led. There is only one internal market serving the interests of consumers and industry alike, and consequently any proposal for the full functioning of the internal market should safeguard and promote two important pillars, if not the most important pillars, of the internal market: competitiveness of business and consumer confidence.

In view of providing the Commission with a clear and structured response to the green paper, our detailed comments below have been divided into several sections aimed at answering the questions set out in the paper as fully as possible.

II. CONTENT OF THE GREEN PAPER

A. Current consumer protection scenario and need for a reform

UNICE disagrees with some of the assumptions presented in the paper to describe the current situation of consumer protection in the internal market.

The paper describes the current legislative framework at both national and European level as a patchy scenario that hampers the full potential for shopping across borders and adds legal uncertainty to commercial relationships between business and consumers. In addition, the Commission believes that the important events above-mentioned such as the circulation of the euro, enlargement and greater use of new technologies may aggravate the situation.

UNICE conceives the Commission's strategy for greater harmonisation of all rules governing the basic principles for B2C marketing as a revolutionary and far-reaching approach rather than just a strategy to tackle existing shortcomings. UNICE understands that the bottom-line idea is to equip the internal market for the new times to come and therefore, this requires the Commission to demonstrate the necessity and workability of the means proposed to achieve the objectives.

As a matter of principle, UNICE considers that, when setting out the lines of such a wide-ranging reform, it is essential to strike a fair balance between the interests and responsibilities of all stakeholders concerned.

It is equally important to take full account, on a verifiable and objective basis, of the principles of subsidiarity, necessity and proportionality from the earliest stages of definition of new proposals.

In this context, UNICE regrets the systematic lack of solid factual evidence demonstrating the existence of barriers in the internal market that call for an overhaul of the current *status quo*.

UNICE feels that the arguments set out in the paper are insufficient to base the need for common EU regulation of all marketing areas. Prior to drawing such an all-embracing conclusion, a proper analysis should be made of each of the existing rules to pinpoint the specific areas that need further harmonisation. Likewise, any proposal should be accompanied by sufficient guarantees as to their viability and effectiveness to attain the objectives sought.

UNICE believes that the current consumer protection legislative framework at EU level already provides adequate basis for ensuring a high level of consumer protection. However, it realises that there is scope for improvement in order to correct both well-identified malfunctionings of the current system and to adapt the legal framework to the market changes.

UNICE does not believe that remaining barriers or obstacles in B2C commercial relations across frontiers are mainly due to the disparity of national consumer protection rules and are sufficient to justify comprehensive action at EU level.

UNICE is of the opinion that European consumers feel increasingly more confident in the internal market and that consumer interest in shopping in other countries depends on various factors, many of them beyond the influence of rules and more connected with behavioural, cultural, geographical, societal and personal reasons. In addition, consumers are more generally interested in enjoying effective and affordable access to justice complemented by appropriate instruments for out-of-court dispute resolution.

Furthermore, UNICE reiterates its request that priority be given to reducing excessive regulatory burdens on business in the EU, especially for SMEs. Simplifying and making regulations clearer should be the underlying objective of

any new initiative. This will ultimately redound to the benefit of the consumer in the form of lower prices, greater choice and better access to goods and services.

By way of conclusion, UNICE can only encourage the Commission to elaborate its strategy further by identifying the concrete barriers to cross-border trade it intends to remove and providing adequate factual evidence and guarantees as to viability and effectiveness of the measures to achieve the objectives sought.

This should be done on the basis of the principle of subsidiarity and the proportionality and necessity tests, a regulatory impact assessment and a cost-benefit analysis of the existing rules and the implications that the projected regulatory reform would entail prior to deciding what tool should be used. In this context, UNICE considers a good example the comprehensive and transparent process followed by the expert committee on commercial communications, which ended with publication of a green paper and, subsequently, a communication attaching a legislative proposal.

B. *Proposals to improve the current regulatory environment*

B.1 Specific approach

UNICE recognises the value of such an approach as a suitable way to respond to specific needs and objectives. In principle, it considers it a familiar and well-established instrument to upgrade the legislative framework when the need is proven. Specific directives should keep up with new market developments and address real needs and circumstances justifying such EU action.

As for the use of minimum versus full harmonisation instruments, in principle, UNICE supports full harmonisation mechanisms in combination with the application of the country of origin principle and mutual recognition arrangements. Conversely, UNICE is not in a position to determine as a general rule the level of consumer protection to be sought.

For UNICE, these questions should be assessed on the basis of proportionality and necessity, reflecting the conditions and specificities of each concrete area and with the overall objective of contributing to a simple and predictable legal framework and striking a fair balance between the interests at stake.

B.2 Mixed approach

This would represent the establishment of a common basic regulatory framework whose central component would be a general framework directive (“an umbrella legislative instrument”) intended to set up the core principles of fair trade for marketing practices between business and consumers and the basis for a general framework which would allow the consistent use of alternative mechanisms (self and co-regulation) at EU level.

For UNICE, creation of a comprehensive legal framework enshrining a general uniform duty to trade fairly at European level does not seem justified or workable by any of the means proposed in the paper. All the more since it is not clear how the proposed regulatory framework would interact with existing European rules. It is vital that any regulatory initiative does not result in overlap and confusion with existing policy initiatives such as the proposed regulation on sales promotions.

Furthermore, a system comprising a general duty to trade fairly seems inappropriate when there is no single concept or common understanding of what fair or unfair means. This will create rather than eliminate legal uncertainty and may result in a superimposition of rules. The regulatory reform accompanying this system, as it is vaguely explained in the Commission paper, would entail an extra

layer of legislation, complicating rather than simplifying the current situation. This is unacceptable for European business.

As the various pieces of research into a general duty to trade fairly clearly show, even where such a concept exists in the regulatory systems of several Member States, it is shaped by different policy aims: to prevent unfair competition, to protect consumers or to safeguard the wider public interest. The emphasis given variously to these objectives has influenced jurisprudence and the development of legislation.

Moreover, interpretation falls to different kinds of institutions which vary in their status and, for example, in their responsiveness to self-regulatory codes and in their definitions of vulnerable consumers (children and the aged). Academic research suggests that the manner of interpretation and enforcement will be at least as important as the text enshrining the general duty, given the range of legal approaches and institutions involved. A heavy burden of responsibility will therefore fall on the mechanisms for developing the general duty and enforcing it in a way that will promote the internal market and improve consumer protection, two of the central aims of the Commission's proposals.

The research also demonstrates that EU directives dealing with specific abuses have a scope which varies according to political attitudes prevailing in the Member States at the time when they were negotiated: often they set minimum standards which the Member States are free to exceed; sometimes they represent full harmonisation measures. It is not clear how a general duty will remedy such an unevenness of approach.

There is already a large European-level arsenal of legislation designed to protect consumers which makes it possible to identify undesirable trade practices effectively (e.g. the directives on unfair clauses, misleading advertising and cross-border cancellation procedures, TV without frontiers directive, E-commerce directive, and rules on competition which seek to avoid undertakings engaging in unfair trading practices, etc.).

The Commission's initiative could duplicate the existing legal framework, hence the risk of legal uncertainty for both businesses and supervisory authorities. Businesses would have to examine the provisions of specific directives and the lists of outlawed conduct accompanying the text of a general duty to determine whether a commercial practice may be queried. Where a practice is not caught by a specific directive but may perhaps fall within the ambit of a practice illicit under the general duty, which piece of EU legislation should prevail?

Another critical aspect is the scale of consumer protection to be established across Europe by means of this strategy. It does not emerge clearly from the Commission's harmonisation proposals what level of consumer protection they are designed to bring about as common denominator for all Member States which is appropriate and feasible and above all, which will avoid any sort of fragmentation. Yet, only total harmonisation can remove fragmentation within the EU.

If the Commission were to harmonise all national legislation governing commercial practices between business and consumers on the basis of the highest levels of protection in force in the Community, it is vital to know what criteria would be used to determine the level of protection that would be translated into practice in the different areas that the Commission's plan would cover.

In the light of the foregoing, UNICE continues to doubt whether a general duty to trade fairly, in either of its two options, will offer less complexity and a smaller burden of compliance.

C. Complements to the general legislative framework

C.1 General comments:

UNICE shares an interest in the promotion of greater use of alternative regulatory models as a response to the challenges posed by enlargement, technological development, globalisation and market complexity. Business is also aware of the constructive role and advantages of dialogue between stakeholders. However, consistent use of alternative regulatory models and formalised dialogue between stakeholders raise important questions of transparency, independence, representation of partners and democratic accountability.

UNICE advocates a case-by-case assessment of all alternatives on an equal footing and based on objective criteria. A given model should not be granted greater attention unless it responds to the policy issue concerned, to the expertise and fora available, and to the interested stakeholders represented.

Equally, UNICE strongly believes that any new regulatory models should not jeopardise co-operation between stakeholders in non-regulatory discussion forums. Here, solutions can be found before problems emerge and it will help to improve an atmosphere conducive to dialogue.

C.2 Co-regulation

In order to guarantee successful application of co-regulatory instruments, UNICE believes that the following principles should be taken into consideration:

- The use of co-regulation should be considered on a case-by-case basis. Involvement of stakeholders at an early stage could help focus on the source of concern.
- The objective criteria against which pre-selected stakeholders are chosen should be clarified. This applies particularly when pre-selection is based on perceived expertise or available resources.
- Stakeholder organisations engaged in a dialogue should be representative at European level, mandated to act on behalf of their constituents, and possess the necessary means to participate fully in the process.
- Each dialogue should be issue-oriented, clearly defined, transparent and managed by the Commission. The process should speed up, not slow down, the decision-making process.
- A dialogue should lead to key conclusions or proposals. A follow-up mechanism should be established to ensure correct implementation or execution of results achieved through dialogue.
- Parties should be clearly informed about the objectives, procedures and conditions prior to the engagement in a co-regulation process.

C.3 Self-regulation

Industry regards self-regulation as a major investment. It drives internal practices as well as wider interactions with consumers.

European companies have a long history of adopting voluntary initiatives that go beyond what is required by legislation, internationally developed standards and the traditional role of enterprises. In many instances, these initiatives are closely linked to the company's core competences, and naturally complement its key activities.

UNICE has always supported the use of self-regulation because:

- It allows a clear definition of good practice.
- It is flexible and can respond to technological and social change.
- It encourages market practitioners to work together to meet recognised objectives.
- It offers a good basis for strengthening consumer confidence and ensuring fast and easy redress.

UNICE would like to express its serious worries about the proposal of adding legal consequence to non-compliance with a self-regulatory code with a view to ensuring effective EU wide self-regulation.

This proposal overlooks the most important element which forms the core of any self-regulation initiative which is the absence of any formal link to legislation and its voluntary nature. By definition, a code of conduct is not intended to create statutory obligations, which is the exclusive remit of traditional legislation. The two approaches are fundamentally different in this respect.

UNICE firmly believes that a concept of EU self-regulation such as the one proposed by the Commission would seriously jeopardise and could kill business investment in self-regulatory codes, eliminating to a great extent the incentives that have made it attractive and successful hitherto, to the ultimate disadvantage of consumers.

It also raises essential questions about liability of the participants in a self-regulatory exercise. In particular, it would be interesting to know what would be the role and responsibility of trade associations and other associations that have drawn up codes of conduct. Would they have to face the legal consequences of a breach of a code of conduct committed by one of their members?

Moreover, the benefits to the consumer of linking self-regulation to the law are questionable. Consumers do not want court cases - they want fast, effective and low-cost redress.

Finally, UNICE is in favour of improvement of self-regulation and in particular the aspect of enforcement. In principle, UNICE would not oppose the elaboration of some guidance on basic principles for self-regulation at EU level, which should remain in all cases voluntary. Those principles should also apply to all Community areas and not be restricted to the consumer protection field.

UNICE would oppose self-regulation becoming an instrument to create statutory requirements.

C.4 Dialogue between stakeholders

UNICE has long supported dialogue between business and consumer organisations to discuss and agree on issues of common concern. Nonetheless, it does not support the idea of any forced dialogue that could diminish the usefulness and the autonomy of the parties to engage in voluntary ad hoc dialogue such as the one recently held between UNICE and BEUC on core guidelines for trustmark schemes in the Internet.

UNICE is of the opinion that more and better informal dialogue between stakeholders should be promoted at European level. It may take a variety of forms such as interactions between stakeholders in informal roundtable sessions, conferences, joint events, etc.

UNICE is confident that this will enhance mutual understanding and co-ordination to determine overall objectives of common interest, resolve issues before they escalate, and pave the way for collaborative projects and expertise-sharing.

In this context, UNICE is very concerned about the Commission's proposal to adopt non-binding practical guidance for the better understanding of the proposed framework directive. UNICE considers this guide an invaluable practical instrument which will considerably determine the interpretation, implementation and enforcement of the provisions of the proposed framework directive and therefore has serious worries about granting control over this guide to a regulatory committee. UNICE would oppose the idea of using this guidance to expand legislation through a committee.

UNICE is particularly worried about the idea of having mandated co-regulation projects whereby the Commission and the Member States through a regulatory committee would ask stakeholders to negotiate and agree on certain parts of the guidance within a specific time limit.

UNICE is concerned about any new structure which formalises the results of any dialogue in the consumer field within a general framework relying on committee procedures.

This type of dialogue goes against the autonomy of the parties to engage in voluntary dialogues and inappropriately resembles the social dialogue pattern which responds to very specific historical and political circumstances. The social dialogue at EU level is a fully structured and autonomous process of the social partners which should not be confused with, or subsumed in, the general consultation methods of the Commission.

UNICE is convinced that it would prove completely unsuitable in the field of consumer protection for obvious reasons regarding democratic legitimacy, representativeness and accountability.

In addition, in the context of the Treaty's social chapter, the social partners have a role and responsibilities which cannot be generalised to other policy areas or actors. Ultimately, policy objectives and legislation in the consumer policy field should remain the responsibility of the EU institutions which have been mandated for that purpose.

D. Enforcement and cooperation

UNICE attaches utmost importance to the proper and consistent application and enforcement of consumer protection rules. It is essential that the existing rules are properly implemented to allow a thorough examination of their effectiveness and whether they need revision.

The prospect of a larger Europe renders the aspect of enforcement together with the proper implementation of existing rules vital elements which call for swift action without further delay.

Irrespective the decision as to the specific tools to improve the current regulatory *status quo*, UNICE agrees on the need for improvement in this area and welcomes the idea of enhancing greater cross-border co-operation between enforcement practitioners and authorities in order to ensure consistent application of EU consumer protection legislation.

However, UNICE does not think that total harmonisation of practices and methodologies is the most appropriate way of achieving that objective in all cases. In addition, due account should be taken of the different nature of existing

enforcement bodies which range from public administrative bodies to judicial and extra-judicial bodies.

UNICE also thinks that the existing informal co-operation arrangements between public bodies should continue to be supported and combined with some degree of formal co-operation. This would constitute an important tool that would increase confidence in the market and reduce the need for new or further regulation.

This could be complemented by information exchange and data collection initiatives as well as education projects which would facilitate the collection of systematic feedback from all parties involved in enforcement of the relevant rules.

III. CONCLUSIONS

In UNICE's view, consumer protection at EU level is a relatively mature and adequate policy and despite the fact that additional harmonisation measures can be appropriate in specific areas, any thorough-going revision of the current consumer protection framework should be linked to demonstrable need and factual evidence.

In this regard, UNICE believes that the Commission fails to offer sufficient evidence of the need for and the workability of the overhaul proposed in the Commission's strategy. UNICE fears that discussions may focus on the search for big solutions to small problems.

The development of a policy of this kind also demands detailed and thorough examination of the potential impact it may have upon other fields (e.g. competition) within the EU's remit before embarking on any proposal for measures.

In sum, UNICE remains highly sceptical as to whether the green paper's proposals to establish a new comprehensive regulatory framework for these aspects of the consumer protection policy would achieve their purposes of improving consumer protection and realising the full potential of the internal market at minimum cost to business.

Therefore, UNICE strongly recommends that the Commission follows-up the green paper on EU consumer protection, which has successfully launched a broad debate on the matter, with a white paper in which further elaboration of the Commission's novel ideas is provided for and findings of parallel discussions on the New Governance Paper are taken into account. This will allow all interested stakeholders to examine ways forward in this field thoroughly and to contribute to choosing the most appropriate instrument.

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