

**PROPOSAL FOR A REGULATION
CONCERNING SALES PROMOTIONS IN THE INTERNAL MARKET
[COM (2001) 546-2]**

UNICE position paper

I. GENERAL COMMENTS

1. UNICE welcomes adoption of a proposal for a EU regulation governing sales promotions in the internal market. The creation of a genuine single market in sales promotions will allow consumers to benefit from more offers across borders and will overcome the unnecessary national differences in promotion rules that continue to fragment the market and drive up business cost.
2. UNICE is pleased that the regulation is based on a detailed analysis of commercial communications rules and on the extensive work of the commercial communication expert group. It has questioned the proportionality of national measures and generally turns to market solutions to resolve issues by putting the emphasis on transparency as the route to informed consumer choice. The scope for bans and restrictions has been narrowed; and the principle of mutual recognition of national has been provided for where there are national restrictions justified by and in proportion to the public interest.
3. The commercial communication expert group clearly has an important role to play and its work should be stepped up in order to achieve an effective internal market for commercial communications in the interest of both business and consumers.
4. UNICE strongly supports the intent of the draft regulation which is to remove unnecessary national bans or restrictions on the use and communication of sales promotion as obstacles to cross-border trade with a view to opening up borderless opportunities for sales promotions and promoting greater transparency and increased consumer choice. This is of particular importance in the imminent context of an enlarged Europe, the consolidation of the euro and the enhanced use of e-commerce and other new technologies.
5. UNICE has consistently pointed out that the current fragmentation of legal requirements applicable to sales promotions leads to serious distortion of competition between companies operating in different member states and increase the costs for businesses advertising and promoting their products and services across frontiers. In addition, barriers in this field weaken EU consumer access to the choice, quality of service, better information and product innovation that a genuine internal market will allow.
6. In principle, UNICE welcomes the Commission's approach in framing this liberalising measure that will facilitate establishment of a genuine level playing-field for promotional marketing across Europe and will provide legal certainty for borderless circulation of goods and services, though the test will be how far the provisions of the regulation are effective on the ground in removing barriers to trade, that is to say, how far there is true convergence in the way the legislation is interpreted and applied.
7. In order to achieve a common interpretation of its proposals by national courts and enforcement authorities the Commission has opted for a regulation with direct application in member states. It is thus important to determine clearly how far national legislation or business self-regulatory codes will need to be amended in order to be compatible with the provisions of the proposed regulation. Recital n° 5 and article 3 offer some indication but further clarification is strongly recommended.

8. UNICE is particularly concerned about the practical application of the regulation's specific provisions by businesses in general and regulated companies, such as utilities, in particular. The concept of the regulation is sound, but the detail needs to be changed on certain points.
9. Finally, the relationship between the proposed regulation, an instrument with clearly delineated and specific scope, and the Commission's favoured proposal for a framework directive on fair trade advanced in the green paper on EU consumer protection is not clear. UNICE is of the opinion that both proposals are perfectly compatible but special care should be taken to ensure that work on the two proposals is constructively coordinated.
10. UNICE calls upon the Commission to ensure that progress on this well-targeted proposal on sales promotions continues and does actually contribute to its ultimate goal, which is the full functioning of the internal market. It should also be guaranteed that it results in consistency with any parallel initiative with which it may co-exist.

II. SPECIFIC REMARKS:

A. Definitions (article 2)

11. Definition of a sales promotion: it is wide and includes discounts. Whilst it is evidently important that consumers should understand the value of a discount, its calculation and communication in intelligible and accurate form may be difficult in some cases. For example, in telecommunications the offer of a flat-rate charge per call at certain times in the week can only be valued (whether as a percentage or unit cost) against the base of a normal charge which depends on the length of the call. The longer the duration of the call, the greater the value of the flat-rate charge. It would be overly difficult to quantify the discount in accurate and simple terms to the consumer.
12. Definition of discounts: as described in the draft, it includes temporary price reductions. However, some discounts may be permanent in the sense that they remain for the rest of the product's commercial life (an end-of-line price to run down stocks). UNICE assumes that such a case would not be covered by the regulation.
13. Definition of a commercial communication: it is very wide and extends to all forms of communication covering products, services and the image of a company, whether in-store (for retailers) or other media. It may be reasonably easy to keep to the information requirements in printed media and on websites with additional small print (which must evidently be clear and unambiguous), but compliance in TV and radio advertising and SMS messaging is a more questionable proposition whose practicability must be examined. Moreover, there should be a distinction between detail conveyed to consumers individually and that which is useful for in-store promotions. For example, should indications about redress mechanisms be included in all in-store promotional material?

B. Protection of children and adolescents (article 5)

14. UNICE is concerned about effective enforcement of the requirement for verifiable prior consent from the legal guardian before data are collected from children. Verification poses challenges – signatures can easily be copied, credit cards raise concerns about security. Against this background, UNICE would suggest that the text is amended as follows:

“Promoters should not collect personal data from a child without taking reasonable steps to obtain verifiable consent from that child’s parent or legal guardian, taking into consideration available technology.”

C. Information disclosure requirements (article 4 and annex to the Regulation)

15. Section 1.1 of the Annex:

- UNICE sees the merit of providing details of additional costs linked to freight, delivery or postage, when the offer forms part of a sales promotion. However, this requirement should not apply to discounts advertised with goods and services, because that would create an inconsistency between the treatment of items advertised with a discount (where the extra costs would have to be specified) and those advertised with the normal price which would not.
- In any event, UNICE believes that there should be a *“de minimis”* exclusion for normal postage and a standard-rate telephone call, where an obligation to state the cost would be disproportionate.
- The obligation to name a start and end date is inappropriate for discounts. Price reductions are often a response to competitive pressures and without a planned duration. To have to name an end date may give commercially sensitive information to a competitor and thus have anti-competitive effects in some circumstances, which is the reverse of the regulation's aims. At another level, it may be difficult to fix an end date where the trader is advertising limited stocks on a first-come first-served basis, or where the continuing availability of stocks becomes an issue in the course of a promotion. These considerations need to be taken into account in a redraft of the annex.

16. Section 2 of the Annex relating to discounts:

- UNICE considers that the requirement to state the exact dates on which the price ruling before the discount applied would be onerous for both in-store and multiple-product advertisements or brochures, and open up wide scope for error. The regulation should adopt the concept of a period during which the base price is established.
- As far as coupons are concerned, they rarely have a cash value, since they are to be exchanged for goods directly or for a discount on goods. UNICE proposes the following new wording of this provision specifying that a cash value for a coupon need only be given when it may be exchanged for cash:

“where possible, the cash value of the coupon or voucher;”

- UNICE questions whether it is necessary to state when a discount represents a sale below cost as a way of informing the consumer of the economic value of the price concession. Economic value for consumers is determined by the price they are ready to pay. It should suffice that the size of the price concession is declared by reference to the established base price. UNICE thinks that a general principle of this kind would be more helpful to consumers and reduce the compliance load for business. There are practical difficulties in establishing and communicating the cost to the supplier when the discount is held to be a sale below cost. For example, a reseller operating in several EU markets may have a different cost of purchase in the various territories. In some cases the discount price will represent a sale below cost, in others not. The result would be an obligation to declare sales below cost in one market, but not in another, so that the benefits of a EU-wide promotion would be lost. The requirement would lead to a fragmentation of marketing effort, the reverse of what the Commission is striving to achieve.

17. Section 3 on free gifts and premiums:

- The requirement to state the actual value of the free gift or premium is not clear. This could be the price charged for the item when it is sold in stores, the recommended retail price, or the price charged to the promoter. If various estimates are given then this could cause confusion. Also, in the Eurozone the value of a single free gift may

be different in different member states. This would make it difficult to deliver the same promotion across language zones. UNICE considers that this requirement should therefore be deleted. Consumers know the value of a free gift to themselves and will make their purchasing decisions accordingly.

- Information on any cost linked to the consumer's access to the free gift should have the "*de minimis*" exclusion (e.g. postage and telephone call) proposed above.

18. Section 4 on promotional contests and promotional games:

- The obligation to disclose the actual or the estimated odds of winning seems excessive and unrealistic. The odds on winning can often be no more than guesswork, since they would involve an estimate of how many entrants there would be for a free prize draw. The Commission should consider whether the information would seriously influence a consumer's decision to buy. UNICE suggests adding "*where possible*" to the current wording.
- Once again, UNICE supports the use of a "*de minimis*" exclusion for charges associated with receiving the prize.
- It should be taken into account that most contests and games are essentially lotteries and do not involve state-monitored or state-approved apportionment of goods. UNICE therefore questions the usefulness of providing information to customers on the details of the jury members or particulars of the selection procedure. This is certainly relevant for official supervision but the interest of participants in a prize draw is highly questionable. UNICE would like those provisions to be removed.

III. CONCLUDING REMARKS :

19. UNICE fully supports the concept of the Regulation which has been carefully prepared. It is a very substantial liberalising and modernising measure for the internal market; and it is important that it should be effective in meeting the needs of consumers and business alike.
20. UNICE urges the EU institutions to give detailed attention to the pragmatic concerns that UNICE has raised in this paper. UNICE looks forward to working with the Commission and the Parliament in support of an enforceable proposal building the single market for both consumers and business.