

**FOLLOW-UP COMMUNICATION TO THE GREEN PAPER
ON EU CONSUMER PROTECTION**
(COM (2002) 289 Final)

UNICE position paper

EXECUTIVE SUMMARY

- UNICE is grateful for the opportunity to give its opinion on the follow-up Communication which seeks to give further guidance for the green paper on EU consumer protection. The far-reaching reform pursued exceeds the remits of the consumer protection field and falls into the broader scope of future EU regulation. It merits extensive research and consultation of interested parties.
- UNICE also welcomes the follow-up programme of consultation and research and urges the Commission to use the findings and input from the surveys, expert groups and interested stakeholders consulted to justify any further development. It would be utterly inappropriate to proceed with adoption of a legislative proposal before the completion of that work.
- UNICE fully supports proposals which pursue regulatory simplification and clarification and at the same time secure a high level of consumer protection. These are core pillars of the intended reform that should be fully realised and reflect the Commission's core principles on governance and better regulation.
- UNICE regrets that, in the Communication, the Commission has squandered a golden opportunity to clarify its ideas fully and to provide the supporting evidence for the reform and information demanded by the majority of stakeholders, in particular from business circles. Particularly, UNICE urges the Commission to make public the list of alleged cross-border barriers triggered by the variety of national rules and jurisprudence that require EU intervention.
- UNICE feels that the views of representative business stakeholders have not been sufficiently considered during the consultation process. UNICE urges that business as a major stakeholder is fully involved in the debate as it is taken forward so that consensus on the legitimacy and appropriateness of EU action can be developed. It is crucial when evaluating responses that the weight and representativeness of consulted stakeholders is considered as a key element.
- Clarification is also necessary on the impact of the intended framework directive on the existing EU *acquis*, case law and codes of conduct in the field of consumer protection. Likewise, The Commission should explain clearly the interaction of this "umbrella legislation" with the existing sectoral rules. Therefore, UNICE calls on the Commission to carry out a simultaneous review of the relevant existing rules as discussions on the framework directive progress. This information should be made quickly available.
- UNICE is seriously concerned about the interaction between the general clause, the exhaustive list of categories, the list of examples, codes and non-binding guidance and how the proposed means are going to bring about simplification and genuine harmonisation of existing rules. The competitiveness of European companies cannot afford a regulatory overhaul that results in a multiplication of rules, legal uncertainty and increased compliance costs.
- The proposal to add legal consequence to non-compliance with a self-regulatory code still raises some concerns and needs to be further explored. This hard measure could diminish business investment in codes and overlook national experience and practice on self-regulatory codes.
- The shortage of information leaves UNICE no option but to reiterate its scepticism about this proposal and its urgent call for clear and substantive responses to the many vital questions that the Commission's proposals have prompted among interested parties before work moves forward.

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I. PRELIMINARY REMARKS

UNICE has noted the publication on 11 June 2002 of the above-mentioned Communication as the follow-up to the green paper on EU consumer protection.

UNICE welcomes the further consultation and research envisaged by the Commission and reaffirms its willingness to maintain its active contribution to this debate. UNICE also welcomes the fact that a proposal on enforcement is currently in preparation with a view to presentation by the end of 2002.

UNICE has participated keenly in the debate launched by the green paper from the very outset, and issued its position paper in January 2001^{*}.

Given the magnitude of the reform outlined, UNICE called on the Commission to adopt a white paper containing further hard evidence on need and adequate information about the details that would enable stakeholders to examine the Commission's novel plans fully and to make an informed choice on the options suggested. This was supported by other business circles and interested parties.

UNICE is disappointed that the Commission disregarded the call for a white paper and decided to expedite the process and consult further only on its favoured 'mixed approach' based on a framework directive on fair commercial practices.

UNICE reiterates that a fully operational internal market is an ongoing endeavour that should have as leading principles improvement of European companies' competitiveness and consumer well-being. In this context, any proposals at EU level should not dissociate these two elements when its impact is assessed. The Commission still has to clarify to European businesses what are the practical advantages that this reform will bring about vis-à-vis the current situation and how the tools and mechanisms proposed are going to attain the objectives sought. The competitiveness of European companies cannot afford a regulatory overhaul that results in a multiplication of rules, legal uncertainty and increased compliance costs.

Commissioner Byrne has stated on several occasions that this proposal represents one of the first examples and a test case of the development in a concrete policy area of the governance and better regulation ideas.

UNICE attaches the utmost importance to initiatives whose aim is to simplify and streamline the regulatory framework. This is at the heart of the European governance and better lawmaking agenda. This is of particular interest for SMEs that may find it more difficult to participate fully in a cross-border market if a complicated plethora of rules is to be observed. While it is a primary responsibility of public authorities, members of civil society, and in particular, business stakeholders also have a strong role in the overall quest for better regulation and regulatory simplification.

Therefore, UNICE believes that the proposed reform can only meet the afore-mentioned objectives successfully if, prior to any development of this ambitious proposal, the Commission furnishes the necessary back-up which should consist of substantive evidence of the need for EU action, guarantees of its workability and the adequate support of the main stakeholders concerned: business

^{*} See UNICE response to the Commission green paper on EU consumer protection of 10 January 2001.

and consumers. For that purpose, the findings and results of the further consultation and research envisaged should serve as the basis for any further work. It is also important that the consultation process is carried out in full transparency, involving all interested parties and providing them with the necessary elements to build up a substantiated decision within an appropriate time frame.

Furthermore, the link between the present proposal and other ongoing discussions such as the above-mentioned on European governance and better law-making or contract law calls for a coordinated approach to ensure that the proposals are fully debated.

II. SPECIAL OBSERVATIONS ON THE CONSULTATION PROCESS CARRIED OUT BY THE COMMISSION

The Communication includes a summary of the content and a chart with numerical findings on the responses received during the consultation period that followed the October 2001 green paper.

UNICE, as the voice of more than 16 millions of small, medium-sized and large companies active in Europe, has already communicated its observations about the Commission's preliminary evaluation of the responses and still remains highly sceptical about the way these responses have been interpreted in particular, about the alleged divided position of business representatives.

The Commission assumes that respondents broadly agree with its main ideas while acknowledging at the same time the urgent need for further consultation and research on the details of the "mixed approach" with the exception of enforcement.

This assessment is at the least surprising for the business community. Given the scarce information and the lack of clarity of the green paper, it seems difficult to deliver definite views on the options without calling for supplementary information and clarification. Most respondents, including Member States, called for further clarification to understand the Commission's ideas.

UNICE believes that only when sufficient substantive information is provided can an objective analysis be made of the responses to determine support for the Commission's plans, in particular for the instruments to achieve the objectives sought.

UNICE has not perceived such a division of opinion amongst business representatives in its internal and external discussions. Quite the contrary, a rather general scepticism and a call for adequate information and clarification on most elements of the green paper were the common denominator.

Against that background, UNICE feels that the views of representative business stakeholders, major respondents to the consultation, have not been sufficiently considered. The assessment of responses made by the Commission does not seem to reflect a balanced evaluation of the importance of the interests represented. If the intended reform is to affect and regulate the way companies of all sizes operate with consumers, UNICE considers it crucial when responses are evaluated, that the weight and representativeness of consulted stakeholders is considered as a key element.

The Commission's planned reform is a far-reaching proposal and it needs to be built on the consensus of all-stakeholders, especially of those who are deemed to benefit from it: European business and consumers. UNICE has recently issued detailed views on the Commission Communication on consultation and dialogue.*

Given this situation, it is difficult to accept that sufficient mandate has been given by representative stakeholders during the first consultation to work on the elaboration of a framework directive.

UNICE therefore calls on the Commission to guarantee that further debate and consultation take place in an unhurried and transparent consultation process where the interested parties can assess the implications of the novel ideas fully. The findings of the consultation coupled with the results of the research and expert work envisaged should provide an adequate basis to decide what option is the most appropriate.

* See UNICE comments on Commission Communication "Towards a reinforced culture of culture of consultation and dialogue" of 30 July 2002.

III. CONTENT OF THE COMMUNICATION

A. Evidence on the need for the Commission's intended reform

UNICE continues to doubt about Commission's assumption that the mere disparities in national consumer protection laws, the prospect of an enlarged Europe, the new currency and the use of e-commerce can justify "per se" a fundamental shift of the current situation regarding consumer protection in the internal market.

The Commission argues that price divergences and low consumer confidence in purchasing products cross-border are also consequences of national differences in consumer protection regulations. UNICE considers these arguments neither convincing nor sufficient. It is still to be demonstrated that price variations are directly linked to diverse national rules governing B2C commercial relationships. Price divergences also exist within a member state and even within a region, and respond to a number of factors that have little to do with differences in fair trade regulations but mostly with socio-economic circumstances.

The Commission again falls short of providing substantive evidence justifying EU action and showing the internal market added value.

UNICE would therefore urge the Commission to make public the list of alleged barriers triggered by the variety of national rules and jurisprudence on business-to consumer (B2C) commercial practices and that act as obstacles to the internal market before moving ahead with a legislative proposal. This basic demand for robust evidence of the scope and impact of the proposed clause is an elementary condition that should accompany any proposal for reform, and it is in line with the central principles of the better regulation ideas.

UNICE is of the opinion that the protection and the confidence of consumers in the internal market have been progressively and substantially enhanced during the past years. Moreover, new regulations will not be a panacea for creating consumer interest in shopping abroad. The choice depends on various factors connected with behavioural, cultural, geographical, societal and personal reasons which are unconnected with existing rules.

The case for regulation at Community level in this area should be sufficiently established on the basis of improvement or contribution for the functioning of the internal market. It appears that the projected reform mainly seeks to change the perception that EU consumers possess of the internal market so that they feel equally confident when they shop in their domestic markets as abroad. Perception is an element that responds to a great extent to personal and individual experiences. Regulations can play a limited role here and should be intended to facilitate cross-border shopping rather than to induce consumers to opt for it.

UNICE has always advocated that, prior to such wide-ranging reform, it is vital that the following requirements are fully respected on a verifiable and objective basis:

- ▶ clear identification of the barriers and shortcomings hindering cross-border trade,
- ▶ full respect of the principles of subsidiarity, necessity and proportionality,
- ▶ provision of adequate information about the impact on the existing EU rules as well as on jurisprudence and codes of conduct,
- ▶ provision of sufficient factual evidence and guarantees as to viability and effectiveness of the measures to achieve the objectives sought.

Information on those conditions should be made available to the interested parties when they are consulted. These requirements are in line with the Commission's governance agenda and the principles set out in the better regulation initiative, and should provide the necessary background to take an informed decision on the most appropriate instruments to achieve a given policy goal.

Against this background, UNICE cannot but question the legitimacy of the Commission to pursue the mixed approach while delaying work to demonstrate its workability and impact for a later stage.

B. Next steps proposed by the Commission

B.1 Further investigation and research

The Communication lists a series of initiatives seeking to ascertain the feasibility of the “mixed approach” and especially of its central element, a framework directive.

They include several surveys, an impact assessment and a list of the relevant obstacles to cross-border trade. Additionally, the Commission plans to establish expert groups from national governments and national academics to investigate whether such a framework directive can operate at European level.

UNICE does not understand well the procedural arrangements followed by the Commission. It is odd to consult on reform of an area when clear information about the shortcomings to be tackled, the impact and the workability of the reform pursued is not available. Deferring the viability and impact assessment to a later stage may result in a waste of legislators’ time and, if the legislative proposal is adopted first, it may give rise to unpredictable consequences regarding the status quo.

UNICE would like to see the afore-mentioned further work performed and discussed with the interested parties prior to any legal proposal being tabled. It should be the basis for such a decision and should prove that the reform pursued has sufficient guarantees to succeed in achieving its purpose.

Equally, the Commission should make available as rapidly as possible the timetable and procedural arrangements for the announced next steps, namely the creation of expert groups, tenders for the surveys, organisation of stakeholder consultation, etc.

B.2 Enforcement

UNICE is happy that the Commission will work on the establishment of an appropriate framework for enforcement cooperation with the aim of adopting a proposal by the end of 2002. Industry has long argued that consistent and even enforcement of existing rules should redound in increased confidence in the market and less recourse to new regulation.

UNICE encourages the Commission to draw experience from the existing enforcement bodies in the Member States and to combine the existing informal cooperation arrangements between public bodies with some degree of formal cooperation. It should also take into account the practice from private-sector-led bodies that also contribute to enforcing consumer protection rules.

UNICE attaches particular importance to the issues concerning disclosure and exchange of commercial information between enforcement bodies. It advocates establishment of clear and strict safeguards to protect commercially sensitive company information in rules covering information exchange.

Hence, UNICE asks the Commission to consult with stakeholders, including business, on the legislative proposal as it is developed.

B.3 A framework directive on fair trade

UNICE notes that the Commission has chosen the framework directive as the most appropriate tool to simplify and harmonise the existing regulatory framework on the basis of maximum harmonisation and a high level of consumer protection.

It is intended to act as an “umbrella directive” or “safety net” to eliminate all unfair B2C commercial practices on the basis of a general clause enshrining a duty for businesses not to engage in unfair practices. The follow-up Communication particularly seeks views on the outline of the content of the framework directive that is attached thereto.

UNICE wishes to clarify that its observations on the attached outline indicated in detail below are strictly based on the information provided by the Commission. UNICE reiterates the need for further information and clarification which would permit stakeholders to examine this proposal fully.

C. Outline of the proposed framework directive

C.1 Purpose of the directive

UNICE welcomes the directive's aim to harmonise and simplify the existing EU rules governing B2C commercial practices and to bring about a high level of consumer protection common to all Member States.

One of the greatest concerns for EU companies is the impact of the directive on the existing EU *acquis* in the field of B2C commercial practices as well as its interaction with the remaining and future sectoral legislation that may be enacted.

UNICE understands that the concrete amendment of those rules is to be assessed when the detail of the directive is decided. However, it is legitimate to ask the Commission to clarify as much as possible what is the impact of the directive on the existing *acquis* and how the resulting legal framework will function. Would it lead to the removal of existing minimum clauses from the existing directives, as was initially intended, or would it leave the level of harmonisation open for negotiation with the Member States?

Business fears a situation identical to the general product safety directive which, intended to fill in gaps in sectoral safety directives, requires complementary guidance to clarify the functioning of the general law vis-à-vis the sectoral rules. UNICE would like to see clarification on this general vs. sectoral legislation relationship prior to any legal proposal being tabled.

Clarification is also necessary as regards the impact of the directive on national law, jurisprudence and regulatory, quasi-regulatory (e.g. ombudsman) and self-regulatory structures. While these questions appear detailed, it is important that they are answered.

UNICE recognises that a detailed regulatory impact assessment may be premature at this stage. However, it considers it essential that the Commission spells out the specific directives that the directive is going to affect, whether it entails repeal, amendment or consolidation. So far there is practically no information about what rules would be affected.

UNICE believes that a framework directive introducing a general duty will only deliver to European business if it provides de-layering of the regulatory framework and a reduction in the burden of compliance for business. This would reflect the current commitment of the Commission to reduce the amount of EU legislation by 25% by 2005 as part of its better regulation package.

In the light of the foregoing, UNICE urges the Commission to ensure that a simultaneous update and review of the existing *acquis* is carried out in parallel with the elaboration of the legislative proposal. This is vital in order to ascertain the ability of the reform to meet the ambitious objectives of regulatory simplification and clarification.

UNICE welcomes the Commission's support for a proposal based on maximum harmonisation. As was stated in the UNICE response to the Green Paper, UNICE considers that maximum harmonisation approach is an appropriate way of securing harmonisation in a single market. However UNICE wants also to make sure that this approach is one that is viable for both consumers and business. It should seek to empower and not to overprotect. UNICE has some doubts about how the Commission will be able to deliver this.

UNICE is also concerned about the implementation and interpretation of the directive. If this directive is to set out EU core principles for commercial practices, it is of vital importance that the utmost efforts are deployed to ensure that the directive's provisions are understood and enforced evenly by all Member States.

At present, UNICE is not persuaded that a general clause illustrated by fairness categories and complemented by indicative lists, codes and non-binding guidance is sufficient to bring about a harmonised approach to protection against unfair commercial practices. Quite the opposite, it leaves considerable room for fragmented interpretation of the directive which could have undesired consequences and would cause severe legal uncertainty.

UNICE urges the Commission to investigate the above-mentioned issues further and to make available the findings before any further work is done.

C.2 Scope of the directive

UNICE notes that the scope of the directive will cover the broader concept of all commercial practices and in particular that the primary focus would be only on unfair commercial practices.

UNICE understands that the directive would indicate which practices are to be regarded as unfair and, therefore, unlawful at EU level. UNICE considers this approach more appropriate and for which a consensus would in principle be less problematic. However, it is concerned about the real material remit of the directive since B2C commercial practices is a very wide concept.

UNICE is also supportive of the exclusion of business-to-business practices from the scope of this initiative.

The reference to the use of the country of origin and mutual recognition principles merits special mention. As indicated in its position paper of January 2002, UNICE thinks that these principles are basic pillars for a fully operational internal market and their interaction with a harmonised general clause could help to achieve a reasonable balance between the interests of relevant parties and a simple and predictable legislative framework. UNICE believes that express reference to these principles in the framework directive is fundamental.

The Commission intends to include the directive under the scope covered by the injunctions directive. This would mean that public or non-public entities qualified under the said directive could bring an action before the competent authorities or courts to stop a given practice that is considered unfair according to the framework directive. UNICE believes that availability of effective remedies in cases of unfair practices is a key element from the consumer protection angle and has no objection in principle to its inclusion. However, given the uncertainty about the scope of the directive and further study and research still pending, this link merits further consideration and debate.

As for the possibility of introducing an autonomous action to be exercised by enforcement authorities and consumer organisations, UNICE considers provision for this additional action at EU level inappropriate and disproportionate. Consumers are sufficiently protected by the existing mechanisms and it could lead to increased litigation that would seriously hinder B2C commercial relations. This would be particularly problematic in cross-border situations.

The Communication also provides that this directive should give rise to liability for damages in cases of serious breaches of specific provisions therein. This needs further clarification as to under what circumstances and for what type of damages liability could be requested. Given that all Member States have specific tort and remedies laws, it is not clear how this suggested provision would function. UNICE does not think that the Communication should deal with these issues here and suggests that this far-reaching proposal is discussed in a more appropriate forum where harmonisation of national tort law is specifically addressed.

Finally, it is also of extreme importance for the sake of coherence and legal certainty, that other ongoing discussions that deal with concepts of fair/unfair practices do not prejudge the results of the present proposal. It does not seem appropriate that the notion of unfair practices is used in other proposals when the viability of a EU-wide notion is to be assessed during the preparatory work planned in the follow-up Communication.

A good example is the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations¹, and in particular article 6 that deals with non-contractual obligations arising from unfair practices that affect the collective interests of consumers. The latter, being a notion that does not exist at EU level and the assessment of which is currently under discussion in the context of the Communication, should not be used in other legal texts which may enter into force before those discussions have been concluded.

C.3 General clause: “the consumer detriment test”

Without prejudice to the comments expressed in this paper, UNICE welcomes that the general clause would consist of a duty not to engage in unfair commercial practices rather than on an

¹ You can find the full text at the Justice and Home Affairs Directorate-General's website: http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm

obligation to trade fairly, which would risk determining what is desirable and would prescribe the best practice arrangements that businesses can opt for.

UNICE particularly concerned about one of the components of the general clause. It is not clear how the “consumer detriment test” would function and which standards and patterns would be employed to assess it. Would it for instance require that substantial damage or injury must be demonstrated or that material economic damage or injury should be shown?.

It is obvious that the level must show the damage to be significant and not merely trivial. This would need to be an objective test, applied in accordance with objective and measurable criteria.

The proposal to assess it against the standard of the consumer of average intelligence, reasonably well informed and reasonably circumspect as defined by the European Court of Justice is workable. The test is to be an integral part of the standard by which the fairness of commercial behaviour is to be judged. It will lay down the basis for the evidence needed to show whether a breach of the general clause has taken place. Enforcers and business will need clarity in terms of the evidence which will be required to establish infringement of the general duty.

Moreover, it is still to be justified how a general duty not to trade unfairly at European level is going to be implemented and interpreted uniformly across Europe when there is no single concept or common understanding of what unfair means. There is a considerable risk of creating legal uncertainty and complicating rather than simplifying the current situation. This is something that should be avoided at all costs.

In the light of the foregoing, UNICE continues to doubt whether a general duty not to engage in unfair practices that is to be applied at European level will offer less complexity and a smaller compliance burden.

C.4 Fairness/Unfairness categories

The Commission envisages including in the directive an exhaustive list of categories intended to illustrate and substantiate the general clause. It would set out the common core definitions of what is unfair as concerning different stages of the B2C commercial relationship.

As a general principle, UNICE believes that the use of these categories should be justified only if they are actually the common denominator of unfair practices and not what is desirable or what is already in best practice codes. UNICE agrees with the Commission that categories should not be overly prescriptive.

The clarity and specificity of the categories are of extreme importance to minimise the risk of fragmented national interpretation. UNICE would be more inclined to favour well-determined categories drafted in a clear, concise and unequivocal manner.

The way in which these categories would be applied in tandem with the general clause is unclear and would need further clarification. Similarly, conditions for review and amendment of these practices would need further elaboration.

- Specific comments on the categories proposed:

1. *Misleading commercial practices*

UNICE agrees with the Commission that misleading commercial practices should not be permitted in the internal market. However, the elements used to characterise this category are extremely wide and imprecise. It could encompass an extensive range of activities and not just marketing and advertising as is implied in the examples provided.

In addition, the examples of unfair commercial practices quoted by the European Commission are already banned on the basis either of the above-mentioned Community directives or of national legislation. For instance, the directive on guarantees provides that there must be clarity as to the quality and characteristics of the product on offer, and the directive on misleading advertising already has the effect that businesses must be able to substantiate their claims (advertising in the widest sense of the word).

UNICE continues to believe that the risk of duplication and juxtaposition of rules renders more reasonable and most importantly more viable the route of a sectoral or case-by-case approach.

2. Duty to disclose

The list of information proposed for inclusion in the framework legislation is again a repetition of what already exists in the existing applicable law in particular in the distance selling directive and therefore distant traders already provide that information.

However, the requirements of the general clause will be imposed on top of those contained in the distance selling and e-commerce directives, they appear to require disclosure of further material information according to the needs of a specific consumer. This does not therefore appear to be an objective test and would mean businesses having to make a subjective assessment in each case as to whether additional information should be supplied. An objective standard is necessary so that all parties are clear what information must be supplied in all cases.

We note also the reference to the list being non-exhaustive, hence implying that the list could be extended. The mechanism for doing so is not made clear.

This highlights the difficulty of determining the interaction between existing specific legislation and a general clause. Moreover this section seems to have been drafted specifically with distance selling in mind in that it refers to the fact that “often information is given in brochures and lengthy contracts or in jargon”. Is it really proposed that the information set out in this section is supplied in all face-to-face transactions? A requirement for retailers, for instance, to provide all such information in conventional sales contracts would be extremely burdensome and could result in information overload and confusion for consumers.

3. Use of force, harassment, coercion and undue influence

UNICE deplores any of these practices but is concerned about how these activities will be defined and interpreted. Their understanding may vary depending on the specific situation, parties involved, customary national marketing rules, etc. This would hardly guarantee a minimum level of legal certainty. This will be particularly difficult for those companies operating on a pan-European basis.

4. After Sales Customer Assistance and Complaint Handling

UNICE believes that the level of detail required in relation to complaints handling is unduly prescriptive and may be impracticable. Furthermore, it goes beyond the main purpose of the directive which is to determine the notion of unfair regarding this particular point.

UNICE is of the opinion that this is an area where it would be extremely difficult to set EU common standards against which business would be able to assess whether in any particular circumstances it has acted within the general duty.

The level, quality and content of practices concerning after-sales customer service are to a great degree related to the commercial competitiveness of individual companies. Hence it does not seem appropriate for Community legislation.

One particularly problematic area relates to information about third-party resolution mechanisms; it is not clear whether this is a reference to the involvement of an Ombudsman. There is a notable diversity in the use of Ombudsmen and third-party resolution mechanisms in Member States which make application of a common standard in this area difficult.

Finally, UNICE asks the Commission to bear in mind the costs, especially for SMEs, to comply with requirements as regards provision of complaint-handling procedures. These costs need to be taken into account in any cost impact assessment of the proposals.

C.5 Indicative list of examples

They are proposed to further illustrate the general clause and the unfairness categories. It is unclear how such a list will fulfil the Commission’s objective of increasing legal certainty and consistency across Europe. UNICE calls for some clarification about the following questions:

- The mechanisms and criteria for elaboration, amendment and review of the list.
- While they are to be indicative and non-exhaustive lists attached to the directive, what would be the legal value of these lists? This is particularly relevant in the light of a recent ruling of the ECJ on unfair terms in consumer contracts .

^{*} Case C-478/99, Commission v Sweden, judgement of 7 May 2002.

- It is not clear what would be the content or scope and the details of this list. It is uncertain whether it would contain specific categories of practices or whether it would contain concrete practices and conducts that are regarded as unfair.

UNICE is concerned about this list be used as a “shopping list” to accumulate practices relevant to specific countries. It is vital that the list reflects practices and examples that are common in all Member States.

Pending further information about the afore-mentioned questions, UNICE considers that if the categories are clearly elaborated there should be no need for indicative lists. If there are to be indicative lists at all UNICE believes that they should be short, exhaustive and closed at the time of adoption of the proposal.

UNICE would oppose the development of open lists that would be open to amendment by regulatory committees or advisory committees. Such lists should be decided under a process of full democratic scrutiny.

C.6 Codes of conduct

UNICE appreciates the Communication’s efforts to clarify the Commission’s proposal for development and promotion of EU-wide codes of conduct in the field of consumer protection.

Codes of conduct are valuable and innovative means to enhance responsible self-regulation by businesses and result in added value for consumers. However, the ideas set out in the Commission’s paper still raise fundamental issues that need careful consideration.

In particular, UNICE remains concerned about the proposal of including in the framework directive a provision whereby any non-compliance with a voluntary commitment towards consumers contained in a code would be considered an unfair practice.

Even though breach of a code usually gives rise to legal consequences for the offending party. Yet those consequences depends on the domestic regulatory framework and in occasions responds to the specificities of a given sector.

Although the Communication furnishes further guidance on these ideas, it is still unclear how in practice it will be possible to reconcile the use of this “legally-binding” formula for codes with the variety of self-regulatory practices existing in the Member States.

UNICE fears that such a provision would diminish the business incentive to invest in self-regulatory codes. This would be contrary to the primary aim of facilitating convergence in the use of codes at European level.

Special mention should be made of the question of the impact of this concept of code intended to operate in the EU dimension on the existing national codes. It is important that experience gained at national level is not overlooked or underestimated.

For UNICE, it is essential to clarify how to identify the type of code of conduct which would be concerned by this provision. It specifies that the directive would cover only voluntary firm commitments that concern B2C commercial practices. However, practice shows that certain elements of codes are aspirational and go beyond the role of interpreting or elaborating the law.

It is difficult to see how in practice the line could be drawn between the two elements within one code. It would be extremely confusing, particularly for consumers, to have two different types of commitments within one code, infringement of some of which would be considered to be an unfair practice within the general duty.

UNICE recognises that more could be done to improve self-regulatory processes, and more in particular to ensure that codes are effectively enforced and monitored. However, UNICE does not believe that the current proposal will address those issues successfully unless it is further explored and some questions thoroughly discussed.

In this respect, UNICE would be more in favour of the elaboration of some EU-wide guidance for the use of codes of conduct and other self-regulatory formulas. Those principles or criteria should

be voluntary and applicable to all EU policy areas. It would be regrettable if different approaches were used for the development of codes in the various EU policy areas.

UNICE is of the opinion that the ongoing discussions on governance, and more particularly on the better regulation package, should be the ideal forum to pave a way conducive to common principles for better and more uniform use of alternatives to traditional legislation.

There are two questions briefly introduced in the follow-up Communication that merit special consideration and concern the possibility of devising some sort of public endorsement of codes and the use of the presumption of conformity for the codes elaborated in accordance with the proposed directive provisions. Overall, UNICE believes that these elements need further elaboration and thinking before any concrete line can be supported. However, the following observations are worthy of note:

C.6.a) Public endorsement of codes

On the whole, UNICE remains very cautious about the idea of endorsement of codes by public authorities. Recourse to endorsement or “approval” processes could render the adoption of a code of conduct lengthy and burdensome.

For companies, it is vital that codes are a flexible and easily adaptable instrument. This would be difficult to combine with a systematic use of extensive processes of public scrutiny for their endorsement. UNICE is concerned that such approval mechanisms would make the use of codes unattractive for companies. This would be to the detriment of both business and, more important, of consumers.

Furthermore, UNICE wonders what would happen if an EU-endorsed code did not meet the requirements of some national law and how national codes would change or be impacted by the EU-level endorsement of a code. Why would a national code-owner change its code just because another one had been endorsed at EU level?

UNICE would oppose the idea that recourse to public endorsement of codes may be generalised. It could be suggested that, should there be specific cases in which a code initiator decides to ask for public endorsement, clear criteria for the endorsement process should be defined so that the voluntary nature of the code is preserved.

C.6.b) Presumption of conformity

While acknowledging that further thinking is necessary, UNICE's initial view is that granting a presumption of conformity equivalent to the role played by standards in the context of the so-called “New Approach Directives” give rise to many complex legal and practical questions.

Clarification is needed as to how effectively this would achieve the aim of harmonisation, for example how new entrants to the market might be affected by code standards which are higher than legal requirements, bearing in mind that participation in a code is voluntary.

UNICE is concerned however whether this model will work in the marketing area as they do in the product standards area. In this regard, it is worth noting that in the technical standards area – standards bodies in the EU15 agree to replace national standards with European standards once they are established. In the marketing area, there are 15 different structures for administering and enforcing codes. If this presumption of conformity is to be gained – all interested parties must be involved and must agree to accept an EU code once agreed. It is not clear how this will be achieved.

UNICE is also concerned about the suggestion that any presumption of conformity will “come at a price”. Business would oppose this requirement. This presumption is about conformity with the law. It is not about conformity with more than the law.

In summary, UNICE would urge the Commission to clarify the following questions concerning codes of conduct:

- How is the presumption of conformity supposed to function in the field of consumer protection?

- Who determines that a certain code falls under the definition of the communication: which criteria will determine what is aspirational or best practice and what is a firm commitment to consumers?
- What will be the impact on companies that do not subscribe to a code:
- Interpretation of codes by judges: what would be their status in court?
- What codes with an EU presumption of conformity immediately replace national codes that may have been developed in quasi-regulatory bodies?

C.7 Non-binding guidance

UNICE notes that the Communication envisages further consultation on the production of non-binding guidance intended to clarify and help uniform interpretation and understanding of the directive.

Its elaboration would be entrusted to the Commission and the Member States in consultation with stakeholders. According to the Communication, the consensus of all parties concerned, i.e. the Commission, national authorities and private stakeholders, will be the basis that will ensure that the common interpretation agreed is acceptable to all.

UNICE reiterates the utmost importance of guaranteeing even interpretation and effective enforcement of the directive. However, it remains doubtful about the use of the proposed guidance to attain this target.

It still remains unclear what would be the material scope or areas to be covered by this guidance and the role of the Parliament in its elaboration and review.

UNICE is concerned about the added-value of a non-binding guidance and its impact. We see that guidance could potentially have an important effect in determining the interpretation of the proposals and hence are concerned about its impact.

UNICE is also concerned about the process of developing non-binding guidance. At present the involvement of both Member States and stakeholders is suggested. UNICE urges the Commission to come forward with clearer information about the involvement and role of the different parties in developing the guidance, which is essential to examine the usefulness and the effectiveness of such a proposal.

C.8 Mandated dialogue between stakeholders

On the involvement of stakeholders, UNICE has serious reservations about the current proposal that would empower the Commission alone or together with the Member States to ask stakeholders, namely business and consumer associations, to negotiate and find consensus on certain parts of the guidance within a specific time limit. This amounts to a forced dialogue that could diminish its usefulness and the autonomy of the parties to engage in voluntary ad hoc dialogue.

UNICE is of the opinion that this proposal may result in an extension of the social dialogue into a new area: consumer protection. UNICE does not support this line. The social dialogue at European level is a clearly structured and autonomous process recognised in the Treaty. The role and responsibilities of the social partners cannot be extended to other areas or other players in civil society.

Furthermore, the use of the social dialogue pattern in this field raises to fundamental issues that need to be further investigated such as democratic legitimacy, representativeness, accountability, independence and allocation of adequate resources. Furthermore, it has implications for the ongoing discussions on EU Governance and the "Better Regulation" package and must be developed in tandem with those debates.

UNICE supports better and more regular dialogue between business and consumer organisations at EU level on carefully selected issues of common concern. Dialogue can also offer a preventive approach; it enhances mutual understanding and enables concern to be addressed before they turn into "problems".

UNICE has considerable experience in dialogue with other stakeholders. Worth mentioning is the recent example of the discussions with BEUC (European Consumers' Organisation) in the context of the Commission's "e-confidence" initiative. Both parties agreed that ad hoc discussions in appropriate cases are a useful tool to enhance further cooperation.

Consequently UNICE welcomes any proposals aimed at boosting this dialogue and improving mutual understanding and coordination, and encourages the Commission to follow this route.

IV. CONCLUSIONS

UNICE is happy to see that this debate has revealed the far-reaching implications that the proposed reform might have on the current consumer protection regulatory framework. It is vital that all interested parties are fully aware of the magnitude and potential of this proposal. This will be possible when focus is placed on its details and workability.

UNICE agrees that the current situation can be improved, especially in the context of an increasingly accessible internal market and an enlarged Europe. It is therefore willing to continue further thinking on the ways to reap all benefits of the internal market. However, it must reiterate its doubts about the justification of for the proposed reform.

The Commission again fails to offer evidence of the need for and workability of its strategy. It is not clear what is the internal market value of this proposal. Stakeholders should know clearly what motivates and justifies a proposed EU action, and should be given all safeguards that the objectives are going to be attained.

UNICE remains to be convinced as to whether the "mixed approach" is going to bring about regulatory simplification and reduction of burdens for companies while ensuring a high and uniform level of consumer protection across Europe.

Business trusts that the Commission will take into consideration its objections and doubts and that it will address them during the second stage of consultation. Representative business stakeholders, as a key interested party in this proposal, should be fully consulted on a participative basis in future discussions on this important subject.

In particular, UNICE urges the Commission to work on finding answers to the numerous questions presented in this paper so that European businesses can effectively ascertain what are the implications and scope of the reform under discussion.

Finally, UNICE strongly recommends that the Commission bases any further step or legislative proposal on the findings and input from the projected further research and consultation with stakeholders.

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