22.5/2/1 17 November 2003

PROPOSAL FOR A DIRECTIVE CONCERNING UNFAIR BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES IN THE INTERNAL MARKET

(COM (2003) 356 final)

EXECUTIVE SUMMARY

PART 1 - CONSULTATION PROCESS AND JUSTIFICATION FOR THE DIRECTIVE

Despite a lengthy consultation, UNICE is not happy with the quality of the process:

1. Consultation process was not objective. The choice for the proposed directive was set in stone from the outset while other options were not fully assessed.

2. Extended impact assessment (EIA) was inadequate. It did not cover all possible policy options and did not involve representative EU-wide stakeholders.

UNICE therefore feels that the case for the directive is insufficiently established. It lacks adequate and robust evidence as to the ability of a framework directive based on a general clause to improve the internal market through further regulatory harmonisation. UNICE calls for a clear and transparent methodology for impact assessments that meet minimum standards.

PART 2 - CONTENT OF THE DIRECTIVE

Despite the weakness of the case for the directive, UNICE endorses the general objectives of reducing regulatory burden, securing a high level of consumer protection and improving enforcement of consumer protection rules throughout the EU.

UNICE also acknowledges the Commission's efforts to improve the text of the directive and supports the focus on maximum harmonisation, the internal market clause, and misleading and aggressive acts. They are key elements to ensure legal certainty and can only work if a sufficiently high level of harmonisation is achieved.

However, UNICE fears that the directive may complicate the existing regulatory regime and create additional burdens if substantial changes are not made. It relies on a vague general clause and broad notions that will apply at EU level and leave much scope for wide national interpretation.

UNICE considers it essential that:

- key definitions (e.g. on professional diligence) are clarified;
- the general clause is limited to target misleading and aggressive practices and take account of the duty of due care of consumers when trading;
- the list of misleading activities (art. 6 and 7) is streamlined;
- annex 1 should be exhaustive and subject to amendment only through the revision of the directive. Member States should not be empowered to add other practices at national level;
- further guidance on its relationship with existing sectoral directives and other areas of law (e.g. contract law) is developed before the directive enters into force.

Finally, UNICE reiterates that the success of the directive is closely linked to its consistent interpretation and effective enforcement and therefore urges the Commission to provide the necessary means to guarantee reasonably unified implementation of the directive across Europe.

Union of Industrial and Employers' Confederations of Europe – Union des Confédérations de l'Industrie et des Employeurs d'Europe AISBL
Av. de Cortenbergh 168 - B-1000 Brussels -VAT BE 536.059.612 -Tel. +32(0)2 237.65.11 - Fax +32(0)2 231.14.45 - E-mail: main@unice.be -Website: //www.unice.org

UNICE
THE VOICE OF BUSINESS IN EUROPE

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INTRODUCTION

UNICE has taken note of the adoption by the European Commission on 18 June 2003 of the above-mentioned proposal for a directive (hereafter "the directive" or "the proposed directive"), intended to harmonise national rules on unfair commercial practices.

UNICE has attentively and actively followed this debate from the start, and adopted position papers in reaction to the consultation documents preceding the adoption of the directive.

European companies attach great importance to consumer protection and welcome initiatives that address rogue traders whose practices undermine healthy competition and deceive consumers. Equally important for both business and consumers is to ensure a simple and clear regulatory regime which is applied, interpreted and enforced by national enforcers and judiciaries in the same fashion.

As stated in its charter on consumer policy[*], UNICE considers that a clear-cut regulatory framework is critical for the future of the European governance and better law-making, especially in the context of a EU of 25 countries.

Against this background, UNICE reiterates its support for the objectives of the debate launched by the Commission prior to adoption of the proposed directive, namely:

- to improve the Internal Market by simplifying and harmonising existing rules
- to provide an adequate level of consumer protection across Europe
- to ensure effective and uniform enforcement of consumer protection rules.

Unfortunately, UNICE has still doubts as to whether the directive, as currently drafted, is capable of attaining these objectives. Detailed comments are developed in the following sections that focus on:

- Part I: Consultation process and justification.
- Part II: Content of the directive.

Areas where clarification is needed and specific recommendations are pointed out in each of the sections that follow.

[*] Visit www.unice.org to find out more about the UNICE Charter on consumer policy and the position papers on the green paper of October 2001 and the follow-up Communication of June 2002.

PART I: CONSULTATION PROCESS AND JUSTIFICATION FOR THE DIRECTIVE

I. A Consultation process carried out by the Commission

Stakeholder consultation is key to ensure high-quality regulation, as it draws on the experience and expertise of the parties consulted. It also adds legitimacy to the policy-making process. This is acknowledged by the Commission's European Governance and better regulation programme.

UNICE recognises that the Commission has made efforts to consult interested parties. However, it thinks that the consultation was in many ways token in nature. Despite the length of the consultation, it is still felt that the Commission's commitment to a framework directive (so-called "mixed approach") was set in stone from the outset and that information available and research carried out sought to justify this approach.

UNICE, as one of the key representative business stakeholders, feels that its views were not sufficiently considered and that mostly responses, irrespective of the weight and interests they represented, favourable to the Commission's ideas were highlighted and used to demonstrate stakeholders' support. This is discouraging for consultation participants and contradicts the ideas supported by the Commission for better regulation and governance.

UNICE considers of particular importance the impact assessment that should accompany all new legislative proposals and would like to express separate remarks on the extended impact assessment presented with the proposed directive.

I. B The extended impact assessment (EIA)

In its Work Programme for 2003[*], the Commission stated that the proposed directive would be subject to an extended impact assessment. As stated in the work programme: "*The purpose of the extended impact assessment is to carry out an in-depth analysis of the potential impacts as well as to consult with interested parties and relevant experts according to the Commission's minimum standards for consultation*".

UNICE regrets the fact that the EIA annexed to the directive does not meet the minimum standards for consultation elaborated in the Commission's work programme.

The EIA focuses on the potential benefits of the draft directive, but makes little or no attempt to identify potential disadvantages or adjustments to be made to the current situation. It seems to serve solely as the justification for the decision to proceed with a mixed approach and fails to assess thoroughly the use of other alternatives (e.g. review of existing rules or use of specific/sectoral rules).

The EIA can also not be considered as an "in-depth analysis". It was based predominantly on an *ex-ante* impact report contracted out to an external consulting group. This report was carried out during the summer period of July and August 2002. Only 16 national business organisations representing just five member states responded to this survey. Neither UNICE nor other EU-wide business organisation were consulted or approached.

Based on the findings from the consultation and the impact study, the Commission determined that a directive was required to boost cross-border trade that is stagnating at low levels due to disparities in national laws on commercial practices.

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[*] See page 16, 17 and 26 of the Commission's Legislative and Work Programme for 2003 at http://europa.eu.int/eur-lex/en/com/cnc/2002/act0590en02/1.pdf

I. C Conclusions of Part I

UNICE continues to believe that the case for the directive has not been convincingly made. It is not proven that this directive is the most appropriate instrument to attain the objectives pursued, namely of improving the internal market through further harmonisation of national laws.

UNICE does not question the impact of having to comply with different regulations which is a well-known situation for companies that operate transnationally. However, we feel that new legislation is not demonstrated to be the best way forward and that non-policy-induced factors (e.g. language, taxes, geographical circumstances, etc.) play a more important role than they are credited with.

In particular, studies and research carried out by the Commission fail to shed light as to how the directive is going to operate in an enlarging internal market and most importantly what impact is going to have on the existing regulatory and jurisprudential environment. Before adoption of the proposal, more accurate, representative and in-depth impact assessment involving all stakeholders concerned should have been carried out.

For UNICE, the lack of representativeness and completeness of the extended impact assessment attached to the proposed directive reflect the urgent need to improve the methodology and to enhance transparency in the procedures used to secure minimum standards for impact assessments across the Commission's services.

UNICE recalls that in a recent interinstitutional agreement on better law-making, the three main EU Institutions have reiterated once more the great importance of high-quality legislation being accompanied by solid justification and supporting data from consultation and impact analyses undertaken.

PART II: COMMENTS ON THE CONTENT OF THE DIRECTIVE

Despite weaknesses in the justification for the directive and its impact, UNICE appreciates that a number of comments regarding the actual text of the directive made by business have been taken on board. UNICE is particularly satisfied with the following elements of the directive:

- It emphasises as its primary objective improvement of the internal market via simplification and harmonisation of existing rules.
- It is based on a maximum harmonisation approach combined with the use of the mutual recognition and country of origin principles.
- It focuses on commonly accepted standards of unfairness of commercial practices with the focus on misleading and aggressive practices.

We also have a number of comments on the specific provisions in the directive which are elaborated below.

II.1 Aim of the directive (art. 1)

As stated above and outlined in the explanatory memorandum of the directive, UNICE considers it critical that the directive brings about:

- simplification of the legislative environment and reduction of regulatory burden
- harmonisation of national rules and enhanced legal certainty

- common interpretation and even enforcement.

UNICE therefore welcomes that the directive is based on maximum harmonisation whereby national transposition laws will not be able to depart from the directive provisions. This approach should lead to a sufficiently high level of harmonisation which would enable the use of the country of origin and mutual recognition principles provided for in art. 4.

Impact and interaction with existing rules and jurisprudence:

In the explanatory memorandum of the directive, paragraph 30 attempts to explain how the new directive would interact in the existing legal regime. UNICE believes that in order to ensure legal certainty, further information should be provided on fundamental questions before the directive is adopted:

- How will the directive, intended to act as a "gap-filling" directive, articulate with minimum clauses in existing consumer protection rules? Having a regime consisting of specific rules with minimum harmonisation clauses topped up by a maximum harmonisation framework directive could result in cases where a given practice may be partially regulated by a sectoral directive based on a minimum clause (i.e. covered by the *lex especialis)* and, for certain aspects (e.g. material information to be provided), by the framework directive which is a maximum harmonisation rule. In this context, it remains unclear how the Commission is going to prevent Member States from making use of the remaining minimum harmonisation directives to require additional obligations for fields covered by the directive as stated in the memorandum. It is crucial that the Commission provides the necessary measures to ensure that Member States refrain from using the existing minimum harmonisation rules which allow for national regulatory discrepancies.
- How is the directive going to fit in with the long-standing case law on unfair commercial practices, especially at national level, insofar as it reflects legal, economic and societal regimes which are often different? UNICE is worried that such an effect will need years of court judgements and frequent recourse to the European Court of Justice ("ECJ") for higher advice. Such a situation is undesirable for both companies and consumers.
- How does it interact with other existing areas of law, in particular its relationship with contract law? Breaches of the directive provisions could have an impact on contract law or commercial law.
- What is its relationship with new proposals in preparation (e.g. on consumer credit, on sales promotions or health claims)?

The Commission should develop further guidance to clarify the above-mentioned questions prior to the entry into force of the directive. This should be done in full transparency and with involvement and assistance of business and consumer stakeholders.

Simplification and deregulation effect of the directive:

The proposed directive is presented as an internal market instrument that would reduce the existing regulatory burden. UNICE has always supported this purpose and has constantly asked for a list of the existing rules that would be simplified or repealed by the new directive.

The information provided by the Commission on this regard shows that no more than three directives will be amended, and only partially, merely to take account of the new directive. In reality, the directive will add to the existing regulatory framework. UNICE is disappointed about the meagre regulatory simplification and compliance reduction effect.

Interpretation of the directive by Member States:

The new directive will necessitate a great interpretation effort mainly from national enforcement authorities and judges. This together with the general and conceptual nature of many provisions of the directive may easily lead to fragmented interpretation which would redound in more burdens and costs for companies and endanger European competitiveness.

UNICE reiterates the urgent call for the Commission to provide the necessary means to guarantee reasonably unified implementation of the directive throughout the EU.

II.2 Definitions (art. 2)

Regarding the definition of "*code of conduct*", UNICE suggests the addition of "voluntary" before the word "agreement". It should be made clear that codes are essentially voluntary commitments that reflect exclusively the autonomy of the parties concerned in the agreement. Moreover, this is confirmed in paragraph 68 of the explanatory memorandum.

UNICE notes that the definition of "*professional diligence*" is not a common concept at EU level. This definition is key for even implementation of the directive. Yet it is not clear what source or reference will make it possible to determine the nature of requirements particular to a profession vis-à-vis the consumer in the internal market.

It seems that understanding of this concept would have to draw on customs and practices in the trade sector concerned or legislative, regulatory, administrative and jurisprudential requirements of the national territory where the practice takes place. This opens the possibility for wide interpretation of this concept.

II.3 Scope of the directive (art. 3)

The majority of UNICE members supports the material scope of the directive only covering unfair business-to-consumer (B2C) commercial practices detrimental to consumers' economic interest.

According to the explanatory memorandum, practices which are in principle excluded from the scope of the directive (e.g. corporate social responsibility, taste and decency or pure B2B practices) could come under it provided it is proven an impact on the consumers economic interest and the link with the commercial transaction.

This creates confusion since it increases greatly the number of practices that could be captured by the directive which could include almost any given commercial practice. UNICE would like to see some clarification on this.

UNICE also wonders about the remaining provisions of the misleading advertising directive which will only apply to practices between traders. It is based on minimum harmonisation criteria and hence does not prevent the Member States from deviating from the directive's provisions for adopting more protective measures of traders and competitors [see recitals (2) and (3) and art. 14 (7) of the directive].

For reasons of legal clarity and coherence, it seems reasonable to carry out a review of this directive to assess the feasibility of converting it into a maximum harmonisation directive.

II.4 Internal Market clause: country of origin and mutual recognition principles (art. 4)

UNICE considers that this is a fundamental part of the directive that is key to ensure legal certainty and predictability of the regulatory environment for business and consumers.

However, it is still unclear how these principles are going to articulate with the general prohibition of unfair practices, which by definition is wide and can be used autonomously by national judges to assess any given practice which may result in different verdicts as to the unfairness of the said practice.

The success of the objectives above is then dependent on the achievement of real regulatory harmonisation. To that end, clarity of the scope of the directive and the quality of its provisions are fundamental. A better description of the remits and application of the general clause is particularly relevant. UNICE's proposals are indicated below.

II.5 General clause: "the three-tier unfairness test" (art. 5)

According to the Commission's proposal, the general clause or general prohibition can be applied autonomously when the following three conditions are fulfilled:

- the practice must be contrary to the requirements of professional diligence
- materially distorts or is likely to distort consumer's economic behaviour
- the benchmark consumer is "the average consumer" as established by the ECJ.

UNICE appreciates the efforts to define the different components of the test categorising an unfair practice. Considerable progress has been made to render the test objective.

However, the general clause is still too vague and its free-standing status may easily lead to divergent national interpretation running counter to the primary objective of harmonisation and legal certainty. Enforcers and judges will enjoy wide discretion when they judge a practice against the above-mentioned conditions.

The concept of "professional diligence", one of the three elements that characterise the general clause, poses special difficulties as indicated earlier on. It will most probably be determined by the generally recognised standards of business conduct in the sector and the country concerned.

UNICE would not like to have an EU-wide clause that is understood and interpreted too divergently at national level.

The proposed general clause, as currently drafted, represents a risk for legal certainty and UNICE would therefore prefer to delineate more precisely the remits of the clause by providing that only practices which are misleading or aggressive can be subject to the unfairness review and adding a reference to the due care that consumers should pay when engaging in commercial practices.

We believe that this would provide adequate means to protect consumers from unfair practices and would gain much in legal certainty.

In addition, when judging whether a commercial practice is unfair, be it misleading or aggressive, UNICE thinks it is appropriate to incorporate in the directive a more balanced approach as regards the responsibilities of businesses and those of consumers.

It is fair to ask from consumers minimum care when engaging in commercial transactions, do some basic research and make explicit any special intentions the consumer might have for the product or service. This is even more relevant for modern and fast developing societies where consumers are increasingly empowered and well informed. This approach is present in other legal regimes (e.g. US law) where similar general clauses exist.

UNICE suggests a new wording of art. 5 as follows:

"1. Unfair commercial practices are prohibited.

2. A commercial practice shall be regarded as unfair if, having taken into account that the harm caused is not reasonably avoidable by the average consumer himself and outweighed by countervailing benefits to consumers,

- it is contrary to the requirements of professional diligence, and

- it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is specifically directed to a particular group of consumers, and

- it is misleading or aggressive as defined below in this Directive.

3. Annex 1 contains a list of commercial practices which shall in all circumstances be regarded as unfair."

II. 6 Misleading practices (art. 6 and 7)

UNICE agrees with the Commission that misleading commercial practices, whether they are active actions or omissions, should not be permitted in the internal market.

However, the elements used to characterise these two categories of misleading acts remain overly wide and imprecise in certain provisions. UNICE has the following comments:

Art. 6.1c) deals with price advantages. Clarification is needed as to its relationship with the proposed regulation on sales promotions which also regulates this aspect.

Art. 6.1g) concerns deception of consumers as regards their rights or the risks they may face. This is acceptable insofar as it does not imply any positive requirement for information which would be too vague and impractical. Furthermore, as for information on risks art.6.1 a) already covers it. UNICE suggests to delete the reference to risks.

Art. 6.2c) on breaches of commitments to public authorities. UNICE calls for its deletion. This is clearly a case that should be dealt with by the enforcement arrangements. It is inappropriate to list these cases among the misleading practices. It would imply that some misleading action is repeated, despite the promise not to do so, and should be dealt with accordingly. However, it is not the non-compliance that is misleading but the recurrence of unfair behaviour.

Art. 7.3 introduces a set of mandatory information requirements for traders where there is an invitation to purchase that should be made available in the commercial communication. This clause is disproportionate since there are practical reasons of space and/or transmission time where some information can only be provided on request.

UNICE suggests the following amendment to art.7.1:

To replace *"omits material information"* by *"omits material information or, where there are physical limitations of space or transmission time, fails to make available material information on request, ".*

Provisions on codes of conduct [art. 6.2 b)]

This clause raises particular concerns amongst UNICE members.

UNICE still does not see the reason or justification for enshrining in a legal instrument, and therefore attaching legal consequences to, self-commitments by traders. UNICE supports greater use of alternatives to traditional regulation. Yet, this should not seek to replace or usurp the place of legislation when the latter is required.

The purpose of most codes is to set out good trading practices towards consumers which exceed legal requirements. They reflect a competitive market place.

They encourage innovative and responsive conduct on the part of businesses. They are promoted and developed on a voluntary basis and are not part of the regulatory regime *stricto sensu*. Attaching legal consequences to statements of good practice would undermine the voluntary nature of codes and since it would apply to all existing and future codes, it would result in a disincentive for companies to use self-regulatory mechanisms.

There are further practical problems relating to the clause. It states that a breach of a code will be regarded as an unfair practice if it relates to failure to observe a commitment which is "firm and is capable of being verified". It is difficult to see how in practice the line could be drawn between commitments in a code which are firm and those which may be "aspirational". 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, while others would not.

UNICE believes that deception of consumers in cases of failure by companies to comply with commitments in codes of conduct can be perfectly well assessed on the basis of the proposed provisions on misleading practices.

There is no need for a specific provision on codes that would lead to great confusion, unnecessary litigation and undermine the use and development of codes of conduct.

UNICE therefore calls for the deletion of art 6.2 (b).

II. 7. Enforcement provisions (art. 11, 12 and 13)

Given the wide scope of the directive and its "gap-filling" purpose, UNICE attaches particular importance to the enforcement provisions and calls for the following amendments:

Art. 11.1, last paragraph: UNICE is concerned about the possibility of directing legal action separately or jointly against groups of traders or code owners. Further clarification should be provided for instance to make clear that code owners should only be liable for the conformity of the code with existing law.

Art. 11.2 enables action to be taken where a certain practice is imminent without proof of actual loss or damage, or intention or negligence on the part of the trader. UNICE is greatly troubled by the practical implementation of this provision and asks for its deletion or at the very least, there should be an indication of the standard of evidence/proof which would be required. It should be necessary to establish evidence or some material element to satisfy authorities that it will actually have that effect and that can therefore justify any of the orders provided.

Art. 11.3 (c): UNICE calls for deletion of the word "normally". Administrative authorities should always provide reasons for their decisions. This is a basic principle of good governance.

UNICE would also like to note that although the material scope of the directive only covers B2C and primarily aims at protection of consumers from unfair marketing behaviour, the economic interest of competitors is indirectly also protected to the extent that the directive also protects traders from the harm that competitors may cause on them by using unfair practices towards consumers.

UNICE calls for introduction of a new paragraph at the end of recital n° 5 as follows:

"However, it should also be acknowledged that this directive contributes to fair commercial environment and protection of traders/competitors insofar as unfair commercial practices harming consumers may also harm their interests."

In respect of the more general issue of enforcement of consumer protection rules, UNICE supports improvement of the cooperation between national enforcement bodies on cases of cross-border infringements. In this regard, the proposed regulation on consumer protection cooperation creates a formal network of public authorities for enforcement of the EU *acquis communautaire* on consumer protection. UNICE believes that, prior to creation of new structures, a detailed analysis should have been made to assess the feasibility and impact of the proposed enforcement system on the existing national regimes. More particularly, the obligation for all Member States to designate public enforcement authorities raises concerns insofar as it could undermine existing enforcement structures at national level which often include non-public bodies.

II.8. Annex I: "the blacklist"

It includes concrete practices that will be automatically regarded unlawful in all Member States. The aim of this list is to enhance legal certainty and secure the harmonisation effect of the directive.

UNICE feels uneasy about the use of EU-wide ex-ante bans in the field of marketing practices which is a fast changing and innovative environment.

It seems difficult to declare the unfairness of a specific practice without at least make a basic assessment of the circumstances and actors involved. There should be some room for interpretation by judges in order to confirm the unlawfulness of the practice.

In addition, UNICE fears that Member States, when enacting their national transposition laws, can add to their lists practices over and above the ones covered in the directive. The use of this capacity by Member States would water down the directive's objective of increasing legal certainty and regulatory harmonisation of national rules.

1. UNICE would only support the use of Annex I provide the following conditions are met:

- The list is exhaustive and Member States are not able to add other examples at national level. Review and modification of the list should be **only** possible by amendment of the directive. This should be made explicit in the body of the directive.

- Practices in the list are set at a reasonable level and do not any cast doubt on their unlawfulness irrespective of the Member State. They must, in all circumstances, result in material distortion of the average consumer's economic behaviour and be contrary to professional diligence.

-¨They are drafted in a clear and unambiguous fashion.

2. If the conditions above-mentioned are not respected, UNICE would prefer that the list only contains practices that "are generally considered unfair" and serve as an interpretative tool for judges/enforcers to help implementation of the directive. Practices contained therein would be under the presumption of unfairness and judged/enforcers would have to assess the specific circumstances of the case in order to confirm or dismiss that presumption.

Specific comments on Annex 1:

Section on misleading commercial practices:

- paragraph (6) refers to language for after-sales services. It is disproportionate and too burdensome on businesses, especially for small and medium traders who often operate with foreign consumers or are situated in border areas. UNICE asks for its deletion.

- paragraph (7) concerns illegal selling of products. It could only be practical if it is limited to the country where the trader is established.

UNICE recommends the following drafting:

" (7) Stating that a product can legally be sold in the territory where the trader is established when it cannot."

Section on aggressive commercial practices:

- paragraph (3) on unwanted solicitations. This is already regulated in art. 13 of Directive 2002/58/EC on privacy and electronic communications. Clarification is needed on the need to regulate it again in the proposed directive and its link with the said existing legislation.

- paragraph (4) deals with cases of misfortune and serious illness. UNICE understands the delicacy and sensitivity of these situations and rejects any abuse by traders. However, we oppose a absolute ban on these cases. This would make it impossible for legitimate businesses such as undertakers to offer and sell their products to help consumers at times of illness, misfortune, or other unfortunate circumstances. UNICE considers that possible abuses are covered by art. 9 (c) dealing with the use of harassment, coercion and undue influence and thus we ask for deletion of this paragraph.

- paragraph (6) makes a reference to marketing to children. It uses the concept of "acceptance by a peer" which is an overly relative concept. UNICE thinks that this issue should not be addressed in a legal text. There are already effective and recognised codes and guidelines protecting children from harmful advertising such as the ICC International Code of Advertising Practices and its national adaptations.

UNICE calls for deletion of Annex 1, section "Aggressive commercial practices", par. (6) and possibly insertion of a reference to existing self-regulation in the recitals as follows:

"The ICC codes include specific provisions on advertising to children. National self-regulatory codes, based on the ICC codes, are established, policed and enforced by national self-regulatory organizations and industry across the European Union. The ICC and national codes are reviewed regularly to ensure that they remain relevant to consumer concerns and that they promote best practice".

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