

UNICE COMMENTS ON PHILLIP WHITEHEAD'S DRAFT OPINION OF 24 NOVEMBER (ENVI)

on

Proposal for a directive concerning unfair business-to-consumer commercial
practices in the internal market

(COM (2003) 356 FINAL)

Introduction

Despite the weakness of the impact study and the justification for the directive as the best instrument to attain the aims sought, UNICE is in full alignment with the general objectives of simplifying the regulatory environment, securing a high level of consumer protection and improving enforcement of consumer protection rules in the EU.

Over-regulation, increased bureaucracy and unnecessary legislative burden has become one of the main obstacles to European competitiveness and is a great preoccupation for UNICE.

UNICE advocates a simplification of rules and reduction of regulatory burden as one of the solutions to unleash the potential of the enlarging internal market and economic growth in Europe. This is also at the centre of the Commission's agenda for better regulation.

Simplification and harmonisation of rules governing unfair commercial practices will result in enhanced legal certainty and will ease better enforcement for the benefit of consumers and business alike.

UNICE considers it fundamental for attainment of those objectives that the directive:

1. it is based on 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.
2. it is modified so that the room for disparate national interpretation is reduced: UNICE calls for a more rigorous general clause, better definitions, an exhaustive black list and guidance on interaction with existing rules.
3. The directive should be accompanied by strong and effective enforcement mechanisms which ensure uniform and efficient enforcement of rules

UNICE hopes that you can take into account its observations and proposed amendments below prepared in reaction to the draft opinion by Phillip Whitehead of 24 November tabled in the Environment Committee.

In case you have not received the detailed UNICE position paper on the proposed directive dated 17 November 2003, you can find it at www.unice.org or send an email to c.alaraz@unice.be to receive a copy.

Amendment 1: UNICE does not see legal grounds for using art 153 and calls for its rejection. Art 95 is the correct legal basis for measures intended to improve the internal market and art 95. 3 provides that those measures must ensure a high level of consumer protection. Art 95 deals with EU action to help establishment of the internal market, a market for the benefit of both consumers and business.

Amendments 2, 3 and 14: UNICE is worried about the implications of these amendments and calls for their deletion. They would result in a directive "à la carte" and this would run counter to the aim of the directive which is to crack down via regulatory harmonisation the barriers caused by divergent national rules and that act as deterrent for consumers and companies to engage in cross-border commercial activities. With this aim in mind, in UNICE's views a maximum harmonisation approach combined with the mutual recognition principle is the best guarantee to achieve those objectives. However, UNICE does not support this approach at all costs and prefers a case-by-case assessment.

In the case of the directive, UNICE considers that increased convergence of laws is a fundamental part of the directive to ensure legal clarity and predictability of the regulatory environment and to ensure a common high level of consumer protection across Europe.

It seems that some confusion exists between those principles and the level of consumer protection to be chosen as the common denominator in the directive. This level will depend on the provisions contained in the directive which should reflect a fair balance between the different national consumer protection systems including those of the acceding countries. UNICE is hopeful that a compromise between EU institutions with the assistance of consumer and business stakeholders will determine the said level.

Amendment 4: We call for its rejection. It complicates the scope of the directive and contradicts the Commission's statement on lack of link between the directive and contract law. Further clarification is needed prior to make a express link to aspects of the contractual relationship between companies and consumer which should be strictly regulated by contract law and therefore not covered in this directive.

Amendment 5, 7 and 23: We oppose special provisions in the directive for particular groups of consumers. In the Commission's text, it is clear that, when the average consumer test is assessed, where a specific group of consumers is involved, be it children, elderly, disabled people or holiday consumers, the average member of that group should be the object of the test and therefore special characteristics and circumstances will be taken into account. This ensures at the same time a certain objectivity and measurability in the test and provides the means to protect those vulnerable groups adequately.

Amendments 6, 16, 26 and 27 are particularly welcome because they clarify and improve the directive's provisions.

Amendment 9: It increases the legal uncertainty of the directive and should be rejected.

Amendment 11: The use of physical force is normally regulated by criminal law and therefore should not be covered by the directive. This amendment should be rejected.

Amendment 16: The purpose of the proposed amendment is difficult to understand. It would imply a positive obligation to inform that would be only acceptable if it is provided for in the relevant applicable law of the product concerned. Furthermore, as for information on risks art.6.1 a) of the directive already covers it and therefore it is not necessary to repeat it in art 6.1g). UNICE suggests rejection of the amendment and calls for deletion of the part on risks in art. 6.1g).

Amendment 17: UNICE opposes this amendment. The directive does not in any way affect the choice of products offered, it aims at eliminating deliberately confusing marketing

techniques that involve “look-alikes”. If consumers are deceived by these techniques, they should be covered by the directive and therefore this provision in the directive should remain.

Amendment 22: UNICE does not oppose the idea of a list of material information that should be known by the consumer. We do not oppose this provided that companies are only required to ensure that the information is "made available" to the consumer. Amendment 22 goes further calling for information to be "displayed". Display of all the mandatory information foreseen is simply not realistic and impractical when space is limited (e.g. on a small pack, or banner ad). We call for the rejection of this amendment.

Amendments 24 and 36: UNICE calls for rejection of these amendments. Legislation should not dictate the use, content and enforcement of codes. This would seriously undermine the development of codes running counter to the objective of the Commission with the subsequent loss for consumers. Public authorities should ensure that the content of codes is in conformity with applicable law.

Amendment 25: UNICE opposes this amendment. It is far from clear what the justification to introduce such collective or class actions in the field of consumer law. This needs separate and thorough discussion in a more horizontal fashion.

Amendment 29: UNICE can only support it if the words "identical to" are removed.

Amendment 32: it should be rejected because it is a variation on the practices already covered in amendment 33 and therefore redundant.

Amendment 38: it should be rejected because it deals with practices which fall under the scope of the proposed regulation on sales promotions which are still under discussion in parallel.

Amendment 41: UNICE calls for its rejection. The directive uses the concept of "acceptance by a peer" which is an overly relative concept and is not commensurate with the legal certainty that the black list must ensure. 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.

Amendment 42: It should be rejected. It is unclear what promotion of anti-social or dangerous behaviors mean. There can be much divergent understanding of those terms which may also change as society evolves. It is also closely linked to ethical and moral parameters that may have nothing to do with the economic interest of consumers.

Amendment 43: It overlaps with contract law. This directive should not regulate the contractual relationship. This amendment should therefore be rejected.

Amendment 44: It is not for the directive to deal with financial services which is regulated by specific law. Furthermore, this amendment would preclude the ongoing discussions on the proposed directive on consumer credit which would take precedence over the directive on unfair practices.

Amendment 45: it is overly prescriptive and difficult to implement and police. The amendment dictates what is fair rather than illustrating an unfair practice, which is not its purpose. It seems more reasonable that the simple refusal to respond to complaints is categorised as an unfair practice. It should be rejected.

Amendment 46: It should be rejected. It is subjective and difficult to enforce since it can vary depending on the service in question. It is not suitable to be included in the annex. These practices should be assessed in the light of other provisions of the directive or against the general clause.

UNICE AMENDMENTS TO

Proposal for a directive concerning unfair business-to-consumer commercial practices in the internal market

(COM (2003) 356 FINAL)

ENVIRONMENT COMMITTEE

Text proposed by the Commission

Amendments suggested by UNICE

Article 7 – Misleading omissions

1. A commercial practice shall be regarded as misleading which, in its factual context, taking account of all its features and circumstances, **omits material information** that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(...)

1. A commercial practice shall be regarded as misleading which, in its factual context, taking account of all its features and circumstances, **omits material information or, where there are physical limitations of space or transmission time, fails to make available material information on request**, that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(...)

Justification

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. UNICE does not oppose the idea of a list of material information that should be known by the consumer. However, this clause is disproportionate since there are practical reasons of space and/or transmission time which mean that some information can only be provided on request.

Text proposed by the Commission

Amendments suggested by UNICE

Annex I section “Aggressive commercial practices” point (6)

(6).Advertising to children in a way which implies that their acceptance by their peers is dependent on their parents buying them a particular product. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.

(...)

~~(6).Advertising to children in a way which implies that their acceptance by their peers is dependent on their parents buying them a particular product. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.~~

New recital “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 organisations 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”.

(...)

Justification

The directive uses the concept of "acceptance by a peer" which is an overly relative concept and is not commensurate with the legal certainty that the black list must ensure 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.

New recital concerning the list of Annex I

Recital 10a

Whereas, for the purposes of this Directive and because of the maximum character of the Directive, the annexed list of unfair commercial practices shall not be the subject of amplification or more restrictive editing by the Member States in their national laws; the same single list will apply in all Member States and can only be modified in the same way as the rest of the directive;

Justification

If Member States, when enacting their national transposition laws, can add to their lists practices over and above the ones covered in the directive, this would water down the directive's objective of increasing legal certainty and regulatory harmonisation of national rules. Changes to the list should be agreed by all Member States within the legislative process followed for adoption of the directive.