

**UNICE* SPEECH BY CARLOS ALMARAZ AT THE EURO
COOP SEMINAR ON 31 OCTOBER 2003 IN BRUSSELS**

SUBJECT: UNFAIR COMMERCIAL PRACTICES & CODES OF CONDUCT

1. UNICE AND STAKEHOLDER DIALOGUE

UNICE and its national members continue to be very committed to contributing to balanced consumer protection and enhanced consumer confidence in Europe. We firmly believe that it will help to improve the internal market for all and will benefit the competitiveness of companies.

UNICE also keeps promoting stakeholder dialogue and in particular dialogue with consumer representatives. We are therefore delighted to be at this seminar and strengthen our contact with Euro Coop which since the 50s has been an active advocate of consumer interests in Europe.

UNICE has considerable experience in stakeholder dialogue, not only with consumer organisations but also in broader fora such as the ESC. This dialogue can help elaboration of a more efficient consumer policy which enables the fast changing internal market to meet consumer and business expectations equally. Good examples of business-consumer dialogue are the “e-confidence initiative” between UNICE and BEUC or the ongoing work to produce a guide on product recall.

These ideas are enshrined in a recent UNICE publication or charter entitled *“Business and consumers: working together for the internal market”* that you may already have seen.

The publication, one of the few of this kind issued by an umbrella industry association, illustrates ongoing efforts by business to contribute to consumer protection and satisfaction and shows practical examples of business-consumer partnership in projects of common interest. The charter is accessible on our website www.unice.org

2. UNICE AND THE PROPOSAL ON UNFAIR COMMERCIAL PRACTICES

After many months of consultation, debate and elaboration of an impact study of the proposal, the Commission decided to adopt a proposal for a directive aimed to improve the internal market and ensure a common high level of consumer protection. To this end the new rule is intended to harmonise national rules dealing with commercial practices between companies and consumers. It should result in increased cross-border trade and higher consumer confidence.

UNICE has followed this debate from its very outset and endorses the above-mentioned objectives. It has also called repeatedly on the Commission to show adequate evidence for new legislation and an impact study to assess implications both for the existing regulatory regime and for the main stakeholders concerned.

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UNICE is unhappy with the Commission's preparatory work and especially with the impact assessment carried out. This proposal is complex and innovative and the utmost should have been done to ensure that it is going to work in practice.

The incompleteness of the impact study that focused mainly on theoretical proposals and was limited to the option preferred by the Commission, and the lack of representativeness of the respondents (not a single EU-wide organisation was consulted and respondents covered only 5 MS) undermines the quality of this study.

UNICE therefore feels that the case for the directive being the most appropriate means to improve the internal market through further harmonisation of rules on commercial practices is insufficiently established. Also more thought should have been given to a review of existing legislation prior to a proposal for new legislation.

Furthermore, it is difficult to believe that new rules will help to promote cross-border shopping. A consumer's decision as to whether or not to buy from a foreign trader normally depends on factors which have little to do with legislation: personal contact, price, quality, language, experience, convenience, easy access to after-sales service, proximity to where he lives. Rules will not be a panacea for creating consumer interest in shopping abroad.

Despite these observations, UNICE is willing to contribute to high-quality content of the directive with the primary aim of ensuring that it attains its objectives of further harmonisation and better enforcement of marketing rules. This is crucial for the forthcoming Europe of 25 countries. The internal market must continue to deliver for both business and consumers and should be reinforced by the enlargement of the market.

Concerning the content of the directive, UNICE is still preparing its detailed comments but is generally supportive of 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 sufficient high level of harmonisation is achieved

However, UNICE fears that the directive, which is based on a vague general clause and notions with much scope for wide national interpretation, may add complexity to the existing regulatory regime and create additional barriers to cross-border trade if substantial changes are not made.

It is in the interest of consumers and businesses that this directive brings about:

- genuine harmonisation of commercial rules reducing the need for detailed specific rules
- increased legal certainty and a level playing-field and
- uniform interpretation and effective enforcement.

To attain those objectives, UNICE considers it vital that:

- key definitions (e.g. on professional diligence) are clarified;
- the general clause is refined to target misleading and aggressive practices;
- the list of misleading activities (articles 6 and 7) is streamlined;
- Annex 1 is clarified. UNICE disagrees with the use of upfront bans which excludes all possibility of defence;
- Ex-ante mechanisms are established to ensure consistent implementation and transposition of the directive [e.g. further guidance on its relationship with existing sectoral directives as well as with other areas of law (e.g. Contract Law)]

UNICE would not like that this directive provides the means for national judges and enforcers to interpret and apply common EU-wide rules and concepts too divergently. The right balance must be struck between flexibility and adaptability, and legal certainty and predictability.

An issue that gives rise to some concerns mainly amongst consumer representatives is the maximum harmonisation nature of the directive.

In the light of the primary objective of the directive which is improvement of the internal market through harmonisation of rules in the field covered by the directive, UNICE is in favour of the maximum harmonisation approach whereby national transposition laws will not be able to depart from the directive's provisions.

Yet UNICE does not support this approach at all costs. It should be justified and assessed on the basis of proportionality and necessity, reflecting the conditions and specificities of the area covered and with the overall objective of contributing to a simpler and clear legal framework.

In the case of the directive in question, it is indispensable that a sufficiently high level of harmonisation is achieved which would enable use of the country of origin and mutual recognition principles provided for in article 4.

UNICE considers that this is a fundamental part of the directive to ensure legal certainty and predictability of the regulatory environment. This would undoubtedly be a benefit for business and consumers who would operate and interrelate according to a single set of rules providing a sufficient common level of protection across Europe.

The crucial question lies at the level of consumer protection to be chosen as the common denominator in the directive. UNICE does not have the answer to that. The answer should be found on the basis of a detailed analysis of the different national systems including those of the acceding countries. We should not go for the most protective systems or for the most fragile.

The solution should ensure that European consumers can feel confident and are sufficiently protected in cross-border shopping not only at the level of legislation but, equally important, when it comes to enforcement of existing rules. Concerning enforcement, UNICE notes that a great number of alleged malfunctioning or gaps in consumer policy are due to defective enforcement of rules or incorrect or unclear transposition of the EU rules.

UNICE members are particularly worried about the capacity of member states to make use of the remaining minimum harmonisation directives, dealing with unfair practices in specific sectors, to require additional obligations for areas where they take precedence over the framework directive. It is crucial for the sake of legal certainty that Member States refrain from using the minimum clauses which allow for national regulatory discrepancies.

The success of the objectives above and particularly of the harmonisation effect is dependent on the clarity of the scope of the directive and the quality of its provisions.

3. UNICE AND CODES OF CONDUCT

Codes of conduct are generally recognised as valuable and innovative means to enhance responsible self-regulation by businesses and result in added value for consumers.

It is important to recall that they are promoted and developed on a voluntary basis and are not part of the regulatory regime *stricto sensu*. They can serve to complement legislation but they should not replace or usurp the place of legislation when the latter is required.

Also it must be borne in mind that nowadays, self-regulation in Europe, namely its use and content, responds to a great extent to a country's specific culture, legal framework, interests and expectations. This is greatly appreciated by consumers and it should not be undermined.

Against this background, UNICE still does not see the justification for enshrining in a EU-wide legal instrument, and therefore attaching legal consequences to, self-commitments by traders. This would make it difficult to reconcile the use of this "legally-binding" formula for codes with the variety of self-regulatory practices existing in the Member States.

The purpose of codes is to set out good trading practices towards consumers which exceed legal requirements. They reflect a competitive market place. Attaching legal consequences to statements of good practice would undermine the voluntary nature of codes and, since it would cover all kinds of existing and future codes targeting consumers, it would result in a disincentive for companies to use self-regulatory mechanisms. This would be contrary to the primary aim of facilitating convergence in the use of codes at European level.

There are further practical problems relating to the proposed clause in the directive. 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 agrees that cases where a company subscribes to a code, uses it as a claim in its advertising or as a marketing device and in practice, it disregards it systematically, the claim is then misleading, and therefore unfair and unlawful. This should be uncontroversial. UNICE believes that those cases can be perfectly well assessed on the basis of the provisions on misleading practices and provided that "the three-tier unfairness test" is met.

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

UNICE agrees that more could be done to improve self-regulation, and more in particular to ensure that codes are effectively enforced and monitored. Certain sectors that have long experience in self-regulation are already working on ways to improve their self-regulatory processes. The advertising sector represents a good example to learn from.

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