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**PROPOSAL FOR A REGULATION ON CONSUMER PROTECTION
COOPERATION
[COM (2003) 443 FINAL – 2003/0162 (COD)]**

UNICE COMMENTS

1. INTRODUCTION

UNICE has taken note of the Commission proposal for a regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation").

According to the Commission, cross-border enforcement of consumer protection rules poses particular problems that existing national and intra-Community enforcement structures are not fully equipped to respond to. This may be aggravated by the prospect of an EU of 25 countries and greater use of new technologies for commercial transactions.

Based on this belief, the Commission presents a regulation creating a network of public enforcement authorities which will be empowered with common investigation, surveillance and enforcement powers. This network will only operate with respect to intra-Community infringements of EU legislation that mostly protects consumers' economic interests.

The regulation follows the proposal for a directive on unfair commercial practices. Both texts were preceded by stakeholder consultation on the Green Paper on European Union Consumer Protection and its Follow-up¹ in which UNICE played an active role.

UNICE has always argued in favour of a balanced EU consumer policy that is based on a clear and simple regulatory framework and supported by effective and even enforcement. This should result in increased confidence of consumers and business in the internal market and therefore contribute to stronger competitiveness of European companies.

UNICE also agrees that improved enforcement of consumer protection law is essential for the good functioning of the internal market, elimination of distortions of competition and protection of consumers. Sound and effective enforcement across the EU will also facilitate the progressive transition from a regulatory environment characterised by patchy national transposition to a common and more coherent corpus of EU consumer law.

UNICE therefore welcomes the proposed regulation's goal, based on art 95 of the EC Treaty, of improving the functioning of the internal market through better enforcement of consumer protection rules in the context of cross-border infringements. UNICE also supports limitation of the scope to intra-Community infringements of EU legislation protecting consumers' economic interests.

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UNICE position papers and follow-up action on these issues are available at www.unice.org

However, UNICE is seriously concerned about the practical implementation and functioning of the proposed network and more particularly of the proportionality and justification of some of the powers of the competent authorities.

UNICE would also have liked to have more information and a thorough assessment of the existing enforcement means to make clear the case for the proposed new structure, taking into account the principles of proportionality and subsidiarity.

2. INTERACTION WITH EXISTING EU AND INTERNATIONAL ENFORCEMENT STRUCTURES

While recognising the enforcement difficulties posed by rogue traders operating in several countries and the prospect of increased cross-border trade in the near future, UNICE regrets that, prior to proposals for a new formal structure, the Commission has not provided a thorough assessment of the efficiency of intra-national enforcement tools already in place such as the injunctions directive, the EEJ-Net, ICPEN² and ICPEN-Europe.

This assessment should have served to collect further information about the performance of existing tools and documented evidence regarding their inability to respond to the new market conditions that motivated proposal of the network.

Taking account of the ambitious scope of the proposed regulation, UNICE also believes that the proposal should have been preceded by a regulatory impact assessment. In particular, it is of utmost importance that the Commission provides further clarification as to the consequences of having a list of directives covered by the regulation whose national transposition is very different in character and content, especially as regards the enforcement provisions and whether public or private enforcement bodies are involved.

The obligation for all Member States to designate public enforcement authorities (the so-called “competent authorities”) raises some concerns insofar as it is unclear how this is going to affect the existing enforcement structures at national level which include non-public bodies in some Member States. Prior to creation of a new structure of such a magnitude as the one proposed, the Commission should carry out an analysis of the feasibility and impact of the proposed enforcement system on the existing national regimes.

Also, it is important that the Commission provides further clarification as to the role to be played with the creation of the new network by existing informal networks for international cooperation between consumer protection enforcers such as ICPEN and more particularly its European sub-group ICPEN-Europe.

3. COMPETENCES AND POWERS OF THE COMPETENT AUTHORITIES (article 4)

UNICE believes that the regulation grants disproportionate powers to the authorities, going even further not only than those of the most stringent consumer protection regimes in Europe but also beyond what is provided for in the field of competition rules.

² The ICPEN (formerly called IMSN) is a worldwide network of national authorities with the aim of strengthening and improving the enforcement of consumer protection legislation (except product safety and the prudential regulation of financial institutions). A sub-group ‘ICPEN-Europe’ has been set up by the Commission to improve European co-operation and prepare for the global meetings.

In the absence of a regulatory impact assessment, and in view of the serious implications for Member States' existing national consumer protection enforcement procedures, any proposal to extend enforcement powers in this way should first be subject to extensive discussion with all stakeholders concerned.

It is unquestionable that authorities enforcing consumer protection regulation for the fields covered by the regulation should have the necessary and appropriate means and resources to exercise their powers correctly. However, and equally importantly, companies as the main parties affected by the investigation and surveillance powers should enjoy adequate safeguards for the protection of basic rights vis-à-vis the powers given to the authorities.

UNICE is puzzled that the Commission provides barely no reasoning or justification for these powers. Furthermore, there is a blatant lack of qualification criteria for the use of these powers which leaves to the authorities full discretion as to when and how to exercise them.

In this context, UNICE is of the view that the regulation does not offer the necessary safeguards for businesses to counterbalance the competent authorities' powers and would like to see specific references in the text ensuring that national laws regulating the right of defence and the respect of confidentiality and professional secrecy are fully respected.

In particular, existing rights under national law, including legal privilege (that is mentioned nowhere in the proposal), must be clearly and specifically protected and respected not only by the investigating competent authority but also in any subsequent distribution of documents. Equally, the principle of proportionality, mentioned explicitly in the recitals, should be taken into account. The question arises here as to what extent national rules, constitutional or others, can modify and constrain the powers of Article 4(3), and the use of those powers.

In particular, the powers to be granted under points (a), (b) and (h) regarding access to documents and information and on-site inspections represent considerable changes to current regimes and have wide-ranging implications for current practice.

In respect of powers regarding access to documents, UNICE believes it inappropriate for authorities to have access to all documents. It should be made explicit in the text that this access to and removal of documents relates only to those documents directly relevant to the investigation in hand and that, as appropriate, legal privilege will apply. As a general principle, all documents obtained by competent authorities during their investigation should be officially logged. This will ensure an appropriate audit trail.

Regarding on-site visits, UNICE is of the opinion that:

- The authorities should be required to obtain judicial orders prior to any such action. The regulation should make it clear that any on-site inspections should only be performed at the premises of the enterprise, so that the consumer authorities do not have any right to inspect private homes of employees, etc.
- The enterprise should in any case have the right to be assisted by a lawyer before any inspection/seizure commences.
- In the event that any documents or information systems are seized by the authorities, the enterprise should have the right to keep copies for their own use.
- Written procedures, such as those applying in the case of competition law, should be in place governing on-site visits setting out clearly standard practice and the minimum rights of the parties involved.

4. USE AND EXCHANGE OF INFORMATION (article 6 and article 11 to article 14)

In relation to information exchanged between the authorities, UNICE welcomes the attention given to confidentiality and secrecy of the information affected which is an essential part of the regulation and should apply throughout the regulation. However, we would like to see further requirements regarding information-gathering, use and further distribution. Our detailed proposals are as follows:

- All requests for assistance and communication of information between authorities should be made in writing via the relevant single liaison office to ensure that they are appropriately logged and coordinated centrally. It should not be possible for information to be exchanged, even between individual competent officials in different Member States, outside this procedure save in the most exceptional, and clearly delineated circumstances.
- The authorities should be required to establish publicly available written procedures. These should include, at least, provisions which ensure that information exchanged, which at a later stage proves to be incorrect or unconnected to the investigation, is duly notified to those authorities that received the information in the first place and that registers are corrected. The documents concerned should be returned via the originating authority to the company concerned or destroyed.
- Businesses should have the right to find out what information the authorities have registered and disseminated, and the enterprises should automatically be informed about any stored information when a case is closed. They should also have the right to challenge formally the relevance and accuracy of such information.
- The regulation should contain requirements for formally deleting information in shared registries about an enterprise, when the information is no longer relevant. In any event, there should be a fixed time limit for storing information about an enterprise when there has been no further "movement" relating to this enterprise.
- Information requested by the authorities from an enterprise may be of a confidential nature and subject to legal privilege. Therefore, the regulation should require authorities to establish necessary written procedures to maintain the confidentiality of such information. Moreover, the exchange of information between competent authorities should also respect legal privilege where applicable.
- Finally, UNICE would strongly oppose any proposal to make this information available to any third party, including consumer organisations. For obvious reasons of confidentiality, this information should only be made known to the competent authorities directly involved in the investigation in hand. In addition, the regulation should make clear that national legislation must not broaden the scope of information accessible to the public beyond what is outlined in the regulation.

5. CREATION OF A DATABASE (article 15)

It should be made explicit that the information stored and processed on the electronic database to be maintained by the Commission should concern only cross-border consumer complaints. A clear distinction should also be made between complaints and proven infringements. This should apply to both the database of consumer complaints statistics and the one provided for in paragraph 2 of the article.

The creation of such databases also raises significant questions relating to, among other things, procedures and criteria for entering and holding information and permitting access to it. It is therefore vital that adequate safeguards and criteria are included explicitly in the

regulation itself, and not left to detailed implementing measures to be agreed later via the Standing Committee as foreseen in art 15.3.

Regarding access to this information, UNICE believes that should the database on complaint statistics be accessible to the public, it should not be restricted to the qualified bodies of the injunctions directive. As for the database foreseen in paragraph 2, this information should only be made available for consultation to the competent authorities as envisaged in the text.

6. ADMINISTRATIVE CO-OPERATION (article 17)

UNICE recognises the importance of the activities listed under this article for promoting consumer interests. However, it questions the appropriateness of the inclusion of such activities in a regulation on cross-border consumer protection enforcement. The activities listed appear to go beyond those strictly necessary for cross-border law enforcement and most, if not all, are already provided for and supported under other EU initiatives and policy papers.

7. STANDING COMMITTEE (articles 19 and 20)

UNICE would like further clarification of the tasks of this Committee, and the role of business stakeholders in it. UNICE wonders why the regulation only refers to ad hoc invitation to the meetings of the Committee for qualified entities as provided for in the injunctions directive.

There are extensive references throughout the regulation (see articles 6.4, 7.3, 8.4, 9.4, 14.4, 15.3, 16.4) providing for the adoption of “measures necessary for the implementation” through the above-mentioned Committee. Consequently, far too much of the critical detail concerning procedures and investigative and enforcement powers will be decided at a later stage. UNICE questions whether leaving so much of the detail to later deliberation and adoption via comitology procedures is appropriate. As these subsequent decisions will affect fundamentally the functioning of the regulation itself, at the very least this process must be made as transparent as possible and adequate consultation should take place with all stakeholders prior to the adoption of such implementing measures. Moreover, it is not clear what measures precisely the Commission has envisaged and some clarification at an early stage would be helpful.

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