

**UNICE PROPOSALS FOR AMENDMENTS TO**

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

(COM (2003) 356 FINAL)

**LEGAL AFFAIRS COMMITTEE**

**Introduction**

In the context of the ongoing discussions in your Committee on the above-mentioned proposal, UNICE would appreciate it if you could support the amendments indicated below.

UNICE continues to be very active in discussions on this proposal and considers it of utmost importance that the proposed directive achieves its objectives of further harmonisation and enhanced legal certainty of the regulatory environment and a common high level of consumer protection.

UNICE firmly believes that this will contribute to the smooth functioning of the internal market for the benefit of consumers and business alike as provided in art 95 used as the legal basis of the proposal.

For attainment of those objectives, UNICE considers it fundamental that amendments to the directive do not undermine the following elements:

1. Art 95 should be the sole legal basis. It applies to proposals seeking improvement of the Internal Market taking as a base a high level of consumer protection;
2. Scope should be limited to B2C, although further study on the need for review of the analogous B2B laws may be advisable;
3. Maximum harmonisation approach: capacity of Member States to depart from the directive provisions should be reduced as much as possible;
4. The internal market clause: an adequate level of harmonisation should allow smooth application of the mutual recognition and country origin principles (art 4);
5. A more rigorous general clause, respect of the concept of "average consumer" as defined by the ECJ and better definitions (e.g. professional diligence or firm commitment) are necessary to facilitate uniform interpretation and implementation of the directive;
6. It should be made clear in the directive that the black list at annex can only be modified via revision of the directive;
7. Further guidance on interaction with existing rules should be provided.

UNICE hopes that you can take into account its proposals prepared in view of the forthcoming discussions by the Legal Committee on this proposal.

For further clarification on the proposals attached or a copy of the UNICE position paper on the directive, please contact the UNICE Secretariat (Carlos Almaraz, tel. 0032 (0) 2 237 65 57, email: [c.almaraz@unice.be](mailto:c.almaraz@unice.be)).

**UNICE PROPOSALS FOR AMENDMENTS TO**

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

(COM (2003) 356 FINAL)

**LEGAL AFFAIRS COMMITTEE**

Text proposed by the Commission

Amendment suggested by UNICE

**Article 5 – Prohibition of unfair commercial practices**

1. Unfair commercial practices are prohibited.
2. A commercial practice shall be regarded as unfair if:
  - 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.
3. In particular, commercial practices shall be regarded as unfair that
  - (a) are misleading, or
  - (b) are aggressiveas defined below in this Directive.
4. Annex 1 contains a list of commercial practices which shall in all circumstances be regarded as unfair.

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.”

**Justification**

*The proposed EU-wide general clause, as currently drafted, represents a risk for legal certainty and could easily be understood and interpreted too divergently at national level. To reduce this risk, UNICE proposes to delineate more precisely the remit 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 take when engaging in commercial practices. This approach is also more in line with existing legal regimes (e.g. US law) where similar general clauses exist.*

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Text proposed by the Commission

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Amendment 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 to 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

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Amendment suggested by UNICE

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**Article 11.1 –**

1. With due regard for national laws, those legal facilities may be directed separately or jointly against a number of traders from the same economic sector or against a code owner.

(...)

1. With due regard for national laws, those legal facilities may be directed separately or jointly against a number of traders from the same economic sector ~~or against a code owner.~~

(...)

**Justification**

*Code owners should only be liable for the conformity of the code with existing applicable law (“the legality of the code”). A code owner should not be liable for non-compliance of a code’s provisions by traders who are members of that code. Any proceedings should be taken directly against traders.*

Text proposed by the Commission

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Amendment suggested by UNICE

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(4) Targeting consumers who have recently suffered a bereavement or serious illness in their family in order to sell a product which bears a direct relationship with the misfortune.

(...)

**deletion**

(...)

**Justification**

*There no justification for proscribing services which are necessary and valuable to consumers. This would make it impossible for legitimate businesses to offer and sell their products to help consumers at times of illness, misfortune, or other unfortunate circumstances. UNICE supports stop of abuses of these cases and considers that possible abuses are already covered by other directive provisions and we ask for deletion of this paragraph. which prohibits the activity as such, irrespective of whether it is abusive or not.*

Text proposed by the Commission

Amendment 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 the black list. 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. Should point (6) be retained, we would prefer the following wording used in the ICC codes: “**Advertisements which include any direct appeal to children and young people, to persuade their parents, or other adults, to buy advertised products for them**”.*

## **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**

*To avoid any confusion or misinterpretation, it is necessary that the directive expressly provides that Member States, when enacting their national transposition laws, cannot add to their lists practices over and above the ones covered in the directive, since 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. A similar recital is used in the directive on unfair contract terms.*