

UNICE PROPOSALS FOR AMENDMENTS TO

Proposal for a regulation on consumer protection cooperation

(COM (2003) 443 FINAL)

EP 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 believes that improved enforcement of consumer protection law is important for the good functioning of the internal market, elimination of distortions of competition and protection of consumers. This is particularly relevant in the context of cross-border activities. Rogue traders operating from different countries pose additional challenges for effective enforcement.

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.

However, UNICE is seriously worried about the practical implementation of the proposed public network of consumer protection enforcers, the proportionality and justification of the powers granted to the competent authorities, and the use and dissemination of information.

UNICE's main concerns can be summarised as follows:

1. It is disappointing that the preparatory work preceding the proposal fails to provide adequate justification for and information about the impact of the proposed network both on existing national, EU and international enforcement structures.
2. The regulation grants excessive and exorbitant powers to the authorities without taking full account of the proportionality and subsidiarity principles.
3. It does not offer the necessary safeguards for companies commensurate with the authorities' powers of investigation and surveillance.
4. The regulation should provide with further requirements, for instance, to delimit information-gathering, use and exchange or on-site inspections.
5. Finally, it should not be left to an Advisory Committee to decide at a later stage so much of the critical detail as regards procedures and implementation particulars.

We hope that you can take into account our 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 regulation, please visit our website www.unice.org or contact the UNICE staff (Carlos Almaraz, tel. 0032 (0) 2 237 65 57, email: c.almaraz@unice.be).

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New recital

Recital 13 (bis)

Member States shall ensure that competent authorities designated under this regulation exercise their powers and carry their competences taking into account and in coordination with existing national enforcement mechanisms.

Justification

Some coordination and liaison should exist between the proposed public network and national enforcement agencies (whether they include public or non-public bodies) existing at national level. It should be up to each Member State to determine the details and conditions of that coordination and cooperation. This will enable the proposed network to benefit from the experience and expertise national enforcement tools.

New recital

Recital 17

The Commission shall report on the evaluation of existing intra-Community enforcement mechanisms such as the injunctions directive or the EEJ-net, and shall establish coordination mechanisms to ensure that existing enforcement arrangements complement and optimize the application of the regulation and to avoid overlaps or duplication of competences and procedures.

Justification

It is regrettable that prior to adoption of the proposed regulation, 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, ICPEN1 and ICPEN-Europe. For the sake of transparency and coherence, further work should be done by the Commission to ensure proper coordination between the existing enforcement tools at EU level and the proposed public network. This will contribute to upgrading the quality and consistency of enforcement.

¹ 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.

Text proposed by the Commission

Amendment suggested by UNICE

Article 1 – Objective

This Regulation lays down the conditions under which the competent authorities in the Member States responsible for the enforcement of the laws that protect consumers' interests are to be designated and are to cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests.

This Regulation lays down the conditions under which the competent authorities in the Member States responsible for the enforcement of the laws that **protect the collective interests of consumers** are to be designated and are to cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests.

Justification

The regulation is intended to apply only to the collective consumers' economic interests as provided for in the definition of article 3. This should be made clear throughout the text of the regulation and especially in article 1 setting out its objective.

Text proposed by the Commission

Amendment suggested by UNICE

Article 3 – Definitions

For the purposes of this regulation:

- a. 'laws that protect consumers' interests' means the Directives listed in Annex I as transposed into the internal legal order of the Member States.
- (...)

1 For the purposes of this regulation:

- a. 'laws that protect consumers' interests' means the Directives **and Regulations** listed in Annex I as transposed into the internal legal order of the Member States.
- (...)

Justification

Annex I includes also regulations not only directives.

Text proposed by the Commission

Amendment suggested by UNICE

Article 4 – Competent authorities

1. Each Member State shall designate the competent authorities and single liaison office responsible for the application of this regulation.
2. Competent authorities shall have the investigation and enforcement powers necessary for the application of this regulation and shall exercise them in conformity with national law.
3. These powers shall include, at least, the right:
 - (a) to have access to any document in any form whatsoever;
 - (b) to request information from any person, and if needed, to obtain judicial orders requiring the supply of information by any person;
 - (c) to carry out on-site inspections;
 - (d) to request in writing that the seller or supplier cease the intra-Community infringement;
 - (e) to obtain from seller(s) or supplier(s) responsible for intra-Community infringements a binding commitment to cease the intra-Community infringement; and to publish the resulting commitment;
 - (f) to require the cessation or prohibition of any intra-Community infringement or to obtain judicial orders requiring the cessation or prohibition of any intra-Community infringement; and to publish resulting decisions;
 - (g) to obtain judicial orders against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with a decision;
 - (h) to obtain judicial orders requesting the freezing and/or sequestration of assets;
 - (...)

1. Each Member State shall designate the competent authorities and single liaison office responsible for the application of this regulation.
2. Competent authorities shall have the investigation and enforcement powers necessary for the application of this regulation and shall exercise them in conformity with national law.
3. These powers, **which shall be exercised only where there is reasonable suspicion that an infringement has taken place**, shall include, at least, the right:
 - (a) to have access to any document in any form whatsoever **that is directly related and relevant to the investigation**;
 - (b) to request information from any person, and if needed, to obtain judicial orders requiring the supply of information by any person;
 - (c) **to obtain judicial orders to carry out on-site inspections in the premises of the seller or supplier concerned**;
 - (d) to request in writing that the seller or supplier cease the intra-Community infringement;
 - (e) to obtain from seller(s) or supplier(s) responsible for intra-Community infringements a binding commitment to cease the intra-Community infringement; and to publish the resulting commitment;
 - (f) to require the cessation or prohibition of any intra-Community infringement or to obtain judicial orders requiring the cessation or prohibition of any intra-Community infringement; and to publish resulting decisions;
 - (g) to obtain judicial orders against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with a decision;
 - ~~(h) to obtain judicial orders requesting the freezing and/or sequestration of assets;~~

(...)

new 4 (bis)

All documents and information obtained by competent authorities during investigations must be officially logged and respect applicable requirements of legal privilege or professional secrecy.

Justification

As currently drafted, the minimum investigation and enforcement powers extend well beyond those which are justified within the context of this Regulation and well beyond those which exist in competition law. Where similar investigation and enforcement powers do exist in competition law, they are circumscribed by safeguards in relation to their operation to ensure that they are exercised proportionately. There must be a balance between the powers of the authorities and the rights of the traders subject to investigation.

The purpose of the amendment is to insert certain safeguards so that there are appropriate and reasonable restrictions on the exercise of powers under Article 4. In particular that the powers can be exercised only when there is a reasonable suspicion that an infringement has occurred and that the documents or information which are sought are relevant for the purposes of the investigation or enforcement action contemplated.

The new paragraph proposed [new 4 (b)] will ensure an audit trail and respect of sensitive and/or confidential commercial information.

Text proposed by the Commission

Amendment suggested by UNICE

Article 15 – Complaints and Database

1. The Member States shall regularly notify to the Commission statistics on consumer complaints received by competent authorities.

2. The Commission shall maintain an electronic database in which it shall store and process the information it receives under Articles 7, 8, 9 and this Article. The database shall be made available for consultation by the competent authorities.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

1. The Member States shall regularly notify to the Commission statistics on consumer complaints **regarding cross-border infringements** received by competent authorities.

2. The Commission shall maintain an electronic database in which it shall store and process the information **regarding cross-border infringements** it receives under Articles 7, 8, 9 and this Article. The database shall be **only** made available for consultation by the competent authorities.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in

Article 19 (2).

Justification

It should be made explicit that the information stored and processed on the electronic database should only concern cross-border consumer complaints in line with the purpose and scope of the regulation.

Regarding access to the database foreseen in paragraph 2, the proposed amendment intends to make clearer that this information should only be made available for consultation to the designated competent authorities who are best placed to guarantee respect of confidentiality and professional secrecy.

Text proposed by the Commission

Amendment suggested by UNICE

Article 17 – Administrative cooperation

1. Member States shall, with the Commission, co-ordinate their activities designed to:

Deletion

- a. inform, advise and educate consumers;
- b. support the activities of consumer representatives;
- c. support the activities of bodies responsible for the extra-judicial settlement of consumer disputes;
- d. support consumers' access to justice;
- e. gather statistics, research or other information relating to consumer behaviour, attitudes and outcomes;

2. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Justification

While the activities referred to in this article are perfectly valuable and merit support, it does not seem appropriate to include them in the regulation. The latter has a different objective and seeks to establish and set out details of a public network of national enforcers. It defines their competences, duties and responsibilities. Its provisions are simple to enforce and monitor. On the other hand, the activities of article 17 are general recommendations of a political nature to Member States and 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.

Text proposed by the Commission

Amendment suggested by UNICE

Article 20 – Committee tasks

1. The Committee may examine all matters relating to the application of this Regulation raised by its chairman, either on his own initiative or at the request of the representative of a Member State.

2. In particular, it shall examine and evaluate how the arrangements for cooperation provided for in this regulation are working.

3. Where appropriate, the Committee may also invite qualified entities notified under Article 3 of the Injunctions Directive to participate in its meetings.

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2. In particular, it shall examine and evaluate how the arrangements for cooperation provided for in this regulation are working.

3. Where appropriate, the Committee may also invite qualified entities notified under Article 3 of the Injunctions Directive **and representative business organisations** to participate in its meetings.

Justification

UNICE is very concerned about the power and the Committee tasks to determine practical implementation arrangements and particulars and the role of business stakeholders in it. Far too much of the critical detail concerning procedures and investigative and enforcement powers will be decided at a later stage by this Committee. Questions about transparency and democratic legitimacy arise. As these subsequent decisions will affect fundamentally the functioning of the regulation itself, this process must be made as transparent as possible and adequate consultation should take place with all representative stakeholders prior to the adoption of such implementing measures. Possibility for ad hoc invitations of representative business organisations must be made available, given that they, together with consumers, are key parties concerned.