UNICE
THE VOICE OF BUSINESS IN EUROPE

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PROPOSAL FOR A DIRECTIVE CONCERNING UNFAIR BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES IN THE INTERNAL MARKET

UNICE COMMENTS FOR SECOND READING

Introduction

In view of the forthcoming second reading discussions on this proposal, UNICE would like to bring the following comments to your attention.

UNICE recalls that this proposal was tabled under the justification that it would harmonise and simplify existing rules on unfair commercial practices. This would provide legal certainty and a common high level of consumer protection that would boost consumer and business confidence in cross-border trading and thus improve the internal market. UNICE never objected to those good intentions.

However, UNICE considers that the common position adopted by the Council in first reading runs counter to the above objectives and contradicts the Parliament's opinion of 20 April 2004 which offers more legal certainty and respects the spirit of the proposal.

The vast majority of UNICE members are particularly disappointed by the removal of the internal market clause based on the country of origin principle contained in article 4 of the initial Commission proposal[*]. They regard this clause as fundamental in order not to undermine the legal certainty and confidence companies need to operate across frontiers.

The Parliament, while introducing a temporary derogation period, always supported the need for this clause to guarantee legal security. UNICE therefore urges reincorporation of article 4.1. It is the absolute minimum to avoid increased regulatory burden on companies, especially SMEs.

Other issues that are of great importance to ensure real harmonisation and legal clarity are:

1. A clear provision should be introduced providing that the list in annex I can only be modified via revision of the directive. This was also endorsed by the Parliament.
2. Clarification of new art. 5.3: it could lead to use of "the average vulnerable consumer" as the benchmark consumer and unjustified excessive litigation.
3. Reintroduction of the "average consumer" concept as defined by the European Court of Justice (hereinafter 'ECJ') in the list of definitions of article 2.
4. Derogation period of 6 years: it should be made clear that its sole aim is to enable Member States to bring national regulations into line with the directive's provisions.

We hope that you can take into account the above observations and proposed amendments below. We remain at your disposal should you wish to discuss these matters further (please contact Carlos Almaraz: c.almaraz@unice.be).

[*] MEDEF (French Business Federation) cannot support reincorporation of the internal market clause insofar it believes that the directive will not lead to the full harmonisation intended such as to permit smooth use of the country of origin clause. Uncertainty about the harmonisation effect and the practices covered by the directive will give rise to distortions between competitors.

UNICE PROPOSALS FOR AMENDMENTS TO

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

EP SECOND READING

The Internal Market clause (article 4)

Text agreed in first reading	Amendment suggested by UNICE
Article 4	
Article 4 *Internal market*	*Article 4* *Internal market*
1. [...]	**1. Traders shall only comply with the national provisions, falling within the field approximated by this Directive, of the Member State in which they are established. The Member State in which the trader is established shall ensure such compliance.**
2. Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.	2. Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

Justification

UNICE is fully supportive of the aim of the directive which is to break 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.

UNICE supported the Commission initial proposal that combined a full harmonisation approach with the use of the country of origin principle as the best guarantee to achieve that objective and secure legal certainty and a common level of consumer protection.

In the text tabled for second reading, paragraph 1 of article 4 on the country of origin has been surprisingly deleted from the text.

This is unacceptable for companies. This provision is central in the proposal to ensure legal certainty for trading across frontiers. Its removal would mean that 25 national versions of the

directive would be enacted and need to be known by those companies that operate across borders. This would impose an unbearable compliance burden on companies, especially SMEs that would feel discouraged from making use of the internal market.

In addition, asking the reintroduction of the Commission's initial article 4 is consistent with the approach of the Commission's proposal on the law applicable to non-contractual obligations (so-called "Rome II") in particular with its art 23.2 which ensures coherence between this proposal and other existing or future legislation based on a country of origin approach as is the case of article 4 of the Commission's initial proposal for a directive.

In this regard, we reiterate UNICE's position adopted in the context of the afore-mentioned "Rome II" proposal:

> **(…) 'Relationship with other provisions of Community law (Article 23)**
>
> UNICE strongly welcomes and supports the "carve-out" foreseen in Article 23(2) [of the Rome II proposal] and the Commission's intention to exclude existing and future Community instruments based on a country of origin approach (e.g.: the e-commerce Directive and the Television without Frontiers Directive, the unfair commercial practices directive, etc) from the scope of application of the preliminary draft proposal. If the Commission decides to pursue this initiative [i.e. the Rome II proposal], it is essential that this "carve-out" be maintained throughout the legislative process.'(…)

Art.4.1 (the country of origin principle) is the ultimate guarantee that companies will only have to comply with the law of their country of establishment without having to adapt to the laws of 25 different countries. It thus provides for legal certainty, especially for SMEs that would not otherwise be encouraged to engage in cross-border commerce. This would lead to more consumer choice and reduce red tape and the costs of cross-border operations.

If this paragraph is not reinserted, UNICE fails to see the benefits this directive will generate for companies or for the efficiency of the internal market more generally.

Recital (12a) concerning the list of Annex I

Text agreed in first reading	Amendment suggested by UNICE
Recital (12a)	
It is desirable that those commercial practices which are in all circumstances unfair shall be identified to provide extra legal certainty. Annex 1 therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9.	It is desirable that those commercial practices which are in all circumstances unfair shall be identified to provide extra legal certainty. Annex 1 therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. **This list shall not be modified by the Member States when transposing the Directive; the same single list shall apply in all Member States and may only be modified via revision of the Directive.**

Justification

Member States, when enacting their national transposition laws, should not be allowed to add to their lists of practices over and above the ones covered in Annex I of the directive, this would water down the directive's objective of increasing legal certainty and regulatory harmonisation of national rules. Changes to this list should be agreed by all Member States within the legislative process followed for adoption of the directive (co-decision).

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The notion of "average consumer" (article 2)

Text agreed in first reading	Amendment suggested by UNICE
	Article 2 (b)
_____ (removed)	**(b) 'average consumer' means the average consumer as interpreted by the European Court of Justice taking into account the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices**

Justification

This is a key definition repeatedly used throughout the text of the directive and that has been developed over the time by the case law of the ECJ. For the sake of legal coherence and certainty, it is imperative that this notion is reintroduced in article 2 together with the other definitions as provided for in the Commission's initial proposal.

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The 6 year-derogation period (article 3.5.a)

Text agreed in first reading	Amendment suggested by UNICE
Article 3.5.a	
5.a For a period of six years from the date referred to in Article 18, first subparagraph, Member States shall be able to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 17a may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.	5.a **In order to enable Member States to bring national regulations into line with the Directive's provisions,** for a period of six years from the date referred to in Article 18, first subparagraph, Member States shall be able to apply **existing** national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 17a may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.

Justification

UNICE acknowledges the compromise character of the introduction of the derogation period. However, it is not clear what its real purpose is. It appears from the text agreed in first reading that Member States are allowed to perpetuate the status quo of national regulatory divergences indefinitely since extension of the derogation is possible. This would be contrary to the spirit and objective of the directive and would run counter to legal certainty.

UNICE thus calls for introduction of a reference to the raison d'être for this period which should serve to help smooth accommodation of divergent national laws within the field approximated by this directive to the requirements of the directive. All the same, Member States should not be allowed to establish further restrictions in fields harmonised by the directive.

New article 5.3

Text agreed in first reading	Amendment suggested by UNICE
Article 5.3	
3. Commercial practices which reach the generality of consumers, but are likely to materially distort the economic behaviour only of a group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.	3. Commercial practices **which are not covered in paragraph 2** but are likely to materially distort the economic behaviour only of **a clearly identifiable and significant** group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

Justification

Art. 5.3 as it is currently drafted will lead to disproportionate use of an average vulnerable consumer as the benchmark consumer since virtually any given commercial practice can be deemed to reach the generality of consumers and therefore be subject to article 5.3. This would result in excessive litigation and unjustified restrictions and/or prohibitions on practices traditionally deemed to be fair.

The proposed wording offers more clarity and defines better the type of practices that are featured in this provision.