

REVISED UNICE RESPONSE ¹ (26 September 2005)

THE LEGAL FRAMEWORK FOR CONSUMER POLICY

QUESTIONNAIRE

1. **Treaty Article 153**

Are there any difficulties in applying Treaty Article 153 to protect consumer interests?

No. The competence of the Community to take measures for the protection of consumers is clearly delineated by articles 153 and 95 TEC dealing with consumer protection and completion of the internal market respectively and constitute adequate legal basis for EU action in this field.

In the light of ECJ case law², do consumer protection directives have an adequate legal basis?

Yes. UNICE believes that combination of articles 95 and 153 TEC offers sufficient legal basis for further harmonisation of national laws in this field.

Would it be useful to encourage the adoption of legislation underpinned by the highest level of protection in the Member States?

No. This approach does not seem sensible for business or for consumers. More common rules will undoubtedly be a benefit for business and consumers who would operate and interrelate on a more level-playing field ensuring a common level of protection across Europe. The crucial question then lies at the level of consumer protection to be chosen as the common denominator in new legislation. We should not go for the most protective systems or for the most fragile. A fair balance must be found which provides a harmonised adequate high level of protection.

1 UNICE is the voice of more than 20 million small, medium, and large companies. Active in European affairs since 1958, UNICE's members are 39 central industrial and employers federations from 33 countries, working together to achieve growth and competitiveness in Europe. For more information, please visit: www.unice.org

2 ECJ, C-376/98, Tobacco advertising

2. **The "consumer-citizen"**

How are consumers involved in European-level lawmaking on issues that affect them?

European consumers are actively involved in the EU decision-making. All possibilities and decision-making *fora* that are open to business are equally open to consumers which participate through their national, European and international organisations as well as through other NGOs. Furthermore, a considerable amount of EU money is dedicated to the promotion and funding of consumer associations and their activities.

How does consumer protection fit in with current market developments, taking on board issues such as health, quality of life and the environment?

UNICE is of the opinion that the only way to deal with market developments is through a policy that is sufficiently flexible and adaptable. We agree that the overarching objective of consumer policy is to increase consumer welfare, which may encompass *inter alia* health, environmental and life quality aspects. However, when dealing with the interdependence and interaction between the various policies, it is critical to strike a balance based on established principles which often respond to the particularities of the policy concerned.

In this regard, one should not forget that the competences that the EU has in the above-mentioned areas are clearly determined and correspond to a specific legal basis that should not be bundled or confused.

3. **Level of protection**

With regard to question 1, how should a high level of protection be defined?

Although the Treaty itself proclaims a "high level", this concept is not very informative. Clearly, protection should not be "low", but apart from that it remains fairly unclear. Most importantly, however, "high" should not be construed to mean "the more restrictions on companies, the better". Overregulation is counterproductive, and not in the interest of either consumers or business. For practical purposes, the concept should rather be consumer protection at an adequate level, i.e. a protection level that effectively but without negative side effects (on competition, for instance) satisfies justifiable consumer demands.

The level of protection can only be decided by a political process, which should be based on facts and sound and objective research providing empirical hard data and on substantive stakeholder consultation. It should be also borne in mind that the notion of consumer needs to embrace both the rights and obligations that a consumer has as part of the market and the society as a whole.

Are there any parameters which should be used to assess the level of consumer protection provided under national or Community rules?

[See response above.](#)

4. **Minimum or maximum harmonisation?**

Should we support the position of the Commission, which, in its 2002-2006 strategy³ makes a case for maximum or "full" harmonisation, if the legal basis rules out any scope for Member States to adopt more stringent protective measures, and is considered less than satisfactory in terms of consumer protection?

[UNICE supports the Commission's approach seeking, where possible, full harmonisation in this field. This approach coupled with even enforcement should result in increased legal certainty, a more common level of consumer protection and less regulatory burden.](#)

Is there a need for a case-by-case assessment of whether maximum harmonisation is identical with consumer protection?

[Taking into account the previous response, UNICE believes that decisions should be taken in a case-by-case fashion. They should be justified and assessed on the basis of proportionality and necessity, reflecting the conditions and specificities of the area covered and with the objective of contributing to a simpler and clear legal framework and ensuring an adequate level of consumer protection.](#)

In your opinion, would there be a risk that maximum harmonisation prevents Member States from adopting new measures to deal with purely domestic developments?

[No. Member States can still offer further consumer protection for the fields not covered by Community maximum harmonisation legislation and provided they are compatible with all other relevant provisions of the EC Treaty. In addition, EU legislation as well as national legislation can be adapted if need be.](#)

³

COM(2002) 208

5. **The impact of directives**

What is the current impact of consumer protection directives?

Most consumer protection directives are minimum harmonisation laws and although they have established a fairly high level of consumer protection across Europe, national transposition has often led to unduly divergent national rules that may act as an obstacle and a deterrent to cross-border trade.

According to certain observers, ECJ case law would be discriminatory in the distinction it establishes between certain safeguards and its continuing case law which rejects any horizontal effect for directives. What is your opinion?

No comment.

Would it be useful if the Community monitors unfair practices, as it does in competition policy?

Yes provided it is strictly limited to purely monitoring and exchange of data and does not entail any independent enforcement power, both Member states and the Commission could have a shared responsibility for monitoring and exchanging information about cross-border commercial practices involving consumers. Collaboration with business and other relevant stakeholders should also be encouraged in this regard. Equally, adequate transparency and respect of confidentiality as regards the data and information collected should be guaranteed. Correct transposition and enforcement of the recently adopted directive on unfair commercial practices is a perfect example where Commission, Member States and stakeholders can cooperate.

What constraints are placed on the right to redress of consumer associations or state consumer protection bodies?

No comment.

6. **Access to the Court**

Does not the fact that consumer associations have no direct recourse to the Court to challenge general acts adopted by the Commission, the Council or the Parliament constitute an attack on its recognised rights?

No. Consumer associations as well as other stakeholder associations including business have at their disposal means to make their voices heard to the EU Institutions and the judiciary. In particular, there is the possibility in the light of the Injunctions Directive for qualified consumer associations to file a case before a court for the protection of the collective interest

of consumers. As regards access to the European Court of Justice, any change to the existing framework should apply *erga omnes*.

If it is the case, what would be the arguments that could be brought forward to justify a change in ECJ case law?

Not applicable.

7. **Self-regulation**

What is the current status of self-regulation in Community law?

Self-regulation, although recognised as an alternative to legislation in the Community better regulation agenda and encouraged in some EU laws, it may still need further promotion and recognition by public authorities both at national and EU level.

More specifically, to what extent is it recognised as an instrument capable of responding to consumers' interests?

The purpose of most codes and self-regulation tools is to set out good trading practices towards consumers which exceed legal requirements. They reflect a competitive market place. They encourage innovative and responsive conduct on the part of businesses. They are promoted and developed on a voluntary basis and are not part of the regulatory regime *stricto sensu* although they often function within it.

What investigations have been conducted into the consumer benefits of self-regulation?

The *Information report on the current state of co-regulation and self-regulation in the Single Market*, published by the European Economic and Social Committee (February 2005); the *Study to identify best practice in the use of soft law and to analyse how this best practice can be made to work for consumers in the European Union*, by Lex Fori for the European Commission DG SANCO, (October 2002); and the *Study on the impact of advertising and teleshopping on minors*, INRA/Bird & Bird (2001), refer to the benefits of self-regulation in terms of consumer protection, for example with regard to speed, flexibility, response to technological and societal change and the handling of complaints at no cost to the consumer. The consumer benefits from self-regulation are also, for example detailed in the self-regulation charter issued by the European Advertising Standards Alliance (EASA).

Should self-regulation be encouraged?

Yes, to a certain extent. Consumer protection is an appropriate area for development of codes of conduct and other self-regulatory instruments. In any event, choice between regulatory or

non-regulatory mechanisms should be assessed on a case-by-case basis paying special attention to the situation of the market (s) or sector (s) affected.

How will self-regulation be monitored?

Monitoring of compliance is an essential element and activity of an effective self-regulatory system. It should be primarily up to the self-regulator to determine the mode of monitoring and ensure transparency.

8. **Other questions that you consider important to be raised**

Please send your answers to

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