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COMMUNICATION FROM THE COMMISSION

Follow-up Communication to the Green Paper on EU Consumer Protection

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EXECUTIVE SUMMARY

The Green Paper¹, which was adopted in October 2001, set out a number of options and questions on the future of the regulation and enforcement of consumer protection. In particular, it suggested the idea of developing a framework directive on fair commercial practices. In addition, it suggested the development of a legal instrument for cooperation between enforcement authorities.

The Green Paper received a wide response from businesses, consumer organisations and national governments and agencies. The ideas set out in the Green Paper were broadly supported by respondents, although not all the ideas were welcomed by all groups of respondents. The consultation identified a broad consensus along the following lines:

- A majority of respondents accept the case for reform of EU consumer protection legislation. The current status quo is holding back the internal market for consumers and for businesses.
- A majority of the respondents who expressed a preference would like reform to proceed on the basis of a framework directive. A majority of those who expressed a preference said that this should be on the basis of fair commercial practices.
- A large majority of those who expressed a view endorsed the Commission's idea of developing a legal instrument for cooperation between national enforcement bodies responsible for consumer protection.

The Council has called on the Commission to follow-up the Green Paper as a matter of priority. The response to the consultation has also given the Commission clear support to develop a proposal for a framework directive. However, there is a strong case for further consultation on the detail before presenting a proposal. This communication therefore sets out an action plan for further consultation with the Member States and stakeholders. As a first step towards this consultation, an outline of the issues to be covered in a framework directive is attached in Annex I. This will be complemented in due course with more detailed consultation papers.

These initiatives are fully consistent and compatible with existing Community policies such as the Commission's audiovisual policy (notably the Television without frontiers Directive²) and its policy on commercial communications and the follow-up to the Commission's Internal Market Strategy for Services.

¹ COM (2001) 531

² Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L298 of 17.10.1989, p.23), as amended by Directive 97/36/EC.

In the meantime, reactions to the communication are welcome and should be sent to the Commission by **30 September 2002**. All reactions should be sent by email to consultsanco@cec.eu.int. In addition, paper copies may also be sent to:

European Commission
DG Health and Consumer Protection
F101 06/52
B-1049 Bruxelles/Brussel

Separately the Commission services will begin the development of a proposal for a legal instrument on enforcement cooperation, consulting informally national governments and enforcement authorities that are most concerned, with the intention of adopting a proposal by the end of 2002.

I. INTRODUCTION

1. The central argument of the Green Paper was that the fragmentation of EU and national rules on consumer protection means that the internal market does not work properly for business to consumer transactions. It identified barriers to consumer confidence in purchasing cross-border and to business confidence in selling cross-border and in establishing in several Member States. The potential of the internal market to stimulate competition and benefit consumers has not been achieved. The Green Paper proposed a choice for further harmonisation, between the specific approach (consisting of additional vertical harmonisation measures) and the mixed approach of a framework directive on commercial practices, complemented as necessary with sectoral measures).
2. The Green Paper suggested an important role for EU-wide codes of conduct under a framework directive. As part of this it suggested that non-compliance with voluntary commitments relating to commercial practices made in codes should be defined as an unfair practice in itself. It also suggested making associations responsible for the conformity of their codes with legislation, but not liable for their members' compliance with their own codes.
3. The Green Paper consulted on the question of whether non-binding guidance, drawn up either through lists by a regulatory committee of the Member States, chaired by the Commission, or through Commission recommendations be developed. The guidance could serve to guide national enforcement bodies and so reduce the risk of fragmentation by ensuring a common approach. The Green Paper suggested that the Committee could mandate business and consumer organisations through stakeholder participation to negotiate non-binding guidelines. Finally the Green Paper proposed the establishment of a legal framework for enforcement co-operation between public bodies.
4. The consultation period closed on 15 January 2002. A public hearing on the Green Paper was held on 7 December 2001 in Brussels and was attended by over 200 participants³.

³ A report of the proceedings of the hearing can be found at http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/hearing_greenpap_en.html

5. In its conclusions in preparation of the Barcelona European Council, the Internal Market Council called for priority to be given to the follow-up to the Green Paper⁴.

II. SUMMARY OF RESPONSES

6. The Green Paper has generated a large degree of interest, with 169 responses received⁵, the majority from business organisations. The annexed table (Annex II) provides a more detailed breakdown of the responses. However, the response to the consultation was not geographically balanced. All Member States responded to the consultation. Of the EU institutions, the Economic and Social Committee has to date produced an opinion⁶, which broadly supports the mixed approach of the Green Paper, whilst calling for more clarification.

The need for reform

7. On the overall case for reform, the responses to the Green Paper were divided, but with a majority of those who expressed a clear view (114 out of 141) agreeing with the Commission's analysis. All **Member States**, with one exception, accepted the need for reform. Two other Member States only accepted the need to reform existing EU directives. **Business** associations and company respondents were fairly evenly divided. An important group (36) and most of the multinational corporations that responded (8) confirmed this analysis. Some gave examples of barriers. Many argued that inconsistency between the national laws transposing the consumer protection directives containing minimum clauses was also a significant barrier.
8. Another important group of business associations (24 respondents) argued that the analysis was unproven. They called for more evidence on attitudes to cross-border trade generally and the role of consumer protection in these attitudes. Some within this group were less sceptical than others: they were open to being convinced by further evidence. For others the nature of any legal proposals was the determining factor. 17 business associations and 3 companies did not express a clear view either way.
9. A clear majority (30 out of 31) of **Consumer** organisations agreed with the need for reform and some supplied examples. One rejected the Green Paper analysis entirely; arguing that consumer protection was best carried out at national level.

Harmonisation

10. A large majority of the **Member States** (12) supported the **mixed approach** and a framework directive based on full harmonisation and fair commercial practices. The remaining three expressed a preference for the specific approach and considered that simplification and harmonisation of existing legislation should be the priority. These countries also expressed concerns that the framework directive might not reduce fragmentation sufficiently. Two Member States argued that the objective of the

⁴ Report of the Internal Market/Consumer Affairs/Tourism Council of 1 March 2002 - Council Document 6503/02

⁵ A full list of respondents and copies of all responses can be found at:
http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/responses/responses_en.html

⁶ CES 344/2002

framework directive should be to protect consumers, competitors and the general public by means of a ban on unfair trading practices. They maintain that the framework directive should be drafted in such a way that includes business-to-business trading relations as under their system of unfair competition, which includes trading practices such as protection of trade secrets or slavish imitation. They argued that this extension of the scope of the directive is justified by the fact that not only consumers, but also competitors, and particularly SMEs, need protection against unfair commercial practices.

11. Most **consumer associations** (29) were in favour of the mixed approach with a framework directive based on fair commercial practices. However, two of them expressed concerns about the idea that a framework directive would eliminate the justification for minimum clauses in consumer protection directives and create the conditions for the application of the country of origin principle.
12. **Business** was again fairly evenly divided, with views ranging from strong support to profound scepticism. 31 business associations and companies expressed a preference for pursuing the mixed approach. 27 expressed a preference for the specific approach and 30 expressed no clear preference, calling for further information, clarification or consultation. 18 business associations and companies preferred the idea of a framework directive based on fair commercial practices, 16 based on misleading practices, with 54 expressing no clear preference.
13. In general, those who were most sceptical were concerned that a framework directive would result in an increase in fragmentation of the internal market. These respondents questioned whether a framework directive would work in practice or whether it would truly harmonise national rules. In general these respondents also called for more evidence that a framework directive could overcome these obstacles. Several businesses would be more willing to contemplate a framework directive if it consolidated and simplified existing rules.

Codes of conduct, non-binding guidance and stakeholder participation

14. The Green Paper ideas on **codes of conduct** have provoked the most questions and the highest levels of 'don't know', probably because of their novelty and because they were only briefly sketched out in the document. A majority of business association and company respondents were in favour of developing EU-wide codes of conduct in principle (55 for, 11 against, 22 no clear view). Some argued that codes, especially in advertising, had a strong quasi-regulatory role. Others argued the opposite: that codes of conduct could not be a complement to regulation or that too great a reliance on codes would confuse business and consumers.
15. A large majority of those business associations and companies who expressed a view (28 out of 35) were against the idea of making voluntary commitments binding. However, 53 expressed no view on this point. The role of nationally based codes raised many questions, especially from one Member State where codes are more established. There was support for the Green Paper line that codes of conduct should remain genuinely voluntary but some argued in favour of Commission endorsement of codes. Some concerns were expressed about making code-owners responsible for their codes.

16. Consumer groups and other respondents were cautiously positive, being more strongly in favour of making commitments binding. Of those who expressed a view, the idea of defining non-compliance with a commitment as unfair was a critical precondition for their support for codes of conduct (8 in favour, 0 against, 25 no view).
17. The Member States were mainly supportive of the use of codes of conduct in general. One called for further consultation. Two others supported the idea of codes of conduct in consumer protection in general. One of these two in particular argued strongly in favour of public endorsement of codes. Four Member States favour more public involvement in the negotiation of codes.
18. The ideas on **non-binding guidance** and a **regulatory committee** also provoked questions. There is broad support for the use of EU-level guidance as providing additional clarification of fair commercial practices. Consumer groups (15 in favour, 1 against, 17 no view) especially value this since it increases the adaptability of the regulatory framework. Business associations and companies were fairly evenly divided: 19 in favour, 17 against, 52 no clear view). Those in favour welcomed the idea as a contribution to certainty and clarity. Those against feared that guidance would not solve the problem of fragmentation. There is no clear view as to preferred form and legal character of this guidance: many respondents ignored these issues or have responded with questions. A small number of business respondents expressed concerns about how the guidance would be drawn up or would work in practice.
19. Those business respondents who expressed a view either had strong reservations to the idea of a regulatory committee producing non-binding guidance in general or had many questions about its operation and membership. Those Member States who supported the framework directive also generally supported the need for non-binding guidance.
20. Finally there was strong support for **stakeholder participation** from consumer groups (20 in favour, 0 against, 13 no view). A majority of business associations and companies liked the idea of being strongly involved as stakeholders (32 in favour, 11 against, 45 no view). Those Member States who supported the framework directive also generally supported stakeholder participation

Enforcement

21. This idea was strongly welcomed by those Business associations and companies (30 for, 7 against) and consumer associations (18 for, 1 against) who responded and most Member States (10) have also strongly welcomed this proposal. A few businesses expressed concern that information about companies should be kept confidential, so that unsubstantiated allegations are not made public. Of the Member States, one which does not have a tradition of public enforcement bodies in this area, preferred to emphasise the role of judicial cooperation and did not see a need for an instrument at this stage. Another also emphasised judicial cooperation and pointed out the obstacles to cooperation between its national enforcement body and other Member States from its confidentiality rules on criminal law proceedings. While supporting the need for enforcement cooperation in general, three other Member States preferred to enhance informal cooperation further in the short term. All other Member States strongly endorsed the need for such an instrument.

Follow-up

22. A large majority of respondents support the idea that the Commission proceeds with a proposal on **enforcement co-operation** and have not requested further consultation on this initiative. On a framework **directive**, most businesses have requested a White Paper. Most other respondents would either like to see further consultation or have raised questions that they wish to see answered. A majority of the Member States, whilst supporting the framework directive, would also like further consultation on the contents of such a directive, but would not insist on a White Paper if this would slow progress.

III. NEXT STEPS

The need for reform

- The response to the consultation is more than sufficiently clear to justify further steps towards reform. A number of respondents and the majority of the Member States have indicated that disparities between national rules, in particular in the field of marketing practices, do give rise to appreciable distortions of competition.
 - The Commission recognises the need to continue to develop research work in this area. Accordingly a number of further surveys are planned, designed to improve the general understanding of business and consumer attitudes to trading cross-border and their perception of the barriers that they face and to measure price divergences. These surveys will help the Commission identify the Internal Market barriers that a future framework directive would resolve.
 - In due course any major proposals would be accompanied by an impact assessment and a list of the relevant obstacles to cross-border trade.
23. Further evidence has come to light since the Green Paper was published. The Commission's Cardiff report on the functioning of the internal market⁷ pointed to significant price divergences that remain in the internal market. The report showed that some retail prices can be up to 40% above or below the European average and that the average price difference is around 30%. The report concluded that these divergences were due to 'economic' not 'geographic' factors and that "economic reform and competition measures seem best to eliminate residual price dispersion in these markets". The report mentioned that the Green Paper "sets out some options to increase competition in business-to-consumer and retail markets". Certain companies would clearly benefit from the continuation of these price divergences and may therefore be opposed to an increase in transparency and competition in this area.
24. The European Financial Services Round Table commissioned a report⁸ that has recently been published on the benefits of a working European retail market for financial services. It estimated the cost saving potential at 5 billion Euro annually and a possible beneficial effect of 0.5% in economic growth. The report identifies differing national rules on consumer protection and commercial practices as

⁷ COM 2001 (736) of 7 December 2001

⁸ www.zew.de/erfstudyresults/

important barriers which “render a pan-European marketing strategy and standardised products impossible”.

25. A recent Eurobarometer carried out for the Commission⁹ also demonstrated that consumers in the EU have significantly lower confidence in making purchases cross-border than domestically. The report showed that 32% of European consumers feel well protected when in dispute with a business based in another Member State, compared to 56% when in dispute with a domestic business. This lack of confidence is also reflected in the general take up of e-commerce. The recent eEurope benchmarking report revealed slower than expected growth, with only 4% of users in Europe classifying themselves as ‘frequent purchasers’¹⁰.

Harmonisation

The framework directive

- The response to the question supports the Commission to pursue the mixed approach and develop a proposal for a framework directive. There is a strong case for further consultation on the detail of a framework directive. Elements of a possible framework directive are set out in Annex I, as a basis for consultation.

A framework directive should bring about:

- maximum harmonisation with a high level of consumer protection. Given the need to achieve a properly functioning internal market, further consultation is needed on the required level of harmonisation in the framework directive.
- Simplification and, where possible, deregulation of existing provisions should be prioritised.
- Application of the principle of mutual recognition and control by the country of origin (Internal Market principles).
- A balance between legal certainty and adaptability to market circumstances. On the one hand, it is essential that the legislation provides a sufficient level of detail both to genuinely harmonise, and to provide certainty for business and consumers. It should be clearly drafted to ensure that questions of interpretation are kept to a minimum. On the other hand, the legislation should be as ‘time-proof’ and technology-neutral as possible, avoiding overly prescriptive rules.
- The scope of the legislation should be based on the wider concept of ‘fair commercial practices’ and not only the narrower concept of ‘misleading practices’. It should also be phrased in terms of actions that are unfair – in other words an obligation not to trade unfairly, rather than a duty to trade fairly.
- A framework directive should be based on a general clause, which could consist of two core elements: the unfairness of the practice; and a “consumer detriment test” (developed in the annex). The general clause would have to be substantiated by a number of specific rules (the “fairness/unfairness categories”) concerning

⁹ FLASH BE 117 ‘Consumer Study’ January 2002

¹⁰ COM (2002) 62 final of 5 February 2002

different stages of the business to consumer relationship. In order to further illustrate the general clause and categories, a non-exhaustive list of examples would be drawn up.

- Possible elements of fairness/unfairness categories include:
 - A prohibition on business from engaging in commercial practices that are misleading or likely to mislead the consumer;
 - A duty to disclose to the consumer all material information which is likely to affect the consumer's decision;
 - A prohibition on the use of physical force, harassment, coercion or undue influence by business;
 - Effective information disclosure and complaint handling in the after-sales period.
- The primary focus should be on unfair practices that cause detriment to the interests of consumers as a whole, rather than individual cases, in line with existing practice. The legislation should provide that injunctions could be taken to ensure such unfair practices are withdrawn rapidly. The framework directive would be included in the list of the directives covered by Article 1 of the Injunctions Directive¹¹.

In addition:

- According to two Member States, a framework directive should also cover fairness in business to business commercial relations. As it is clear from the Green Paper the Commission's initial orientation was to limit a framework directive to business to consumer transactions. On the one hand, there are some unfair practices, such as protection of trade secrets or slavish imitation, which appear to be purely "business to business" in nature and should be outside the scope of application of the framework directive. On the other hand, there are practices, such as misleading advertising, which may affect both consumer and competitors' interests, which fall more clearly within the scope, as far as consumers are concerned. Given that no other Member State advocated the extension of a framework directive to all business to business relationships, the Commission sees no reason to change its initial orientation of covering solely business to consumer transactions.
- The decision to pursue the framework directive approach does not mean, as was made clear in the Green Paper, that the use of sector-specific measures such as the Television without frontiers Directive will be abandoned. Where necessary they will continue to be used.

26. The Commission's proposal for a Regulation concerning sales promotion in the Internal Market is compatible with the mixed approach. The Council has stated that priority should be given to the effective follow-up to the Commission's Green Paper

¹¹ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

on consumer protection. This Communication responds to that call. The Council has also stated that work on the proposal for a Regulation on sales promotions should be continued. In this context, the Commission wants to restate that work on the proposal for a Regulation on sales promotions should be continued in parallel.

Existing consumer protection directives

27. The Green Paper, in describing the mixed approach, suggested that any reform of existing consumer protection directives “would be undertaken once a framework directive has been established and experienced has been gained of its operation in practice”. The fundamental basis for this approach has not changed. The insistence of the Member States to insert minimum clauses into Commission proposals, was not an idle caprice. Rather it was due to the underlying differences of approach to consumer protection identified in the Green Paper. Despite the wishes of some respondents, it is not politically realistic to expect the Member States to abandon the minimum clauses in existing consumer protection directives without addressing these underlying differences.
- There is however some scope for repealing certain provisions of existing consumer protection directives and incorporating them into the framework directive.
 - The possibilities for reform of contract law provisions in existing directives that have proved problematic would be examined in the context of the follow-up to the communication on European contract law¹², which will be submitted before the end of the year.

Codes of conduct, non-binding guidance and stakeholder participation

Codes of conduct

28. According to the Green Paper, a framework directive would address two aspects of codes of conduct:
- Definition of non-compliance with voluntary commitments contained in a code as an unfair commercial practice.
 - The compatibility of codes that recommended commercial practices with the framework directive.
29. The development of codes of conduct at EU level in the field of consumer protection should be governed by the following criteria:
- The essence of codes of conduct is that they are voluntary: businesses should not be obliged to write codes nor to join them. Business should also not be obliged to negotiate codes with public authorities or other third parties. Codes should not be applied to non-signatories.

¹² Communication from the Commission to the Council and the European Parliament on European Contract Law (COM(2001) 398 final)

- Ensuring that commitments made in codes of conduct are respected is essential if the Member States where there is no tradition of codes of conduct are to accept their wider use and a corresponding shift to less intrusive legislation. Non-compliance with a voluntary commitment should be considered as misleading and therefore an unfair commercial practice.
 - Only commitments that concern business-consumer commercial practices would be covered.¹³ In addition, only non-compliance with a firm commitment, such as an undertaking to follow certain ‘good practices’ could be construed as misleading. Non-compliance with an aspirational commitment (‘best efforts’) would not be misleading.
 - Code-owners should be responsible for ensuring the conformity of their codes with legislation but not legally liable for the compliance of their members with the code. Ensuring code-owners are responsible for their own codes should reinforce their credibility.
 - The development of EU-wide codes should be encouraged. Membership of a code could provide an implicit ‘presumption of conformity’ equivalent to the role played by standards under the New Approach. At present, it is almost impossible to develop a genuine EU-wide code, given the differences in national rules. In addition, the status of commitments made in codes differs greatly between Member States.
 - Public endorsement of codes of conduct must always come at a price, in terms of changes that may be demanded by the public authority. The Commission will consult further on whether there is a need to provide for endorsement of codes and the mechanisms needed to ensure that such codes are in conformity with Community law. Public endorsement would give rise to a presumption of conformity with the provision of the framework directive, but would be without prejudice to the compatibility of the codes with the Community or national law provisions on competition.
30. Important concerns have been expressed about extending the role of codes of conduct. Codes of conduct are not a panacea. They can be abused either to mislead consumers or for anti-competitive reasons. Codes do not have the same legal status as legislation. The ultimate fallback of sectoral legislation will always remain. Effective codes of conduct simply means that there will be less need to have recourse to this safeguard. In this context, the Commission encourages the development of codes which, rather than setting minimum compliance requirements, go beyond the provisions of the directives and provide a higher level of consumer protection.

Non-binding guidance and stakeholder participation

31. These instruments should be seen together with a framework directive as a whole, with each element providing a different degree of certainty and adaptability. The value of the guidance would lie principally in supplying a point of reference for business, consumers, enforcement authorities and judges and in minimising the risk

¹³ The Commission has launched an initiative on business-to-business codes of conduct in the area of e-commerce. See <http://europa.eu.int/comm/enterprise/ict/policy/b2b-market-fair-trade.htm>

of differing interpretations arising. The use of such guidance is an important aid to clarity in several national consumer protection regimes in the EU and in other EU policies. Although not binding it is a practical tool for building consensus on new issues. Most importantly it would provide the basis for reaching consensus among national public authorities whose own interpretations have a significant impact on the market.

32. Further consultation is needed both on the form and development of guidance and on the possible role for stakeholders in developing guidance. While the latter was welcomed in principle, further consultation and examination is needed on the mechanisms needed to give stakeholders a role in identifying the consensus.

Enforcement

33. The clear welcome to the Commission's proposals for enforcement cooperation has given clear support for work to proceed on a legislative proposal to establish a framework for cooperation. The Commission will now begin work on this with the intention of making a proposal by the end of 2002. Before making a proposal, the parties most concerned, national governments and enforcement authorities will be consulted informally. The detailed ideas (e.g. establishment of a central national liaison point, mutual assistance and common enforcement actions) presented in the Green Paper will be the basis of the Commission proposal.

IV. FOLLOW-UP

34. Further consultation on the questions that remain open should proceed on the basis of working documents. The outline of a framework directive set out in Annex I is the first such working document.

Fair commercial practices

Initial areas for investigation and assessment methodology

35. The first step will be to build on the outline framework by consulting with national experts and interested stakeholders to identify possible options. The initial key areas for investigation, which may be discussed on the basis of one or more working documents, will cover the national notions of fairness, namely general clauses and fairness/unfairness categories; codes of conduct; non binding guidance; and stakeholder participation. Any relevant information will be gathered in order to evaluate the impact of the proposals.
36. As regards the notions of fairness, the objective is to identify the notions/categories of fair/unfair commercial behaviour ("notions of fairness"), which are common to the legal systems of most Member States. The notions which are not common, but specific to the systems of one or a minority of Member States will have to be characterised by taking into account the following criteria: (i) the public interest objectives motivating the measure; (ii) whether the measure is linked to the invoked public interest objective; (iii) how efficient is the measure in achieving the invoked public interests objectives; (iv) whether the measure is characterised by cultural or social peculiarities.

37. On the basis of the information above, the Commission will carry out a legal assessment of whether the national measure is a proportionate response to a legitimate public interest in protecting consumers and coherent notably with other Community consumer protection measures.

Establishment of an expert group

38. The Commission will establish a group of experts from national governments to:
- Facilitate a more in-depth exchange of views between the Commission and Member States;
 - Assist the Commission in identifying key cross-border obstacles in the field of the fairness of commercial practices faced by business and consumers, causing appreciable distortions of competition;
 - Identify and compare concepts of fair commercial practices in the Member States;
 - Identify common ground and the issues to be addressed in any framework directive, using the annex as a starting point to structure the debate, and the level of harmonisation necessary in order to apply the principles of mutual recognition and country of origin and thus achieve the Internal Market in this field;
 - Identify obstacles in the field of the fairness of commercial practices which do not cause appreciable distortions of competition and thus may be solved through application of the principles of mutual recognition and country of origin in any framework directive without further harmonisation;
 - Provide detailed analysis and options for future measures in this area to be used as a basis of wider consultation.
39. The Commission will chair the expert group. Its members will consist of governmental experts from the Member States. The Commission will invite interested stakeholders, in particular business associations and consumer organisations, to present their positions on specific issues being considered. The expert group will meet on a regular basis. The agenda of the expert group, any additional working papers prepared for it and reports of meetings will be made publicly available. The work of the expert group will be taken into account along with in-put from other sources.

Existing expert groups

40. The work and experience of a number of ongoing expert groups will be drawn on, where necessary and relevant, to give further insight and reflection on key issues. In particular, the work of the commercial communications expert group, the service strategy expert group, the OECD, the International Marketing Supervision Network (Europe), an important forum where Member State enforcers meet and discuss problems, will play a significant role. The Consumer Committee will also continue to be involved in discussions on an ad hoc basis.

Academic group

41. The Commission will also set up a group(s) of academics from different Member States to help it identify the notions of fairness which are common to the legal systems of the Member States and distinguish them from those that are specific to certain Member States. To this end, the academic group will carry out a comprehensive comparative law study.

Stakeholder involvement

42. The Commission considers that further stakeholder consultation is crucial and it will hold further dialogue with all stakeholders over the coming months. It will organise a number of open meetings in Brussels and, where appropriate, on the initiative of national governments, in the Member States to explore specific issues. In the meantime reactions to the communication are welcome and should be sent to the Commission **by 30 September 2002**. All reactions should be sent by email to consultanco@cec.eu.int. In addition, paper copies may also be sent to:

European Commission
DG Health and Consumer Protection
F101 06/52
B-1049 Bruxelles/Brussel

43. Unless otherwise explicitly requested, the Commission will make all responses received public through the Internet.

European Parliament

44. The Commission will keep the European Parliament fully informed of the developments in the consultation, especially the outcomes of the expert groups and meetings with stakeholders.

Reviewing existing acquis

45. The Commission will also begin a comprehensive review of the existing consumer legislation to identify areas that may be consolidated and simplified. This will concern those parts of the acquis that address commercial practices having no effect on the contract law provisions of the Member States. The Commission will outline the key areas in order to consult widely on possible consolidation initiatives and ensure consistency with any follow-up measures on the Green Paper. Business, consumer and some Member States respondents have all complained about the barriers in this area, for example, differing withdrawal periods arising from the existing directives. As indicated earlier, the Commission will examine the barriers that arise from the contract law provisions of the existing acquis in the follow-up to the communication on European contract law.

ANNEX I

ELEMENTS OF A POSSIBLE FRAMEWORK DIRECTIVE

The following is a working document that outlines elements of a possible framework directive in order to provide a starting point to structure the debate within the expert group above.

I. Scope

A possible framework directive could harmonise the legal provisions of the Member States relating to the fairness of commercial practices in order to ensure a uniform high level of consumer protection and the smooth functioning of the Internal Market. The health and safety aspects relating to goods, services or property as well as contract law and contractual law remedies would not be covered.

The primary focus of a framework directive would be on unfair commercial practices harmful to the collective interests of consumers, rather than claims of individuals. Under the framework directive Member States would ensure that court actions under their national laws allow for the rapid adoption of measures, including interim measures designed to terminate any unfair practice. The framework directive would be included in the list of the directives covered by Article 1 of the Injunctions Directive.

A further question for consultation is whether or not the framework directive should provide for the exercise of an autonomous action by national enforcement bodies and/or consumer organisations. An additional issue to consider in this context is whether the most blatant and serious breaches of specific provisions of the framework (e.g. use of force, harassment or coercion, see below) directive could give rise to liability for damages proven by individual consumers.

The framework directive would apply only in so far as there are no specific Community law provisions regulating these commercial practices. For example, it would be without prejudice to the information requirements to be provided under the Consumer Credit Directive,¹⁴ or the rules on sponsorship set out in the Television without frontiers Directive.

II. Structure

1. General clause

The framework directive would be based on a general clause, according to which Member States should ensure that traders established in their territory should not engage in unfair commercial practices.

The general clause could consist of two elements:

- a) the unfairness of the commercial practice.
- b) a “consumer detriment test”, i.e. the fact that the commercial practice should cause or be likely to cause direct detriment to the consumer. This test would

¹⁴ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and subsequent amendments.

have to be measured against the standard of the consumer of average intelligence, reasonably well informed and reasonably circumspect, as defined by the Court of justice¹⁵. Where the business consciously directs its activities to a specific vulnerable group of consumers (such as children) that criteria could be adjusted accordingly.

2. Fairness/unfairness categories

The general clause would have to be substantiated by an exhaustive number of specific rules (the “fairness/unfairness categories”) concerning different stages of the business to consumer relationship. In order to define these categories the Commission will have to examine the notions of fairness, which are common to most of the legal systems of the Member States.

Some common elements could be:

- misleading practices;
- failure to provide material information (“duty to disclose”), including representations, omissions and conduct;
- use of force, harassment, coercion and undue influence;
- failure to provide after sale customer assistance and effective complaint handling.

2.1 Misleading commercial practices

A framework directive should prohibit business from engaging in commercial practices that are misleading or likely to mislead the consumer to whom they are directed or effected. Possible examples of this are:

- any technique to promote the goods or services or property on offer that is not clearly identifiable as such by the consumer. In particular, features, announcements or promotions that are disseminated in exchange for a payment or other reciprocal arrangement should be clearly recognisable as such by the consumer;
- a representation that any good or service has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that it does not have;
- a representation that any good or service is of a particular standard, quality, grade, style or model that it is not;

In this context, business would be required to be able to objectively substantiate all representations/claims, other than those specifically regulated in other EU legislation, made to consumers, whether direct or implied. This would not cover advertising cases based on subjective claims or on correctly stated opinions if consumers are made aware of the source

¹⁵ *Pall corp. v Dahlhausen*, C-283/89 [1990] E.C.R. I-4827; *Verband Sozialer Wettbewerb e.V v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, C-315/92 [1994] E.C.R. I-317; *Mars*, C-470/93 [1995] E.C.R. I-923; *Commission v Germany “Sauce Hollandaise”*, C-51/94 [1995] E.C.R. I-3299; *Gut Springenheide*, C-210/96 [1998] E.C.R. I-4657, *Estée Lauder v Lancaster*, C-220/98 ECR I-117

and limitations of the communication. Further, “puffing” cases would not be covered since a reasonable person can recognise obviously exaggerated claims and do not take them seriously. Some of the above issues are partially covered by the misleading advertising directive, which could be subsumed into any framework directive.

2.2 Duty to disclose

Often information is given in brochures and lengthy contracts or in jargon. A framework directive should ensure transparency of the key facts such as hidden penalties or charges or restrictions on the goods or services that are likely to have an important impact on the consumer’s decision to buy. The consumer should be provided with such information by the supplier prior to the purchase of any goods or services.

A framework directive could impose on traders a duty to disclose to the consumer all material information that is likely to affect the consumer’s conduct or decision with regard to the goods or services.

For example, the following non-exhaustive aspects could be required:

- the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- the price of the goods or services including all taxes indicated in the applicable currency;
- delivery charges, where appropriate;
- the arrangements for delivery or performance;
- the existence of any return, if foreseen by EU law, or any return, exchange or refund policy;
- the cost, if above the basic rate, that a consumer would incur to communicate with the trader, such as the use of premium telephone numbers;
- information relating to available after sales service;
- membership of a code of conduct and an alternative dispute settlement scheme, if applicable;

2.3 Use of force, harassment, coercion and undue influence

A framework directive could provide that business should not use physical force, harassment, coercion and undue influence in their relationship with consumers. This includes aggressive selling and would aim to target a business that:

- a) exploits characteristics or circumstances of the consumer. For example, taking advantage of a specific situation or misfortune of the consumer such as a bereavement or serious illness in his family or anxieties about personal security or debt;
- b) unduly pressures the consumer to agree to the purchase of goods or services. For example, making it clear to the consumer that he cannot leave the premises

until the contract is signed; or prolonged personal visits by sales representatives who ignore requests to leave.

2.4 After sale customer assistance and complaint handling

It will be necessary to examine which aspects of the after-sale customer assistance should be covered in the framework Directive.

An issue that could be covered is complaint-handling procedures. Practice varies but many suppliers do not give adequate priority to the effective handling of their customers' queries and complaints and this is reflected in systems, resources, cultures and outcomes. Under the framework directive, traders should ensure that they respond quickly and effectively to any complaint and make full redress when justified. Rules should focus on outcomes here, rather than prescribing methods, leaving companies free to organise their internal practices.

Examples of possible procedures may include:

- Co-ordinating the handling of complaints;
- Ensuring that information from complaints of general interest is reported to the firm's management;
- Informing consumers about how to make a complaint and the follow-up of their complaints;
- Contact points at which consumers can lodge a complaint; and
- Internal controls to ensure that complaints are properly dealt with.
- Information about third part resolution mechanisms.

A further question for consultation is whether other aspects of the after-sale ongoing relationship between the business and consumer (e.g. failure to provide relevant information over the life of a complex product or not having available spare parts or charging excessive prices for them) should be included as a specific unfair category. Alternatively, such issues could be covered by the information requirement under the duty to disclose.

2.5. Codes of conduct

Only voluntary commitments in codes of conduct made public by companies addressing business-consumer commercial practices would be relevant for the purposes of the framework directive. These commitments could be adopted collectively by an industry sector or an association of companies or an individual company. A code-owner would need to be defined as the body responsible for the development of the code (e.g. an association or the company itself in the case of an individual code).

The decision to join a code would also be voluntary. The representation by a firm of its association with a code gives rise to legitimate expectations. If the firm does not comply with the firm commitments in the code that type of behaviour would be considered as a misrepresentation and therefore unfair under the framework directive. A code-owner would be responsible for ensuring the conformity of the contents of the code with the framework directive. However, the framework directive would not seek to make code-owners liable for the compliance of code members with the code. The latter, as explained above, would be ultimately responsible if they fail to comply.

As indicated above, further consultation is needed on whether the framework directive should include an option for the endorsement of codes by public authorities. All codes, as agreements between undertakings, would remain under an obligation to respect competition rules. As

stated above, any endorsement by public authorities would create a presumption of conformity with the provisions of the framework directive, but would have no bearing on their compatibility with competition law provisions, notably those set out in Article 81 of the Treaty.

3. List of examples

In order to further illustrate the scope of application of the general clause and the fairness/unfairness categories a non-exhaustive list of examples would be contained in a list attached to the framework directive. For example, the following could be given as examples of misleading practices:

- A representation about the independence, neutrality or objectivity of their advice where this is not the case;
- A representation about the risk or probability of risk associated with goods or services that is not correct.

III. Mutual recognition and country of origin

The combination of an adequate level of harmonisation and the principles of mutual recognition and country of origin (which should be enshrined in the framework directive) will have as a consequence that divergent interpretations in jurisprudence at national level will not result in the fragmentation of the internal market.

IV. Non Binding Guidance

Rules for the use of guidance on the general clause and the fairness/unfairness categories should be established in the framework directive. The framework directive would make clear that this guidance is not legally binding. There are different options for the development of such guidance. One possibility is through Commission recommendations/interpretative communications, after having consulted Member States' representatives in an appropriate forum, business associations and consumer organisations.

V. Stakeholder participation

Depending on the option chosen for guidance, a framework directive would provide for the Commission to mandate stakeholders to try and identify consensus on such guidance.

The framework directive would need to provide for general criteria for the selection of stakeholders. These criteria should ensure that the stakeholders chosen represent the interests at stake in the issues concerned.

Further criteria for the granting of mandate and the verification that the mandate had been respected would have to be laid down. These criteria should ensure that the mandate is precise and that a clear deadline is supplied. The right of the Commission to produce guidance if the negotiations failed should be safeguarded in the framework directive.

Further consultation is required on the precise nature of the above provisions.

ANNEX II

	Reform			Approach			Practices			Codes			Guidance			Stakeholders			Enforcement		
	Yes	No View/ More info	No	Mixed	No Pref./ No view/ More info.	Spec	Fair	No Pref./ No view/ More info.	Mislead	Yes	No Pref./ No view/ More info.	No	Yes	No Pref./ No view/ More info.	No	Yes	No Pref./ No view/ More info.	No	Yes	No Pref./ No view/ More info.	No
Member States	12	2	1	12	0	3	13	1	1	10	2	3	10	5	0	11	4	0	10	3	2
Governments (other)	9	1	0	6	1	3	6	4	0	6	3	1	5	5	0	3	7	0	5	5	0
Consumer Org.	30	2	1	29	2	2	22	10	1	15	11	7	15	17	1	20	13	0	18	14	1
Business Assoc.	36	17	24	27	25	25	16	46	15	49	18	10	16	44	17	28	38	11	26	44	7
Companies	8	3	0	4	5	2	2	8	1	6	4	1	3	8	0	4	7	0	4	7	0
Lawyers	8	0	1	5	2	2	2	6	1	3	6	0	5	4	0	4	5	0	6	3	0
Others	11	3	0	12	1	1	9	4	1	9	4	1	7	6	1	8	6	0	7	7	0
TOTAL	114	28	27	95	36	38	70	79	20	98	48	23	61	89	19	78	80	11	76	83	10