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**COMMISSION STAFF WORKING PAPER**

**EXTENDED IMPACT ASSESSMENT**

**on the**

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)**

**{COM(2003)356 final}**

## Extended Impact Assessment: unfair consumer practices

### Overview

- Internal market barriers inhibit firms from selling and consumers from buying.
- This limits consumer choice, reduces competitive pressure for efficient pricing and represents a lost opportunity in terms of economic growth.
- Research has shown that the divergent regulation of unfair ‘commercial practices’ (eg advertising, marketing and other commercial communication) is a significant internal market barrier which inhibits firms from marketing and selling cross-border and contributes to a lack of consumer confidence in purchasing cross-border.
- This proposal aims to address these barriers, by harmonising regulation of unfair commercial practices at a level which provides a high enough level of consumer protection to justify consumer confidence. It also contains an ‘internal market clause’ providing for mutual recognition of national provisions implementing the Directive, which will contribute to the achievement of the internal market in this area.

### INTRODUCTION: THE DEVELOPING ROLE OF IMPACT ASSESSMENT

The European Commission indicated in 2002 its commitment to developing impact assessment of new proposals.

Work on this proposal pre-dates that commitment and the publication of the Commission’s guidelines on carrying out impact assessment. This extended impact assessment should therefore be seen in the context of an evolving Commission approach which will continue to develop in the light of greater experience. Nevertheless, it marks a significant step forward in ensuring that Commission proposals are grounded in a systematic analysis of their likely impacts and a more robust basis for action than has been required in the past.

This extended impact assessment draws on a range of specially-commissioned sources, all of which are available on the Commission’s website<sup>1</sup>. These include

- 169 responses to the consultation on the Green Paper on Consumer Protection and 113 responses to the Follow-up Communication;
- Quantitative Eurobarometer surveys of 2899 businesses, large and small, and 16,129 consumers across the EU about the problems they encounter and options for resolving them<sup>2</sup>;

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<sup>1</sup> [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm)

<sup>2</sup> The surveys were carried out in the fifteen EU Member States between 30 April and 10 June 2002 and between 26 August and 23 September 2002, as part of the Standard Eurobarometer 57.2 and the Flash Eurobarometer. For the consumer survey the sample was consumers aged 15 or over, with the ‘raw’ results weighted to reflect each Member State’s proportion of the EU population as a whole. The targets have been defined as: all companies – farmers excluded - employing 10 persons or more, that are installed in the European Union and sell or advertise to final consumers. The sampling of companies were chosen according to four criteria: the Country (15 levels), the geographical location of the

- A survey of national business associations<sup>3</sup> and European Consumer Centres<sup>4</sup>;
- A detailed *ex ante* impact assessment drawing on the above sources, carried out for the Commission by GFA Management<sup>5</sup>;
- Several studies which assessed the current legislation in the Member States<sup>6</sup>, including one study which uses comparative analysis to identify internal market barriers and assesses the effort required to transpose this proposal.<sup>7</sup>

The impact assessment also takes into account existing analysis by the Commission and others of the state and impact of the internal market.<sup>8</sup>

Survey evidence needs to be interpreted with care; just because a survey respondent expresses interest in doing something that does not necessarily mean that it will be translated into action. However, the survey evidence can reliably be used to assess the relative importance respondents attach to different factors.

The *ex ante* impact assessment was discussed at the workshop on this subject organised by the Commission in January 2003. Some participants expressed concern about the robustness of the methodology used and in particular argued that the business survey was insufficient. As explained at the workshop, the response rates for the survey were high<sup>9</sup> and supplemented the responses received in consultation (where a question about likely impacts was specifically asked) by seeking the views of national business organisations. The Eurobarometer survey included a range of size of businesses (including a high proportion of SMEs) to enable the effect on different types of enterprise to be determined.

## 1. WHAT PROBLEM IS THE PROPOSAL EXPECTED TO TACKLE?

### 1.1 An incomplete Internal Market: businesses, consumers and the economy lose out

The central problem is the under-development of the consumer dimension of the internal market. In brief, specific legal barriers caused by the fragmented regulation of unfair commercial practices cause cost, complexity and uncertainty for firms and a lack of consumer confidence in cross-border transactions. This in turn inhibits firms from selling to consumers

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company, the size of the company (3 levels: 10-49, 50-249, and 250 employees or more), and the activity sector (4 levels: Construction, Industry, Services and Trade).

<sup>3</sup> 16 responses out of 38 questionnaires sent were received, in addition to the 77 responses from businesses to the green paper consultation.

<sup>4</sup> The ECCs exist to help consumers make use of the internal market. When the survey was carried out there were 14 ECCs in 12 Member States; there are now 15 in 13 Member States.

<sup>5</sup> *Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection*, GFA Management

<sup>6</sup> Studies by V.I.E.W, Price Waterhouse and Lex Fori all available at [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/studies/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm)

<sup>7</sup> See Analysis of National Fairness Laws co-ordinated by Prof Dr Reiner Schulze and Prof Dr Hans Schulte-Nölke available at: [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/studies/index\\_en.htm](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm).

<sup>8</sup> See eg Economic Reform : report on the functioning of community product and capital markets, COM (2002) 743 final

<sup>9</sup> See GFA op cit p81

cross-border and consumers from purchasing. The resulting low levels of cross-border transactions limit consumer choice, reduce competitive pressure for efficient pricing and represent a lost opportunity in terms of economic growth.

This section looks first (1.2) at general effects of an under-developed internal market in this area, in terms of prices and business and consumer behaviour. It then (1.3) looks at the problems that cause these effects, in terms of internal market barriers. Finally (1.4) it analyses the specific problems relating to national laws on commercial practices that give rise to these internal market barriers.

## 1.2 An under-developed consumer dimension of the Internal market

The **Lisbon European Council goal** is for the EU to become “the most competitive knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater cohesion”. It highlighted the importance of completing the internal market, simplifying the regulatory environment and boosting consumer confidence in order to do so.

There is evidence from a range of sources that progress in completing the **internal market for business-to-consumer (B2C) transactions has stalled**:

- Significant price divergences remain, and price convergence has stagnated
  - Prices inside Member States vary 5% around the national average; across the EU prices vary 20% or more<sup>10</sup>
  - 51% of EU consumers had noticed price differences for the same product between Member States<sup>11</sup>
- Firms are not marketing to consumers cross-border and consumers
  - Marketing (including advertising) and sales to consumers have stagnated since 1991 and remain at almost insignificant levels<sup>12</sup>
  - 55% of EU consumers had not seen or heard cross-border advertising or information in the last 12 months.<sup>13</sup>
- Very few consumers are purchasing cross-border
  - Consumer confidence in buying cross-border has stagnated at 1991 levels and has not translated into significant cross-border purchases in practice.<sup>14</sup>
  - 13% of consumers have made one or more cross-border purchases in the last 12 months.
  - Only 5% of consumers say they have bought a bank account in another country, though 12% say they would consider doing so in the next 5 years.<sup>15</sup>

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<sup>10</sup> COM (2001)736 final

<sup>11</sup> Eurobarometer 57.2

<sup>12</sup> COM (2002) 743 final

<sup>13</sup> Eurobarometer 57.2

<sup>14</sup> See GFA op cit pp49-51

The **consequences** of this are that:

- Individual **consumers**, particularly in small member states, lose out on access to good value and/or innovative products. This is not because they are unwilling to buy cross-border in principle: 53% of EU consumers would certainly or probably consider cross-border shopping to buy a product because it was cheaper or better.<sup>16</sup>
- **Businesses**, particularly SMEs, find it difficult to tap into other markets within the EU which would help them to grow;
- The **EU economy** as a whole suffers an ‘opportunity cost’ in lost GDP growth.

The potential **economic gains** of addressing these problems are significant. A report commissioned by The European Financial Services Round Table estimated that the potential cost savings arising from a functioning internal market for retail financial services could be €5 billion annually, with potentially a 0.5% increase in economic growth.<sup>17</sup>

### 1.3 The barriers that hold back the consumer dimension of the internal market

There is a range of causes for the current stalemate. These can be divided into ‘natural’ and ‘policy-induced’ barriers, each of which is outlined in turn. The specific legal barriers arising from divergent regulation of unfair commercial practices are then examined in greater detail.

#### *‘Natural’ barriers*

There are ‘**natural**’ barriers, such as language and distance. These will never be entirely eliminated, but there is evidence that their impact is reducing:

- The **euro** has made it easier for consumers to understand and compare prices, aided by policy measures to equalise the cost of cross-border bank transfers within the euro zone. 32% of businesses said they were more interested in cross-border trade since the advent of the euro.<sup>18</sup>
- **E-commerce** has reduced the impact of time and distance as a disincentive, and there is potential for further growth, at least for some products. 41% of businesses said they were more interested in cross-border trade since the advent of e-commerce.<sup>19</sup>
- **Language** barriers are falling. 53% of EU consumers say they can speak at least one European language in addition to their own and 26% two other languages, while 71% think that everyone in the EU should be able to speak another European language in addition to their mother tongue.<sup>20</sup>

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<sup>15</sup> Eurobarometer 58.1, financial services.

<sup>16</sup> Source: Eurobarometer survey available at [http://europa.eu.int/comm/public\\_opinion/flash/fl131\\_en.pdf](http://europa.eu.int/comm/public_opinion/flash/fl131_en.pdf)  
<sup>17</sup> [www.zew.de/erfstudyresults/](http://www.zew.de/erfstudyresults/)

<sup>18</sup> Eurobarometer 57.2 (2002)

<sup>19</sup> Ibid

<sup>20</sup> Special Eurobarometer ‘Europeans and Languages’ EB 54.1b (February 2001)

### *'Policy-induced barriers'*

There are also '**policy-induced**' barriers to cross-border selling and purchasing. These are barriers which arise from regulation, taxation being one example.

#### **1.4 Fragmented regulation of unfair commercial practices.**

At the moment, EU directives set **minimum standards** in specific areas of consumer protection, such as advertising, to which Member States are able, but not obliged, to add. This means that **15 sets of different requirements** (soon to be 25) operate in practice. Both businesses and consumers see this as a significant problem:

*For businesses: compliance costs act as a deterrent to cross-border marketing*

- 47 % of businesses cited the need for **compliance** with different national regulations on commercial practices, advertising and other consumer protection regulations as very or fairly important obstacles to cross-border shopping, making this issue on a par with tax differences (46%) and more of a problem than language barriers (38%)
- A survey by the European Mail Order Trade Association found that five of the top ten barriers to selling cross-border encountered by its members related wholly or in part to **differences in national rules** on commercial practices

*For consumers: uncertainty and lack of confidence in cross-border shopping*

- On average, 18% of consumers in a recent survey cited **poor legal protection** as a reason not to buy financial services cross-border, rising to 36% in one Member State.<sup>21</sup>
- In another survey 68% of consumers who felt less confident buying from another EU country than their own cited perceived **lower standards of consumer protection** laws as a very or fairly important reason for their lack of confidence. 76% cited as a very or fairly important factor a lack of trust in foreign sellers and a **perceived greater risk of fraud or deception**.<sup>22</sup>
- An even higher number were deterred by the **uncertainty** of not knowing what consumer protection is provided by other EU countries, with 79% of respondents citing it as a very or fairly important obstacle.<sup>23</sup>

Both businesses and consumers also suffer from the activities of **rogue traders**, who both harm consumers directly and take business away from law-abiding competitors. The European Advertising Standards Alliance concluded that the cross-border complaints it handles "overwhelmingly concern the activities of 'rogue-traders' and other fringe operators, who deliberately set out to exploit the loopholes between national regulatory systems."

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<sup>21</sup> Eurobarometer 58.1 Financial Services

<sup>22</sup> Eurobarometer 57.2 and Flash Eurobarometer 128: *Public opinion in Europe: Views on business-to-consumer cross-border trade*, 14 November 2002

<sup>23</sup> Ibid. 68% of respondents cited lower consumer protection standards as a very or fairly important factor. Base in each case: consumers who are less confident buying from another EU country than from their own country

### *Specific legal barriers*

**Evidence** on specific divergences and their other practical effects has emerged from consultation, surveys and the assessment of them by GFA, the work of the national governments experts group and extensive legal analysis undertaken for the Commission. The following examples are illustrative.

- Different sources of law and practice increase research costs

Some Member States have a single act which includes one or more ‘general clauses’ protecting consumers, and often competitors, from unfair commercial practices.<sup>24</sup> Others codify the provisions in private law or the civil code.<sup>25</sup> Some have no specific legal framework but a number of specific legal provisions in different pieces of legislation.<sup>26</sup>

However, the legislation is rarely enough to determine whether a practice is unfair. In Germany, for example, extensive reference would need to be made to jurisprudence, while in Sweden in addition to the case-law of the Market Court the Ombudsmen’s guidelines would need to be taken into account.

- Differences of substance in what types of practice are considered unfair meaning that businesses need to change their business model and/or marketing strategy

For example, Belgian law prohibits the use of comparative tests by consumer associations in advertising. In other Member States (eg Austria, Germany, Italy) this would be considered legal as long as the information given to consumers is true, complete and fair.

In Germany, certain practices have been found to be unfair because they exert a moral pressure on consumers. For example, a German court recently convicted a brewery that had promised in its advertising to pay for the safekeeping of one square metre of African rainforest for each crate of beer sold.<sup>27</sup> Academic analysis suggests that many other Member States would be extremely unlikely to deem this practice to constitute unfair pressure.

While all Member States apply stricter standards to advertising to children, there are significant differences in approach. For example, the Finnish Market Court prohibited a radio advertisement of a fast food chain in which a child asked his mother to buy a hamburger meal that was packed in a plastic boat toy<sup>28</sup>. Whereas this case might have been judged similarly by the Italian Antitrust Authority<sup>29</sup> several other Member States (e.g. Austria, Belgium, Germany) apply less restrictive standards to advertising aimed at children and/or the use of

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<sup>24</sup> eg Austria, Belgium, Denmark, Finland, Germany, Sweden

<sup>25</sup> eg France, Italy, Netherlands

<sup>26</sup> eg Ireland, UK

<sup>27</sup> Oberlandesgericht Hamm, *Judgement of 12 November 2002 – Krombacher*. The Court held that advertisements of that kind could coerce the consumer (psychologically or legally) into a contract and therefore contravene § 1 Act against Unfair Competition. In the scientific literature this decision has been commented critically (*cf. Bottenschein*, WRP 2002, 1107).

<sup>28</sup> *MT* 1987:13. The Market Court held that a child must not be used in a central position in an advertisement in a way that the child advises an adult to purchase a marketed product.

<sup>29</sup> According to the case law of the Authority concerning advertising featuring children, such advertising is considered unfair if it exploits natural feelings of adults towards children and consequently coerces them in buying a product that they would otherwise not buy, or not buy under these conditions (*cf. Autorità per la concorrenza ed il mercato*, Decision No. 5755 of 5 March 1998 – Norad).

children in advertising. Hence, the cases dealt with by the Finnish Market Court would probably have been judged differently in these countries.

- Different ‘benchmark consumers’ are used when assessing a commercial practice

An assessment of the impact of commercial practices will depend on what assumptions are made about which consumers are affected and how they behave. The policy trade-offs related to this issue are discussed in section 7.3 below.

The European Court of Justice has used the concept of the ‘average consumer’ who is ‘reasonably well informed, observant and circumspect’ in its judgements. This test allows for the behaviour of the ‘average consumer’ to be determined in the light of, for example, relevant cultural factors, so it does not assume that the ‘average consumer’ is exactly the same throughout the EU. But it does imply that national courts should be assessing the effect of commercial practices on the ordinary consumer who is expected to be reasonably able to protect their own interests and not on consumers who are particularly vulnerable or gullible.

However, national courts do not always apply the ECJ’s ‘average consumer’ concept. For example, in the Saint Brice case<sup>30</sup> the Belgian Cour de Cassation referred to the least attentive consumer who accepts without criticism the representations made to him and who is not in a position to see through the traps, exaggerations or manipulative silences. In the recent Scanner advertising case<sup>31</sup> the highest German Court described the “average consumer” as a “casual observer” in certain situations, referring to the benchmark consumer previously used in German caselaw.

The consequences of this are significant **legal uncertainty and complexity** which constitute a deterrent to cross-border activity for both businesses and consumers.

There are **particular problems for SMEs** who face the same up-front costs as larger businesses and for whom establishment in another Member State is less likely to be a viable option. Even though establishing in another Member State is not necessarily straightforward, an EMOTA survey in 2002 found that its member still prefer to acquire or work with a local firm when selling cross-border, in part because of the difficulties in understanding how national laws are interpreted.

In **consumer protection** terms this situation brings two significant problems. Some areas of consumer protection are **not addressed by the current *acquis*** and so there are not even minimum standards applying throughout the EU. Examples would include holiday clubs which fall outside the scope of the timeshare directive, and the aspects of the relationship between a firm and consumer after a transaction has occurred which are not specified in the contract. In addition, the complex patchwork of regulation is extremely **difficult to explain to consumers**. It is therefore often unfeasible for national authorities to try to inform or educate their own consumers about that protections will or will not apply if they shop elsewhere in the EU. The consequence is uncertainty which, as shown above, deters consumers from buying cross-border.

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<sup>30</sup> *Cour de Cassation*, Judgement of 12 October 2000 (*Saint-Brice NV/ etat belge*).

<sup>31</sup> *Bundesgerichtshof*, Judgement of 20 December 2001 – I ZR 215/98; see also *Bundesgerichtshof*, Judgement of 20.10.1999 – I ZR 167/97 (“Orient-Tppichmuster”).



## 2. WHAT MAIN OBJECTIVE IS THE PROPOSAL EXPECTED TO REACH?

The **overall aim** of the proposal is to fulfil the requirements of **Treaty Articles 95 and 153** to put in place complete the internal market by removing barriers to the free movement of goods and services, and to provide a high level of consumer protection. The proposal must do so in a way which is in line with the Commission's approach to **better regulation**.

The **specific aim** is to **encourage the greater development of cross-border shopping by consumers and e-commerce** across the EU by addressing internal market failures, through

- **Reducing the barriers faced by businesses** who wish to market to final consumers cross-border arising from divergences in regulation of unfair commercial practices; and
- **Increasing consumer confidence** in cross-border transactions, specifically in the purchase of products from firms established in a Member State other than their own, by
  - removing uncertainty about the standards of behaviour they can expect from traders in other Member States, and by
  - providing a high, common level of protection for all transactions.

The **objectives** of the proposal are therefore to

- Ensure that consumers are not treated unfairly by businesses, and in particular that they are not subjected to either misleading or aggressive behaviour from traders or otherwise have their freedom of choice impaired;
- Ensure that legitimate businesses are able to market cross-border and on a pan-EU basis without having to change their business strategies or incur undue costs.

The **benefits** of doing this were recognised in increased consumer choice, pressure for efficient pricing and price convergence<sup>32</sup>, effective competition, and macro-economic benefits accruing from functioning internal market. As explained above, this will contribute to the **Lisbon European Council** goal of enhancing the EU's **competitiveness** and creating sustainable economic growth. It takes account of the wishes expressed by the **European Parliament**, which has called for common general rules enabling a high level of consumer protection to be adopted as a matter of priority and highlighted the fact that current legislation hinders the implementation of a genuine internal market for consumers.<sup>33</sup> It is also consistent

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<sup>32</sup> The most recent Cardiff report, *Economic Reform: report on the functioning of Community product and capital markets*, indicated that greater development of cross-border shopping and e-commerce can "contribute to price convergence by exerting downward pressure on prices". See COM (2002) 743 final.

<sup>33</sup> "The European Parliament ... considers that common general rules enabling a high level of consumer protection should be adopted as a matter of priority", EP Resolution on the implications of the Commission Green Paper on European Union Consumer Protection for the future of EU consumer policy, 13 March 2003, paragraph 1. "The European Parliament ... takes the view that maximum harmonisation may be an effective means of eliminating the fragmentation of business-practice and consumer-protection legislation applicable to the internal market, so as to enable the latter to operate more smoothly and thereby raise consumer confidence; ... Insists that maximum harmonisation must aim at a high level of consumer protection ... Is convinced that the principles of mutual recognition and law of the country of origin can only be fully implemented to all-round satisfaction once a sufficient degree of harmonisation and a high level of protection have been achieved." European Parliament resolution on prospects for legal protection of the consumer in the light of the Commission Green Paper on European Union Consumer Protection, 13 March 2003, paragraphs 6 - 8.

with the Commission's priorities as set out in its **Internal Market Strategy** and **Consumer Policy Strategy**.

Finally, action in this area will also have political benefits in enabling the **clearer identification of consumer rights** at EU level which both helps to promote the image of the EU and brings it **closer to EU citizens** in a very practical way. As well as the distortions of the market which arise from unfair commercial practices, they often lead to serious harm to individual consumers' welfare as well as causing them severe anxiety and distress. The EU can thus make a real contribution to the **day-to-day wellbeing** of EU citizens.

### 3. WHAT ARE THE MAIN POLICY OPTIONS AVAILABLE TO REACH THE OBJECTIVE?

Analysis had shown that the main source of the barriers was the content of and differences between national laws on unfair commercial practices (in particular ways of selling to consumers, including advertising, marketing). This led to several **early conclusions**:

- Any change would need to include legislation

The problems could not be addressed without changes to legislation. The reasons for this have been stated by stakeholders such as EASA<sup>34</sup>, who explained that discrepancies between non-legislative approaches in Member States stem from divergent legislation: "The major discrepancies between national codes arise directly from differences in national legislation and will be eliminated only when they are". So in order to meet the Commission's objectives any change would need to include legislation.

- Change needed to be at EU level

Member States could not address this problem in isolation, since the internal market barriers largely arise from the divergences between Member States. The most efficient solution therefore, taking account of the principle of subsidiarity, was for an approach which harmonised at EU level. The GFA study analysed different scenarios and considered three main options in detail, maintaining the '**status quo**', or two approaches to change called here the '**specific**' and '**mixed**' approach:

#### *Option 1: Status quo*

This would involve keeping the existing EU consumer protection legislation but introducing no new directives. The only action, assumed in all three scenarios, is to improve co-operation between Member States on the enforcement of the existing legislation. This is being taken forward in a separate Commission proposal.

#### *Option 2: Specific approach*

This is the traditional law-making approach of tackling a specific problem as it arises (eg timeshare, doorstep selling) through a Directive which contains minimum consumer protection standards which Member States may (but are not required to) increase for their own traders/consumers.

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<sup>34</sup> EASA brings together national advertising self-regulatory organisations and organisations representing the advertising industry in Europe.

Advantages	Drawbacks
<ul style="list-style-type: none"> <li>• Tailored solution to a particular problem while minimising change required by MSs</li> </ul>	<ul style="list-style-type: none"> <li>• minimum clauses and lack of harmonisation perpetuate internal market barriers</li> <li>• doesn't enshrine high level of protection across EU</li> <li>• legislation soon dated as market evolves</li> <li>• existing <i>acquis</i> focuses on pre-sale relationship only</li> </ul>

*Option 3: Mixed approach*

This would involve a Directive establishing common, fully harmonised framework legislation for unfair commercial practices, and applying the principle of mutual recognition to the laws of the Member State where the trader is established (a so-called “country of origin” approach). It would set out principles for identifying and tackling unfair practices in any sector, through any technology or medium. Legislation on specific problems or sectors would still be an option, but the need for it would be reduced and its focus would be more on contractual matters than unfair commercial practices.

Advantages	Drawbacks
<ul style="list-style-type: none"> <li>• Harmonisation reducing internal market barriers</li> <li>• Inclusion of general principles makes legislation ‘future-proof’ as market evolves</li> <li>• ‘safety-net’ where no specific protection exists</li> <li>• ‘principles’ based approach avoids disproportionate prescription</li> <li>• enables re-examination of other minimum clauses, vehicle for addressing after-sale consumer problems</li> </ul>	<ul style="list-style-type: none"> <li>• likely to involve more adjustment effort by MSs</li> <li>• hinges on achieving required level of legal certainty</li> </ul>

**4. WHAT ARE THE IMPACTS – POSITIVE AND NEGATIVE – OF THE DIFFERENT OPTIONS?**

This section sets out an assessment of the impacts of four scenarios in tabular form: Options 1-3 as described above (the ‘status quo’, ‘specific’ and ‘mixed’ approaches) and then a

version of the ‘mixed’ approach refined to maximise the positive impacts (Option 3b). These scenarios are then compared and Option 3b selected as the preferred scenario.

#### 4.1 Impact Assessment: Options 1, 2, 3a and 3b

The first stage was to assess the impacts of the ‘status quo’, ‘specific’ and ‘mixed’ approach to determine which model should be developed and considered in more detail. This was examined at length in the GFA study, drawing on consultation responses to this question and survey evidence. In the light of their findings a second stage of analysis considered how to refine the mixed approach, which looked likely to be the most effective, to increase the positive impacts.

This scenario, **Option 3b**, contains a different approach in key areas where the GFA study suggested that the original approach was likely to cause problems:

- The categories which were initially proposed containing a **duty to disclose and requirements on after-sales service and complaints handling were abandoned** because the GFA study found that the costs to businesses were out of proportion to the consumer benefits. These issues were therefore **addressed in a different way** in Scenario 3b. Rather than specifying what after-sales service a firm should provide, the scenario applies the same principles to all stages of the trader/consumer relationship. So, for example, a trader should not mislead a consumer about the after-sale service offered or, whether before or after-sale, about the need for replacement or repair. Rather than a general duty to disclose, the proposal defines the omission of material information which is not apparent from the context as misleading and specifies the absolutely crucial information which a consumer should have access to before deciding to make a transaction.
- The GFA study asked businesses about an approach to EU codes under which “codes of conduct made public by companies could be made binding for members. The decision for a company to join a code would be voluntary. But if the firm does not comply it would be considered as a misrepresentation and therefore unfair.” The strong response from businesses was that the development of EU codes would be positive but making them binding in this way would be likely to deter companies from joining. The approach is therefore refined in Option 3b. A breach of a code commitment will only be considered unfair under certain very precise conditions which indicate that the breach would have the effect of being a misleading representation likely to materially distort the consumer’s decision about a product.

**Table 1: Impact Assessment of alternative approaches to regulation of unfair commercial practices**

**Key:** ✓ positive impact; ? net impact uncertain; ✗ negative impact; - no impact

Impact	Description	1: Status quo	2: Specific approach	3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct	3b: Mixed approach with material omission, same principles pre- & post-sale, lighter code of conduct provisions
<b>Economic impacts</b>					
Downward pressure on prices and impetus towards price convergence	Average price divergence for retail products between MSs averages 30% but is only 5% within MSs. <sup>35</sup> 53% of EU consumers would certainly or probably consider cross-border shopping to buy a product because it was cheaper or better. 51% of EU consumers had noticed price differences for the same product between MSs. Even a small number of consumers shopping cross-border can have an effect on prices in each Member State's domestic market, as has been seen in the UK car sector. <sup>36</sup>	✗ Evidence shows that price convergence has stalled. No reason to foresee renewed price convergence without policy change.	✗ Unlikely to have this effect because the policy-induced fragmentation which deters firms from marketing cross-border would remain, and even be exacerbated by new legislation and by enlargement.	? Benefits from harmonisation would make it easier for firms to market and consumers to buy; but benefits likely to be offset to some extent by extra costs arising from duty to disclose and after-sales service requirements	✓ Benefits from harmonisation and consequent removal of policy-induced barriers for traders and consumers should facilitate more cross-border trade and lower compliance costs, promoting price convergence and downward pressure on prices.

<sup>35</sup> COM (2001) 736 final, p6

<sup>36</sup> [http://europa.eu.int/comm/competition/car\\_sector/price\\_diffs](http://europa.eu.int/comm/competition/car_sector/price_diffs)

<b>Impact</b>	<b>Description</b>	<b>1: Status quo</b>	<b>2: Specific approach</b>	<b>3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct</b>	<b>3b: Mixed approach with material omission, same principles pre- &amp; post-sale, lighter code of conduct provisions</b>
Change geographic distribution of economic activity	Facilitating cross-border trade without the need for a physical establishment has the potential to benefit rural areas and/or those which are not geographically close to another MS.	✘ Barriers to cross-border marketing caused by fragmentation will remain.	✘ Barriers to cross-border marketing caused by fragmentation will remain.	✓ Harmonisation will promote cross-border trade but effect may be limited by higher costs resulting from duty to disclose/after-sales service provisions	✓ Harmonisation will facilitate cross-border trade with reduced need for traders to establish in another member state in order to market to consumers.
Impact on price competition internationally	Promoting price competition would enable EU businesses to compete more effectively in markets outside the EU.	✘ No impact	✘ Possible increases arising from greater fragmentation following new legislation and enlargement	? Impact of harmonisation on price competition reduced by costs from duty to disclose/after-sales service provisions.	✓ Downward pressure on prices enabling EU firms to compete efficiently in markets outside EU.
Impact on enlargement countries	Price levels for retail consumer goods in accession countries are half those in the existing EU15. <sup>37</sup> Consequently, there could be particular benefits to them from increased cross-border	✘ Given price differentials, barriers to cross-border shopping cause particularly big opportunity cost for	✘ Given price differentials, barriers to cross-border shopping cause particularly big opportunity cost for	✓ This will help traders in accession countries to take advantage of the internal market by simplifying the	✓ This will help traders in accession countries to take advantage of the internal market by simplifying the

<sup>37</sup> *Purchasing power parities and related economic indicators for EU, acceding and candidate countries and EFTA*, Silke Stapel, Statistics in Focus Theme 2 56/2002, Eurostat

Impact	Description	1: Status quo	2: Specific approach	3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct	3b: Mixed approach with material omission, same principles pre- & post-sale, lighter code of conduct provisions
	shopping.	enlargement countries.	enlargement countries.	regulatory environment and providing a level of protection which could encourage consumers to buy less familiar brands. However, provisions on after-sales service and duty to disclose could bring cost increases to traders.	regulatory environment, reducing compliance costs, and providing a level of protection which could encourage consumers to buy less familiar brands.
Increased cross-border trade	Through reduction of market entry costs and compliance costs generally to firms, coupled with greater consumer confidence and protection after-sale.	✘ Legal fragmentation will remain, so no reason to suppose that market entry costs will reduce or confidence increase.	✘ Legal fragmentation will remain, so no reason to suppose that market entry costs will reduce or confidence increase. New directives could exacerbate the problem and further impede cross-border trade.  “Minimum harmonisation=no	?  Similar benefits to other ‘mixed’ approach but costs from after-sales provisions in particular could impede cross-border marketing.	✓  47% of businesses cited the need for compliance with different national regulations on commercial practices, advertising and other consumer protection regulations as very or fairly Important obstacles to cross-border advertising and marketing. 68% of EU

Impact	Description	1: Status quo	2: Specific approach	3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct	3b: Mixed approach with material omission, same principles pre- & post-sale, lighter code of conduct provisions
			harmonisation=legal insecurity.” <sup>38</sup>		businesses think that harmonising national rules is a very or fairly efficient way of making sales and/or advertising easier throughout the EU. 79% of less confident consumers said that enjoying the same rights and protections abroad was very or fairly important to increasing their confidence.
Reduce market entry costs	“A cosmetics distance-selling company had to place one of their full-time legal staff for six months in another Member State to assess how the company’s retailing model would need to be modified to comply with that Member State’s rules. The company finally decided not to enter the market given the radical alteration to their business	✘ No change because main barrier, fragmentation and resultant compliance costs, not addressed.	✘ No change because main barrier, fragmentation and resultant compliance costs, not addressed.	? The harmonisation would reduce market entry costs but the provisions on after-sales costs would be likely to increase them, giving a neutral or negative impact overall.	✓ This problem would be eliminated by the harmonisation of rules and internal market clause In the Directive.

<sup>38</sup> Austrian Chamber of Economy, quoted in GFA op cit. p93



Impact	Description	1: Status quo	2: Specific approach	3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct	3b: Mixed approach with material omission, same principles pre- & post-sale, lighter code of conduct provisions
	model that would have been required.” <sup>39</sup>				
Specific impacts on SMEs		<p>✘</p> <p>Present barriers to cross-border selling continue. They have a particular impact on SMEs because they disadvantage firms which are unable to establish in another Member State to sell cross-border.</p>	<p>✘</p> <p>Present barriers to cross-border selling continue. They have a particular impact on SMEs because they disadvantage firms which are unable to establish in another Member State to sell cross-border.</p>	<p>?</p> <p>SMEs benefit from harmonisation but savings offset by costs arising from after-sales service requirements in particular</p>	<p>✓</p> <p>Particular benefit from lower market entry/compliance costs: they are fixed regardless of the firm’s size, so have higher impact on SMEs, leading to increased ability to trade cross-border without need to establish.<sup>40</sup></p>
Increased consumer purchasing power and choice	Arising from increased consumer confidence, reduced barriers to market entry and price competition described above.	<p>✘</p> <p>No change from current situation</p>	<p>✘</p> <p>Hard to generate necessary confidence or compliance cost reductions in absence of harmonisation. More piecemeal legislation could make the situation</p>	<p>?</p> <p>Depends whether benefits from harmonisation sufficient to outweigh extra costs arising from duty to disclose and after-sales service requirements</p>	<p>✓</p> <p>Harmonisation leading to greater cross-border marketing and price competition. Particular benefit for consumers in small or peripheral Member States where</p>

<sup>39</sup> The State of the Internal Market for Services, COM(2002) 441 final, p62

<sup>40</sup> See *The State of the Internal Market for Services*, COM(2002) 441 final, pp 8, 16, 62, 65

Impact	Description	1: Status quo	2: Specific approach	3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct	3b: Mixed approach with material omission, same principles pre- & post-sale, lighter code of conduct provisions
			worse.		businesses may choose not to establish but can sell remotely.
Changes to consumer protection		<p>✘</p> <p>None, leaving current gaps (eg after sale, aggressive practices) and anomalies in place.</p>	<p>✓</p> <p>Piecemeal improvements possible but minimum harmonisation approach does not ensure a high, common level of protection across the EU and loopholes inevitable as markets develop in the absence of 'safety net'.</p>	<p>✓</p> <p>Legislation provides 'safety net' which can be applied where unfair practices not caught by specific legislation. In most Member States the overall level of protection will remain the same or rise, particularly in relation to aggressive marketing practices and after-sale protection. The environment overall will also be simpler for consumers to understand.</p>	<p>✓</p> <p>Legislation provides 'safety net' which can be applied where unfair practices not caught by specific legislation. In most Member States the overall level of protection will remain the same or rise, particularly in relation to aggressive marketing practices and after-sale protection. The environment overall will also be simpler for consumers to understand.</p>
<b>Environmental impact</b>					

Impact	Description	1: Status quo	2: Specific approach	3: Mixed approach with duty to disclose, after-sales service, binding codes of conduct	3b: Mixed approach with material omission, same principles pre- & post-sale, lighter code of conduct provisions
	No significant environmental impacts are expected from this proposal. No impacts have been identified on air, water, soil or climate, bio-diversity, heritage sites or safety. There may be marginal changes in transport and distribution patterns arising from greater use of distance selling and/or greater consumption on consumer trips abroad.	- None	- None	?  There may be marginal changes in transport and distribution patterns arising from greater use of distance selling and/or greater consumption on consumer trips abroad.	?  There may be marginal changes in transport and distribution patterns arising from greater use of distance selling and/or greater consumption on consumer trips abroad.
<b>Social impacts</b>					
Change consumer information/ education	The task of informing/ educating consumers about cross-border shopping is harder and more expensive where requirements diverge.	- No change to current complex patchwork of divergent requirements	x Will add to, not reduce complex patchwork of divergent requirements	✓ Much easier because common EU-wide principles will apply	✓ Much easier because common EU-wide principles will apply

## 4.2 Conclusion: Option 3b ('mixed approach') selected

### *Option 1: the status quo*

As explained above, the evidence had shown that even with reductions in the 'natural' barriers to cross-border shopping in recent years, it had stagnated at low levels.

Business identified the need for compliance with different national regulations on commercial practices as a significantly greater problem than, for example, language differences, and consumers. They did not expect any appreciable change in the numbers of businesses transacting with consumers cross-border if the status quo was maintained. Consumers cited lack of information about consumer protection laws in other EU countries as a key barrier, and also had significant doubts about the level of protection provided in other countries.

GFA therefore concluded that "To be able to promote B2C cross-border trader, currently existing policy-induced obstacles have to be removed." This could not be achieved without changes to legislation. Furthermore, with the impending enlargement to 25 Member States the impact of the regulatory fragmentation and complexity would become even greater if no action were taken.

The impact of Option 1 would have been broadly neutral and it would not have met the Commission's objectives. This option was therefore **discarded**.

### *Options 2 and 3: the 'specific' versus the 'mixed approach'*

- **No negative impacts** on consumers were identified for either approach
- In terms of **impact on the number of companies active cross-border**, business respondents considered that continued use of the specific approach would have a *negative effect*, while the mixed approach would have a *positive effect* around twice as large.
- **Both approaches had the potential to address a number of obstacles**, but while the mixed approach would not address barriers arising from the difficulty of taking legal action through the courts and the greater risk of practical problems (eg in relation to delivery), the specific approach would *in addition* fail to address the lack of information about consumer protection laws in other EU countries.
- The **specific approach** "allows for addressing specific consumer problems and **may increase consumer trust**, depending on the measures taken. Yet, it is questionable whether under this scenario it will be possible to increase consumer trust to a level needed to achieve a properly functioning B2C internal market. The European Consumer Centres survey did not bring a clear assessment of this scenario, either. Three of the 12 ECCs expected a greater willingness of consumers to shop cross-border – but two others expected less willingness. The majority of six centres expected no significant change. ... **Divergent views on the impact on businesses** were found by the survey of national business organisations. According to the largest group rating its impact on cross-border activities is neutral. A slightly smaller group is holding a pessimistic and an again smaller group is holding an optimistic viewpoint. Market entry, transaction and marketing cost were nevertheless expected by up to half of the respondents to increase with specific directives. A smaller group of respondents expected the opposite to happen."

- The **mixed approach**, in comparison to the specific approach or maintaining the status quo “may clearly be the **most effective in increasing consumer trust** as a pre-requisite of a properly functioning B2C internal market. This was the result of the ECC survey: All ECCs expressing a view expected under scenario C a decisive change in consumer behaviour and an increased willingness to shop cross-border. ... A clear majority of the respondents to the survey of **national business associations expect a decrease of costs** resulting from the introduction of a general principle of fair commercial practices in a framework directive. Support seems to come from those who estimate the chances arising from the new approach to consumer protection in the long run positive (with maximum harmonisation bringing more legal certainty, less divergent national transpositions of EU directives and a scope for de-regulation).”

This assessment clearly indicated that the **mixed approach would be more effective than the specific approach** as a way of meeting the objectives outlined in section 2 above. However, the original proposals on codes of conduct, after-sales service and a duty to disclose would have imposed significant costs which could in themselves have acted as a deterrent to cross-border sales, or at least made the gains to firms and consumers less significant. Scenario 3b was therefore selected as the option most likely to meet the Commission’s objectives and maximise positive impacts.

## 5. HOW WILL RESULTS AND IMPACTS BE MONITORED AND EVALUATED AFTER IMPLEMENTATION?

The impact of the Directive in relation to its objectives will be assessed using the following **indicators**:

- The **level of cross-border sales**, as reported in business and consumer attitudes surveys. The existing Eurobarometers set some initial benchmarks.
- The **number of businesses and consumers** who participate in cross-border business-to-consumer trade.
- The level and nature of **complaints by consumers** about cross-border traders, as reported to European Consumer Centres, members of the European extra-Judicial Network and to national public authorities and others.
- The number and nature of **cases registered by national public authorities** in the context of the regulation on consumer protection co-operation.
- The number and nature of **cases brought to the ECJ** about interpretation of the framework directive.

The Commission will carefully monitor the **transposition** process, particularly when national measures are notified, to ensure that the desired objectives of the proposal are achieved when it is implemented in national law. After this phase, the Commission will use the existing methods for ensuring the **coherent application** of the framework directive, through monitoring complaints from traders to the Commission and to systems such as SOLVIT. The Commission will also monitor the application of the framework directive in national courts through reports from Member States and will follow any cases brought before the ECJ.

The proposal for a **regulation on enforcement co-operation** in the area of consumer protection establishes the detailed arrangements for monitoring by public authorities of compliance with the framework directive by traders, both in cross-border and domestic situations. The **information exchange and reporting procedures** outlined provide a system for monitoring complaints to public authorities about traders, as well as trends in compliance.

The **reports from the European Consumer Centres and EEJ-net** members will also constitute important monitoring information on the levels of compliance with the framework directive.

In order to measure the effect of the proposal on cross-border trade, the Commission will repeat the opinion **surveys** of business and consumers that measured the **level of cross-border marketing and sales**, from a business and consumer perspective. The combination of these surveys and statistics collected will enable the impact to be evaluated according to the indicators set out above.

Drawing on this considerable monitoring programme, the Commission will, when appropriate, **report to the Council and Parliament** on the application of the framework directive. Where necessary, these reports will be based on economic and legal research.

## **6. STAKEHOLDER CONSULTATION**

### **6.1 Consultation Process**

An extensive and, in the field of consumer protection unprecedented, consultation has informed this proposal. This included:

- two **consultation papers** inviting responses (the Green Paper and Follow-up Communication), the second containing an outline directive for comment<sup>41</sup>;
- **debate in the European Parliament** on the basis of these two consultation papers;
- discussion at **informal ministerial meetings** in Sweden and Greece;
- a **day-long** hearing on the Green Paper and two-day workshop after responses to the Follow-up Communication had been received<sup>42</sup>;
- a group of **experts from member states** which exchanged information about the existing situation in the Member States;
- extensive bilateral and other informal meetings;
- **specially-commissioned** surveys of consumers, businesses, business associations and European Consumer Centres.

Responses were **assessed internally** by theme (eg specific vs. mixed approach, country of origin, post-sale practices) and taken into account in formulating each aspect of proposal. We gave **feedback** on the Green Paper consultation **in the Follow-up Communication**, and on

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<sup>41</sup> 169 responses were received to the Green Paper and 113 to the Follow-up Communication

<sup>42</sup> Attended by over 225 and 150 stakeholders respectively

the second round of consultation **at the workshop** in January 2003, before any final decisions made.

All this material, and all consultation responses, have been made available on the Commission's website, including the GFA *ex-ante* impact assessment.

## 6.2 Content of consultation

During the consultation process, stakeholders' **views were specifically sought** on:

- the nature and impact of the **internal market barriers**
- the merits and drawbacks of the **specific and mixed approach** and their likely impacts
- the **detailed contents of a framework directive** underpinning a mixed approach, based on the outline contained in the follow-up communication.

The **Follow-up consultation** was designed to solicit detailed views on the content of a framework directive. The comments and contributions are consequently difficult to summarise. In broad terms, the responses were positive with constructive criticism. Most stakeholders, including national governments, firmly support the objectives of the proposed framework directive.

Doubts remained in some quarters as to whether a framework directive will meet the objectives set. These respondents called for a proposal to be accompanied by a detailed impact assessment and further evidence of the need for such an approach.

However, most responses, as the follow-up communication intended, focused on the substance of a framework directive. Here several **key issues** emerged:

- the level of harmonisation sought,
- the **scope** of the directive,
- the need for proper **enforcement**; and
- the **interaction** between the proposed framework directive and the other existing Directives and legislative proposals, especially the draft Regulation on **sales promotions**.

Broadly speaking, the **main business concerns** were to exclude provisions on after-sales service and complaint handling. Many also pointed to the possible risk that a general prohibition could create legal uncertainty unless properly underpinned by substantive rules. **Consumer associations** were concerned by the proposal to include the principles of mutual recognition and country of origin. Some were also keen to ensure that harmonisation did not lead to a reduction in the level of protection that some consumers currently enjoy within the Member States. However, most welcomed, albeit sometimes with reservations, the proposals concerning stakeholder participation and an enhanced role for codes of conduct. Business also appeared to emerge more convinced than in the Green Paper that it could actually benefit to a large extent from a high level of consumer protection and enhanced consumer confidence.

### 6.3 Impact of Stakeholder Consultation on the Proposal

In summary, in choosing the overall approach, account was taken of the broad support for the objectives identified for the framework directive and for reform to be based on the ‘mixed’ approach based on a framework directive rather than just the ‘specific’ approach of legislating when a problem arises. Stakeholder representations were also considered on the specific content of the framework directive proposal. In some areas, such as extending the scope to businesses as purchasers or to ‘unfair competition’ discussed in the ‘trade-offs’ section below, it was decided on reflection to maintain the approach originally envisaged. In other key areas, notably the approach to after-sale services, disclosure and codes of conduct discussed above, the original approach was substantially modified in the light of respondents’ comments.

## 7. CONCLUSION: WHAT WAS THE FINAL POLICY CHOICE AND WHY?

### 7.1 Defining the final proposal

In summary, the initial consultation and analysis led to a decision that legislation at Community level was needed to meet the objectives. Two approaches were then examined, and the ‘mixed’ approach selected in preference to the ‘specific’ approach following further consultation and analysis of the likelihood of meeting the objectives. The precise content of the framework directive proposal, which is the cornerstone of the ‘mixed’ approach, was then further refined and adjustments made to increase the positive and minimise negative impacts, for example by changing the approach to after-sale services, disclosure and codes of conduct.

In brief, the **final proposal**

- **Fully** harmonises at a high, common level of protection in which consumers can have confidence
- Establishes **EU-wide conditions for identifying ‘unfairness’**, replacing existing divergent general clauses
- Providing **legal certainty** through an **internal market clause, unfairness categories** and a blacklist of prohibited practices
- Identifies a role for **codes of conduct** to maximise the positive impact of legal convergence.

The main elements of the final proposal are therefore as follows:

- A **‘general prohibition’** banning unfair practices, setting out conditions, including a **material** distortion of consumers’ economic behaviour, for determining whether a commercial practices is unfair, and establishing the ECJ’s **average consumer** as the benchmark consumer, except where a specific group of consumers is targeted.

This is the key element of the proposal. It **eliminates barriers** in national legislation by replacing the existing divergent general clauses and legal principles with a single basis for assessing whether a practice is unfair. It **protects consumers** by making the economic impact of a practice on them a key criterion of unfairness.

It reflects the **principle of proportionality** by defining practices which are *unfair* and therefore problematic, rather than seeking to impose positive *fairness* standards; by ensuring



that the impact on the average consumer rather than the weakest possible consumer is taken into account, unless a specific group is directly targeted; and by specifying that a practice is only unfair if the effect on consumer's behaviour 'material', ie sufficiently significant to affect their decision in relation to a product.

- An 'internal **market clause**' putting in place mutual recognition based on the law where the trader is established, for certainty and clarity

The Directive enshrines principles which provide a high, common level of protection for consumers. In line with the requirements of **better regulation** it does not prescribe in detail how these should be applied in a particular sector but leaves open the potential for Member States to do so. Where they do, these will apply to the traders established on their territory but cannot be imposed on other traders wishing to sell into that Member State. This will not cause problems in terms of consumer protection, because the same, high standards will apply in all Member States. But it will **reduce costs to business** who will only need to comply with the national implementing provisions in their own country in order to sell throughout the EU.

- Specific '**unfairness categories**' to flesh out key areas (eg misleading practices, aggressive practices, duty to disclose, after sale service) and a **blacklist of banned practices**, for clarity and effective consumer protection.

These categories elaborating key types of unfair practice provide additional **legal certainty**. In combination with the **general prohibition** and blacklist, these provisions provide more legal guidance than any existing national general rules on commercial practices.

- The **blacklist** enables those commercial practices which are in all circumstances unfair to be banned outright. This will **facilitate consumer protection** and, because a single list will apply throughout the EU, **increase legal certainty** for businesses and consumers.

As indicated above the objectives for this proposal could not have been met without legislation and the Directive will be implemented in the usual way through legislation by Member States. Codes of conduct are in no way necessary to give effect to the legislation.

The directive does not include any obligation for EU codes to be developed or for traders to be bound by them. However, where they are developed, positive impacts from the development of EU-level codes would include promoting convergence of business practice and common understanding of professional diligence, help for SMEs in particular in understanding how they can meet the Directive requirements day-to-day, and stakeholder participation in working to achieve the effective application of the proposal.

## 7.2 Which more ambitious options were rejected?

The proposal could have been **more ambitious** in four ways, each of which was **rejected**.

- **Harmonising laws on consumer contracts** in addition to those on commercial practices.

Differences in consumer contract law also give rise to internal market barriers. However, attempting to tackle both in one project would have it **unmanageable**, given the extent of consumer contract law and the knock-on to other contract law issues. These problems will therefore be **addressed elsewhere**. Commission has recently published a communication on

general contract law issues<sup>43</sup>. The Commission's consumer policy strategy for 2002-2006 has committed the Commission to reviewing all the existing consumer *acquis*, including contract law provisions, in order to remove the internal market barriers that still remain.

- **Include business, in its role as purchaser**, within the scope of the proposal.

A case was made by small business organisations for SMEs to be given the same protection as consumers. Whilst in some cases the situation of a self-employed independent may be close to that of a consumer, this option was rejected. First, because the **Treaty makes special provision for consumer protection**, not business protection. Second, commercial relations between businesses are inherently more equal than those between businesses and consumers. Therefore, in general **businesses are less in need of protection**. Third, it is **not yet possible to define satisfactorily** and include the more deserving cases of very small companies.

- **Regulate all 'unfair competition'**, following the model in some Member States.

This would have meant covering **commercial practices that do not give rise to consumer detriment**, such as slavish imitation, denigration and the breach of other laws. Having examined these provisions in detail, it appears that they **do not cause important internal market barriers** that need to be harmonised and are statistically insignificant. Further, their inclusion would dilute and obscure the very clear consumer protection focus of the proposal.

### 7.3 What trade-offs were involved?

Three significant **trade-offs** had to be made in coming to the final decision.

- Choice of **benchmark consumer**

The most important trade-off in the proposal is the balance to be struck between consumer protection and business freedom concerning the benchmark consumer to be used in determining what is an unfair practice. In some Member States, the benchmark for judging the misleading nature of an advertisement is a more credulous consumer than average. In most Member States the benchmark is the average consumer.

Of course not all consumers are average consumers, so a balance has to be struck between the need to protect the most vulnerable consumers and the freedom of business to assume a certain level of understanding of their commercial practices. In order to strike this balance, the proposal builds on the ECJ's notion of an average consumer as the central benchmark. This general rule is however off-set by modulating the test when a trader target a specific group of consumers. Whether it is children or rocket scientists, the benchmark becomes an average member of that group. In this way, the benchmark introduced is more precise than the general benchmark currently in existence in each Member State. It therefore delivers commercial freedom but also protects the most vulnerable. When an above average group of consumers is targeted the benchmark is correspondingly relaxed.

- **Information** supplied to consumers by traders

Ensuring consumers receive the information they need is central to their decision-making and therefore effective choice. However, traders, especially small businesses, are unable to supply

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<sup>43</sup> COM (2003) 68 final

unlimited information to consumers. Consumers also can be overloaded with excessive information so the proposal focuses only on essential information.

As explained above, the follow-up communication proposed the development of an open-ended positive duty to disclose. The current proposal instead is limited to a list of information that must be supplied in the context of an invitation to purchase to prevent a misleading omission. In addition the proposal makes clear that, if the information is already evident to the consumer from the context, no extra effort is needed on the part of the trader. This therefore balances the consumer's right to information, set out in article 153 of the Treaty, with the need to avoid an overload for business and consumers.

- **Level of detail** in the legislation

In some Member States such legislation is limited to a general clause. Further rules are either provided by the courts' interpretation or through guidelines and codes of conduct. On the other hand, there is almost an infinite variety of commercial practices for which a specific rule could be imagined. There is therefore a balance to be struck between the demands of legal certainty but also the need to avoid over-complex, inflexible legislation. In order to ensure full convergence is achieved, the proposal provides more than simply a **general prohibition**. The unfairness categories and blacklist deliver a further degree of certainty and clarity. Further room is left for traders to voluntarily commit themselves to more precisely defined practices through developing codes of conduct.

#### 7.4 Conclusion

The Commission has concluded that **sufficient evidence exists to justify proceeding** with a proposal now. There is evidence

- that **internal market barriers** exist arising from unfair commercial practices and their regulation;
- that these barriers cause **problems for real-life businesses and consumers**, and will continue to do so even if other internal market barriers are addressed; and
- that the **approach selected** is an **effective** way of meeting the twin objectives of reducing deterrents to businesses and consumers' lack of confidence, and doing so in a way which **meets the requirements of better regulation**.

A **related proposal** for a **regulation on administrative co-operation** will further increase the positive impacts of the framework directive and, in turn, this directive will make it easier for that proposal to realise its potential by providing a simpler, common legal framework for enforcers.