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Consumer and Marketing Law REFIT follow-up consultation

Background

In 2016, the Commission launched a ['Fitness Check' of EU Consumer and Marketing Law](#) exercise which included a public consultation, the creation of a stakeholder consultative group and several studies.

Six directives were being subject to this exercise:

- Unfair Contract Terms Directive [1993/13/EEC](#);
- Consumer Sales and Guarantees Directive [1999/44/EC](#);
- Unfair Commercial Practices Directive [2005/29/EC](#);
- Price Indication Directive [1998/6/EC](#);
- Misleading and Comparative Advertising Directive [2006/114/EC](#);
- Injunctions Directive [2009/22/EC](#).

The [Consumer Rights Directive](#), an important part of the EU Consumer Acquis, was also target of an evaluation exercise, five years after its entry into force.

BusinessEurope adopted its [reply to the public consultation](#) on 2 September 2016. It has also taken an active role in the [Stakeholder Consultation group](#) which regularly meets to advise the Commission on this topic.

On 29 May 2017, the Commission published its report on the [Fitness Check of Consumer and Marketing Law](#) and its evaluation of the [Consumer Rights Directive](#).

The main findings confirm that, in general, EU Consumer Law (including the Consumer Rights Directive) remains fit for purpose. However, the reports point to the need to improve awareness, enforcement of the rules and redress opportunities.

Following these results, the Commission [is again seeking stakeholders' views on possible targeted legislative changes](#) in some key EU Consumer Law directives.

The current paper highlights BusinessEurope main messages on the way forward for EU Consumer Law as well as it attempts to reply to some of the main questions raised in the targeted consultation.



Relevant facts and figures in the EU¹

- ❖ Overall consumer trust in the Eurozone is at a 16-year high
- ❖ Consumers know better their rights which helps them making more informed purchasing decisions
- ❖ More consumers are buying from a seller in another Member State
- ❖ There are fewer consumer complaints and they are better handled
- ❖ Compliance with consumer legislation has increased
- ❖ EU Consumer and Marketing Law broadly still fit for purpose

Main messages

- BusinessEurope is pleased to see that both the Consumer and Marketing Law REFIT report and the Consumer Rights Directive evaluation report confirm its assessment (mentioned in previous positions) that the **EU Consumer and Marketing Acquis is generally fit for purpose**.
- Effective consumer protection is a key enabler of **online trust** and a key pillar for the **completion of Europe's Digital Single Market**.
- BusinessEurope often stressed that **REFIT should not be interpreted as a “carte blanche” for introducing new regulations** on top of existing ones. It should instead be focusing on better and smarter regulation which includes monitoring the effectiveness of existing regulations and taking corrective measures (i.e. reform, replace or remove) only when absolutely required.
- BusinessEurope is fully committed to work together with EU institutions and other stakeholders to find ways to achieve a more coherent **interpretation, implementation and enforcement** of EU Consumer Law as well as more awareness among businesses about existing business-to-consumer rules. BusinessEurope supports the use of guidance/interpretation guidelines as tools to reach a more uniform interpretation of EU law. These guidelines can be developed either by the European Commission (e.g. Guidance on the Consumer Rights Directive or Unfair Commercial Practices Directive) or by multi-stakeholder dialogue groups (e.g. recently adopted principles comparison tools and compliance criteria on environmental claims).

¹ Extracted from the 2017 [Commission Consumer and Marketing Law REFIT Conclusions](#), the [2017 Consumer Rights Directive Evaluation](#) and [2017 Consumer Conditions Scoreboard](#).



- We also believe it is **crucial to continue to work on awareness** of existing rules **amongst traders and consumers**. One of the conclusions of the Consumer REFIT report is that both traders and consumers (despite clear improvements) often struggle to find the relevant information or to understand the rules and their impact on their rights and obligations. BusinessEurope is strongly engaged in the Consumer and Marketing Law REFIT Consultation Group which is working on different initiatives to improve the communication of information by traders. BusinessEurope also welcomes projects such as the [Consumer Law Ready](#) specifically orientated towards small companies.
- The Consumer and Marketing law REFIT exercise points to the need of legislative adjustments, for example on the injunction directive. If the Commission decides to go forward with legislative initiatives on consumer law, **it is fundamental that:**
- This is done in a **targeted way** and **limited to provisions that represent substantial barriers** to the functioning of the internal market (e.g. triggering legal uncertainty, administrative burden or unfair competition);
 - Any new rules must be **easy to comply with** and remain **technology-neutral** to allow for future solutions.
 - It is **proportionate and adequate**. It should not be up to legislation to solve problems which can be addressed via better enforcement.
 - It **takes account of the many ongoing legislative initiatives in the consumer protection field** (e.g. digital content proposal, tangible goods proposal, CPC regulation revision or e-privacy directive) and it does **not risk overlapping with existing legislation** (e.g. general data protection regulation).
 - **Simplification of certain overlapping or unnecessary information obligations** would be welcome.
 - **Full harmonisation should be the method** used. Any other approach would not be consistent with the objective of fighting legal fragmentation.
 - It does **not imply the extension to the business-to-business environment** of the provisions of certain consumer directives covered by REFIT (e.g. unfair commercial practices, unfair terms or sales directive).

You will find in the annex replies to some of the main questions of the public consultation.



ANNEX: REPLY TO THE ONLINE QUESTIONNAIRE

21. What should be done, in your opinion, to ensure that traders comply better with consumer protection rules?

EU and Member States should stimulate self-regulation by traders - **Strongly agree**

Enforcement authorities should be given more financial and administrative resources - **Strongly agree**

Penalties for infringing consumer law should be strengthened (more proportionate, effective and dissuasive) - **Tend to disagree**

Explanation: regarding the question on penalties, BusinessEurope believes an EU harmonisation would not have added value. More important than seeking to inflate the amounts of fines for noncompliance with EU law, a more uniform interpretation and application of the rules by enforcers is needed as well as a legally tighter technique to assess the severity of the infringement and the proportionality of the sanction.

It is crucial for ensuring fair competition and a well-functioning Single Market, that harmonised EU rules are not only interpreted/implemented in the same way, but also enforced the same way. In this context, it is important that Member States have a relatively similar view on the relationship between the severity of an offence and the sanctions applied by the competent authorities. The strengthening of cooperation between national consumer protection authorities is thus welcomed. We believe that once in place the revised EU Consumer Protection Cooperation framework will lead to a more coherent and effective application of the EU Consumer Acquis.

Also, linking the fine with a percentage of the turnover might not be the most effective mean to determine a sanction. Turnover is not necessarily representative of the ability of a company to pay a fine.

We also believe that there should be a clear distinction between severe non-compliance and non-compliance that is not severe. It is not always clear if a commercial practice is legal or not. That is not least the case when EU legislation is out-of-date compared to the technological developments and changes in consumer behaviour, etc. Severe, repetitive or clearly deliberate non-compliance, on the other hand, should be met with truly dissuasive sanctions.



1.1 . Clearer consumer rules for the digital economy

1.1.2 "Free" online services

36. In your view, is it problematic that consumers do not have the right to be informed (before acquiring the service) about the main features of "free" online services (e.g. on functionality and interoperability with hardware and software)?

No, it is not a major issue - **Strongly agree**

Yes, it disrupts level playing field between digital traders offering services with and without payment - **Tend to disagree**

Explanation: Provision of online services against no monetary compensation is already being discussed in the digital content proposal legislative process. This proposal includes more substantive rules such as conformity as well as the rights and obligations for traders and consumers in the event of non-conformity or termination of a contract for provision of (free or not) online digital services.

We did not see enough evidence of consumer detriment which would justify reopening the Consumer Rights Directive regarding 'free' digital services. Regarding the advertisement phase, we believe that the Unfair Commercial Practices Directive already awards consumers with certain rights.

Most online services are not paid by consumers but funded by advertisers. The consumer gets access to a service and stands to lose no money, rather, his attention in the process. If the consumer is not happy with the service he can choose to simply stop it. Several leading digital services companies have been developing efficient tools to make it easier for anyone to take their 'data' with them if they want to switch service.

It is also worth noting that consumers have different expectations regarding their rights whether they access online digital services for free or against payment. This was one of the conclusions of a 2016 Deloitte Study commissioned by EDIMA on the Impact of the European Commission's Draft Directive on Contract for the Supply of Digital Content.

Finally, if the concern is what happens to consumers' data, then the rules of the general data protection regulation (GDPR) come into play. Issuing new rules could lead to an unnecessary overlap with the GDPR and reopen the discussion on the "*tradeable commodity*" nature of personal data, a concept that has been rejected by the European Data Protection Supervisor. With regard to pre-contractual information, requirements to ad funded digital services would require users to go through the equivalent of a purchase journey and accept certain terms of service upfront which could lead to complications. This would result in over-notification and consequent annoyance; and collection of data which otherwise was not intended to be collected.



40. In your view, is it problematic that consumers do not have the right to cancel "free" online services within 14 days?

No, it is not a major issue - **Strongly agree**

Yes, it creates harm for consumers including when they use services cross-border - **Tend to disagree**

Yes, it discourages consumers from acquiring such online services - **Strongly disagree**

Yes, it disrupts level playing field between digital traders offering services with and without payment - **Tend to disagree**

Other

Explanation:

See reply to question 36

1.2 Better enforcement and redress opportunities for consumers

1.2.1 Individual redress/remedies for harm suffered from unfair commercial practices

48 Do you agree that differences between national rules on remedies for unfair commercial practices cause the following problems?

Harm to consumers as they cannot remedy the consequences resulting from unfair commercial practices on the national and cross-border level - **Tend to disagree**

Costs for traders engaging in cross-border trade due to need to adapt to different national rules on remedies - **Tend to disagree**

1.2.2 Penalties for breaches of consumer rules

50. Do you agree that the following differences between the national legislation of EU Member States on penalties cause insufficient enforcement of EU consumer protection rules across the EU?

See reply to question 21



1.4 Doorstep selling

62. Under current EU law, doorstep selling is a legitimate sales channel in Europe, except for certain specific exceptions under the UCPD. Do you agree that Member States' authorities should be allowed to introduce a general ban on doorstep selling, as explained above?

Strongly disagree

Explanation: [Statistics from 2016](#) showed that there are nearly 7 million individuals active in doorstep selling. This industry generates 29,1 billion EURs with sales increasing on a stable basis, which is similar to the GDP of some of the smaller EU Member States. It would be highly disproportionate to allow for a general ban of this sales channel due to the behaviour of a small minority of rogue traders. We believe that the appropriate rules are already in place especially after the adoption of the Consumer Rights Directive in 2011. Enforcement should be the best answer. The new EU CPC framework is a step in the right direction in this regard.

2.1 Clearer consumer rules for the digital economy

2.1.1 Platform transparency

65. Do you agree that throughout the EU, consumers buying on online marketplaces should be informed about the following:

Other

Explanation: transparency is definitely a vital factor to create trust among consumers. It is important that, when buying via a platform, a consumer is able to identify who his real contract party is, whether a business or a consumer/prosumer (more and more frequent with the growth of sharing economy models). If it is a EU based trader, then the consumer knows that he will be covered by the EU Consumer rights. The same also apply to purchases from non-EU online traders if they target the EU market. Before deciding whether new regulation is necessary (e.g. information obligations), it is important to verify whether within the current *acquis* the rules can already be found. Strengthened enforcement could be the best suitable option.

2.1.2 Free online services

81. In your opinion, should consumers benefit from the rights listed below when using "free" online services?

Other

Explanation: We do not believe this is an issue given that it already being addressed in another area (digital content proposal). See reply to question 36.



2.1.3 Modernising the rules governing the means of communication between traders and consumers

103. Under the [Consumer Rights Directive](#), the fax number and the email address – both if available - are listed as information that must be provided to the consumer before conclusion of the contract ("pre-contractual information obligation"). In view of technological developments, which of the following communication means are for you most relevant when communicating with consumers/traders?

Email

Web-based contact form

2.2 Better enforcement and direct redress/remedies opportunities for consumers

2.2.2 Strengthening penalties for breaches of consumer rules

130. Do you agree that the following measures should be established by EU law regarding penalties for breaches of EU consumer protection rules?

Fines should be available as penalties for breaches of consumer law in all Member States- **Strongly disagree**

There should be a common maximum level of fines in all Member States for example a common absolute amount or a common maximum % of the trader's turnover– **Strongly disagree**

In all Member States a part of the profits from fines should be dedicated to promote consumer protection, including financing consumer associations – **Strongly disagree**

2.3 Simplification of rules

2.3.1 Simplification of the rules on the right of withdrawal

148. Do you consider that traders face unnecessary and/or disproportionate burden due to the following obligations related to the right of withdrawal?

Obligation to accept the return of goods bought online which consumers have used more than what they could have done in a brick and mortar shop (thus requiring the trader to calculate the diminished value of the used good, to resell it as second-hand goods and/or to dispose of it as waste) - **Yes, to some extent**



Obligation to reimburse the consumer without having the possibility to inspect the returned goods as soon as the consumer has supplied evidence of having sent them back. - **Yes, to some extent**

152. Do traders face the following problems when consumers [Companies, business associations] return goods that they have used more than they could have done in a brick and mortar shop?

Difficulties with determining the 'diminished value' of returned goods - **Strongly agree**

Practical difficulties with recovering from the consumer the diminished value of returned goods - **Strongly agree**

Charging costs for diminished value is difficult from the customer relations' viewpoint - **Strongly agree**

Difficulties with reselling returned goods with diminished value as second-hand goods - **Strongly agree**

Costs related to the disposal of the returned goods as waste - **Strongly agree**

2.3.2 Simplification of information requirements

162. Currently, traders are required to provide the following information to consumers at the advertising stage and at the stage before the actual purchase. Do you agree that the following information is necessary already at the advertising stage even though the consumer will also receive this information at a later stage?

Information about the complaint handling of the trader - **Strongly disagree**

164. Would removal of the requirements to provide information [Companies, business associations] about the trader's geographical address and complaint handling policy at the advertising stage result in savings for your company or the companies you represent?

To some extent

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