



9 November 2016

Consumer protection cooperation regulation revision

Key messages

- 1 BusinessEurope is in favor of measures (of different nature and scope) which ensure an effective and uniform enforcement of consumer protection rules in the single market.
- 2 Fostering further cooperation between consumer authorities is important to increase trust in the markets and foster fair competition.
- 3 Although favourable to the proposal's approach, BusinessEurope has important concerns regarding the way certain powers are being conferred to national authorities as well as the way such powers could be exercised.

Context

On 25 May 2016, the Commission put forward a proposal for the reform of the **Consumer Protection Cooperation (CPC)** Regulation, which governs the powers of enforcement authorities and the manner in which they can cooperate. In operation since 2007, the CPC facilitates the exchange of best practices and provides for a mutual assistance mechanism. The CPC network is also regularly carrying out EU-wide screenings of websites ("sweeps") to check whether a given sector is complying with consumer rules. The proposal introduces a set of new **minimum powers** for enforcement authorities to enable them to work together faster and more efficiently.

BusinessEurope issued a [press release](#) on the day of the proposal supporting the approach to streamline cooperation between authorities with the aim of securing a more effective enforcement in the single market. However, BusinessEurope also alerted that the use of additional powers - such as the one to take down websites - should be proportionate and subject to minimum procedural guarantees.

This position paper comments on the approach taken by the Commission in this revision as well as on some of the specific articles of the proposal.



General comments



Importance of enforcement and cooperation

BusinessEurope is in favor of measures which ensure an effective and uniform enforcement of consumer protection rules in the single market.

Consumer protection and confidence are key for the further development of the single market. They will stimulate more consumption which is a driver for job creation and a strong economy.

Effective enforcement generates more confidence among businesses and consumers when they engage in the single market and should lead to the need for less regulation in the future. In most Member States, it mainly falls on public enforcement to ensure that rules are complied with. This is less the case in other parts of the world (e.g. US) where private enforcement takes a more substantial role.

If on a one side, it is acknowledged that national consumer protection authorities need to be properly equipped to carry out this task, it is also true that they cannot act in isolation.

In a single market with no borders, especially when it comes to the digital economy, it is essential that national authorities are able to cooperate to tackle illegal practices affecting multiple Member States. These practices can have a harmful impact on markets and companies. Therefore, cooperation also allows for authorities to have a similar way to interpret the existing rules and act coherently in upholding these rules. This is crucial for a level playing field and a properly functioning of the single market.

Strengthened powers to be balanced with strengthened guarantees

Although BusinessEurope is favorable to the Commission approach in this proposal, it has some important concerns regarding the way certain powers are now being conferred to national authorities as well as the way such powers could be exercised.

It is essential that these enforcement powers are balanced with competing fundamental rights such as due process, professional secrecy obligations or right to an appeal.

The way these powers will be applied needs to be proportionate and take the involvement of courts into account. The role of a judge is essential in ensuring due process and protecting fundamental freedoms of companies in the EU. Also, companies should be given a right to object.

Finally, we believe that it is not appropriate to empower administrative bodies with both administrative and compensatory powers without a mandatory judicial control.

Other dimensions of enforcement should be considered

Consumer (and business) information, the role of self-regulation and a widespread use of alternative dispute resolution (ADRs) should not be forgotten in a new approach to enforcement in the EU. The EU Online Dispute Resolution Platform in operation since the beginning of 2016 is one of the central means to facilitate the use of ADRs for cross border claims within the single market. The new CPC framework should take these



other dimensions of consumer protection into account. For example, it is important it integrates well with existent self-regulatory schemes allowing them to continue to prosper in delivering compliance.

Consistent approach to Customer Protection and Enforcement

There are currently several horizontal or sector specific initiatives related to consumer protection in the digital area which are running in parallel (e.g. digital content and online sale of goods proposals, “Fitness Check” of EU consumer and marketing law, directive establishing the European Electronic Communication Code and Geo-Blocking proposal, etc.).

We believe that, in order to achieve an efficient enforcement of the rules, it would be necessary to ensure the maximum consistency among all these initiatives, particularly between horizontal and sector-specific rules.

Specific comments

Section II - Widespread infringement with Union dimension + Article 3 (b) and (c) – concept of likely to harm

Section II establishes a new instrument to address widespread infringements with Union dimension which harmed, harm or are “likely to harm” consumers in the EU.

We believe that commonly accepted principles in **administrative sanctionary** systems must apply. This is the case of the principles of legality, *lex certa* and proportionality. The reference in the draft proposal to the concept of “*likely to harm*” leads to uncertainty regarding type of infringements meant to be covered and in which circumstances these infringements could be considered to trigger preventive actions. This uncertainty would also be extended to the type of acceptable preventive measures and on which competent entity to carry them (court or a national authority).

BusinessEurope believes both Section II and the definitions of Article 3 need to be redrafted to take into account the above concerns.

Article 4, limitation periods for infringements

According to our information, the limitation period varies considerably across Member States (and even inside Member States), in some cases being set at 6 months or 3 years depending on the gravity of infringement. It is therefore important to evaluate whether setting this period at 5 years is considered to be proportionate given the needed balance with the aim of ensuring legal certainty and proportionality with the type/gravity of the infringement.



Article 8, minimum powers of competent authorities

BusinessEurope questions whether it is necessary to be so prescriptive regarding powers awarded to national authorities given that it will mean groundbreaking changes in the way national administrations are structured. This has implications with the principle of subsidiarity.

We also fear some of these powers might undermine fundamental rights of companies provided under national law.

In the light of the general tort law, it does not seem appropriate to just attribute a wide variety (some far reaching) of powers to national authorities without defining a correlation between the these powers and the gravity/type of the infringement.

BusinessEurope believes that the focus should be on ensuring a coherent and uniform application of EU rules rather than detailing which powers authorities can use to uphold those rules. A list of powers as such will not guarantee a level playing field in terms of enforcement. Authorities could still continue to apply these measures in a very different manner.

For example, the following powers in Article 8 raise some specific concerns:

- Powers like the **ability to suspend/close down websites** (points (g) and (l)) or **enter premises of traders** to look for documents (point (d)) are typically powers for which Member States legal systems require a preliminary court approval. Judicial control is needed given the intrusive nature of these powers in the sphere of rights (e.g. implications regarding freedom of enterprise, freedom of expression, etc.) of both natural and legal persons.
- BusinessEurope also questions that every national authority is able to **publish any interim measure** (point (p)) or information regarding ongoing enforcement procedures. Companies should be able to rely, during the procedures, on certain guarantees of confidentiality by authorities to prevent irreparable damage to their reputation and brand especially in case the procedures do not lead to a confirmed infringement. Publishing interim measures or detailed information referred to ongoing enforcement procedures at an early stage, and without all elements of proof being gathered or even a judicial assessment may undermine the company's fundamental right to defend itself. Besides *de facto* reversing the burden of proof, such publication could also cause serious and irreparable damage to the company's reputation and to its financial health (e.g. caused by loss of consumer confidence).
- **Ordering the compensation of affected consumers** (point (n)) is a power that in most Member States remains in the remit of courts'. Also here, the proposal will interfere with national administrative law.
- **Ordering the restitution of profits** obtained as a result of infringements (point (o)) is an example where this proposal goes too far.



Not only is this a power unbeknown to many national authorities it might also lead to situations of disproportionate sanctioning with a summing up of measures without a particular aim. Given the lack of correlated guaranties and safeguards foreseen in this proposal, a company might find itself over-punished if the authority had already awarded a fine (point (m)) and ordered for the compensation of affected consumers (point (n)). Enforcement measures are no longer justified whenever the objectives of deterrence against infringement and compensation for harm caused have been met proportionately, adequately and reasonably.

- **Ordering companies to terminate contracts** (point (n)) is a prerogative that in several Member States needs to be carried or confirmed by a judge. This could have an implication in the away contractual freedom principle is uphold in those Member States.

For these reasons, definition of the powers to be hold by consumer authorities should be left to Member States in compliance with the principle of proportionality.

Article 9, Exercise of minimum powers

It is important that Article 9 states that only courts are able to authorise the exercise of some of the most far-reaching powers of Article 8.

Article 35, participation of other entities in alert mechanisms

BusinessEurope welcomes the fact that entities representing business interests may be designated to the new alert mechanism established in Article 34. Business organisations can be of great help in enforcement as they possess lots of market information through their broad base of members.

Article 41, use of information and professional and commercial secrecy

This article should state that the decisions by competent authorities in respect of information collected, disclosed or used pursuant to Article 8 shall be subject to judicial review by the courts in the Member State in which the relevant competent authority is established.

One-stop-shop approach

BusinessEurope welcomes the one-stop-shop approach regarding the competent authority. This allows businesses to have one interlocutor instead of 28 which is more efficient.
