



29 August 2018

Comments paper on New Deal for consumers

KEY MESSAGES

- Effective consumer protection is a key enabler of online trust and a key pillar for the completion of Europe's Digital Single Market.
- The New Deal for Consumers from April 2018 suggests significant changes to the existing and well-established European Consumer Acquis. These proposals were preceded by the 2017 Consumer and Marketing Law REFIT report and the 2017 Consumer Rights Directive evaluation report confirming that the EU Consumer and Marketing Acquis is generally fit for purpose
- Studies also show that trader compliance has increased, there is more awareness among consumers of their rights and consumer trust is at a 16-year high.
- Therefore, BusinessEurope has significant concerns about:
 - A shift from full harmonisation to minimum harmonisation which is contrary to the Single Market Strategy to bring down stifling legal fragmentation;
 - A shift from public enforcement to private enforcement with the proposal on collective representative actions (BusinessEurope has prepared a separate paper on this proposal);
 - The limited focus on existing instruments such as alternative dispute resolution and the role of European Consumer Centres (not mentioned in the New Deal proposals nor umbrella Communication);
 - A new, doubtful layer of legislation to be imposed on traders in areas not up until now regulated at EU level.
- Before amending the current rules, BusinessEurope believes that it is vital to achieve a coherent interpretation, implementation and enforcement of those rules and a good understanding of how they apply to new market realities and players.
- 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 on the Unfair Commercial Practices Directive) or by multi-stakeholder dialogue groups (e.g. Principles on comparison tools and Compliance criteria on environmental claims).



- 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.
- Any legislative amendments should be done in a targeted way. They should be limited to those provisions that represent substantial barriers to the functioning of the internal market and full harmonisation should be the method used. Any other approach would not be consistent with the objective of fighting legal fragmentation.
- BusinessEurope supports a revision which brings balance and simplifies the legal framework, making it up to date with new technological development and different business models.

RELEVANT FACTS¹

- ✓ Overall consumer trust in the Eurozone is at a 16-year high
- ✓ Consumers know their rights better, which helps them make 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 is still fit for purpose

¹ Sources: 2017 Consumer Conditions Scoreboard; 2017 report on Consumer and Marketing Law Fitness Check



SPECIFIC COMMENTS on the New Deal

Right of withdrawal

In Article 2(9) it is proposed that the right of withdrawal will not apply, if the consumer has used the goods beyond what is necessary to establish its nature, characteristics and functioning. Also, it is stipulated that the trader may withhold the reimbursement until he has received the goods back (Article 2(7)a).

BusinessEurope supports these elements of the proposal, since both amendments to the Consumer Rights Directive (CRD) will bring further balance to the rights and obligations provided for in the directive. They are reasonable and important safeguards against abuses.

Means of communication between traders and consumers

The proposal allows traders to use new means of online communication, such as web forms or chats as alternative to traditional e-mail as long as the consumer can keep track of the communication with the trader.

BusinessEurope supports this feature as a means to keep up with the digital and technological developments.

Penalties

The proposal introduces identical penalties in all four directives encompassed by the proposal², including the possibility to impose fines of at least 4 % of the trader's annual turnover for widespread infringements (affecting many Member States). Furthermore, the proposal establishes certain criteria for how Member States shall impose penalties.

BusinessEurope supports the idea of guiding *criteria* for Member States to assess whether to impose a penalty and its level, but BusinessEurope does not believe that an EU harmonisation of the *threshold* for fines for widespread infringements would have added value.

It is important that Member States have a similar view on the relationship between the severity of an offence and the sanctions applied by the competent authorities. Furthermore, Member States shall take the nature and gravity of an infringement into account, since 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.

On the other hand, the fact that thresholds for fines differ across the Member States is not sufficient to justify harmonising the level of fines. The different thresholds might be

² Directive 93/13, Directive 98/6, Directive 2005/29 and Directive 2011/83/EU



adjusted to the reality, intensity and nature of infringements verified in those Member States and to the general level of fines in different Member States. There is no evidence that Member States with higher fines possess a higher level of compliance.

According to the 2017 European Commission Consumer Conditions Scoreboard it is difficult to draw a conclusion that Member States with specific penalties such as turnover based fines perform better in terms of trust or on enforcement³. This shows that Member States are in a better position to design the most efficient enforcement measures. At the same time, fines are not the only enforcement measure available to national authorities which might choose other means to enforce EU law.

Also, linking the fine with a percentage of the turnover might not be the most effective mean to determine a sanction. On the one hand, turnover is not necessarily representative of the ability of a company to pay a fine. On the other hand, if a company is given a fine for a breach of law connected to one of the products with an insignificant impact on its turnover, the amount of the fine could become highly disproportionate. Factors other than turnover tend to be more appropriate to determine the level of fines: severity of the infringement; intentionality; risk for the property, physical integrity and interests of the consumer(s); damages; type and size of the breach; repetitive nature of the breach, etc.

The newly revised CPC regulation has barely been adopted hence it would seem premature to take any conclusions on whether national measures are not sufficient to fulfil the above requirement.

More important than seeking to inflate or harmonise the amounts of fines for non-compliance with EU law, a more uniform interpretation and application of the rules by enforcers is needed. 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 in the same way. Just as the “Fitness Check” showed, the Commission therefore needs to focus on better and more uniform enforcement across the EU.



Individual remedies for consumers

According to Article 1(4) the Commission proposes that Member States shall ensure that contractual and non-contractual remedies are also available for consumers harmed by unfair commercial practices as defined in the Unfair Commercial Practices Directive (Directive 2005/29) (hereafter referred to as “UCPD”).

While BusinessEurope supports effective enforcement of EU Consumer Law, it has reservations on the need for this provision, namely due to its impact and proportionality.

The UCPD already requires Member States to have penalties for infringements, and that those penalties are effective, proportionate and dissuasive. And such public enforcement has proven to work well in many Member States.

³ 2017 Consumer Conditions Scoreboard: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=117250



Public enforcement is complemented by existing EU-wide contractual rights to remedies for consumers in situations where the seller, the producer or his representative has given wrong or misleading information about the product, particularly in advertising or on labelling, cf. Article 2(1) and (2)d in the Sales Directive (Directive 1999/44). This EU-wide right to remedies is built into the contract law of Member States and covers most of the potential infringements of the UCPD.

However, there are considerations inherent in contract law (private enforcement) that differ from marketing law (public enforcement) which make it difficult to require that all infringements of marketing law shall also give remedies in contract law.

For example, it is an integrated part of contract law that a product must show non-conformity relating to the quality, performance or purpose of the product in order for a buyer/consumer to have a right to contractual remedies. On the other hand, in marketing law (UCPD) an infringement already occurs if a commercial practice materially distorts the economic behaviour of consumers. Not all infringements of the UCPD has a connection to the quality, performance or purpose of the product, e.g. omission to indicate paid advertising.

Moreover, in contract law, it is the specific situation between the contract parties that must be assessed. For example, did the individual consumer have reason to believe in relation to the concrete sale? And did it affect that particular purchase? On the other hand, in marketing law the focus is on commercial practices and its impact on the average consumer.

In this context, it is problematic, if all infringements of the UCPD *automatically* give consumers contractual rights to remedies, especially considering that the minimum remedy proposed is termination of the contract.

Contractual rights to remedies must follow the well-established principles inherent in the contract law of Member States. The same goes for non-contractual remedies, where the right to compensation must follow the well-established principles within tort-law, amongst which the principle that a right to compensation requires having suffered an economic loss. Therefore, the proposed measures must be redrafted in this regard. In particular, it is unclear what is meant by “harmed by unfair commercial practices”. For example, it would not be appropriate to award a right to individual remedies in situations where a consumer has lost time, but not money.

Dual quality

BusinessEurope does not have a specific position on the sectoral issue of dual quality of food. However, given the possible spill-over-effect of these regulatory amendments to other areas we would like to make the following considerations:

- UCPD is a horizontal legislation applying to other areas beyond the food sector. So far, all discussions around alleged dual quality has been limited to food, and the Commission has taken several initiatives, including the guidance published in September 2017 and the work of the Joint Research Centre. Therefore, the Commission should not underestimate the effect of choosing a horizontal legislative tool.



- Considering the potential impact on consumer choice and companies' entrepreneurial freedom, we would advise against going for a far-reaching regulatory solution without robust evidence of the problem and the advantages of such intervention. Better enforcement, especially in the light of the new CPC framework, seems like a more adequate solution.
- Also, there are no EU concepts for the terms "quality" and "identically branded", meaning that it is completely unclear from which Member State the alleged higher quality reference product should come. Developing these concepts at EU level presents several challenges and risks.
- The EU should not seek a harmonisation of product composition, design etc. which would be disproportionate and extrapolating EU competences.



Free online services

Article 2(1)d proposes to include free online services (i.e. "contracts where the consumer provides or undertakes to provide personal data to the trader") in the Consumer Rights Directive (Directive 2011/83).

BusinessEurope notes that a provision on online services against no monetary compensation is already in the final stages of adoption 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.

We do not see enough evidence of consumer detriment, which can justify reopening the Consumer Rights Directive regarding 'free' digital services. Regarding the advertisement phase, we believe that the UCPD already awards consumers with sufficient rights.

Also, it is unclear how to practically give data back to the consumer once he exercises his right to withdrawal.

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 add 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 as well as collection of data which otherwise was not intended to be collected.



Online marketplaces

Article 2(4) introduces additional information requirements for contracts concluded on online marketplaces in the Consumer Rights Directive (Directive 2011/83).

BusinessEurope finds that transparency is 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). BusinessEurope finds that transparency about which search results have been paid for by a trader is reasonable. This is in line with the guidance in the Unfair Commercial Practices Directive.

However, BusinessEurope is sceptical about the potential extent of information requirements in Article 2(4)(a) according to which companies must inform consumers of the main parameters determining ranking of offers on the online marketplace. In line with recital 19 of the European Commission proposal, it is important to acknowledge that the obligation to provide information about the main parameters determining ranking of search results is without prejudice to any trade secrets regarding the underlying algorithms. These algorithms often contain trade secrets and hence need to be adequately protected when obliging online marketplaces to introduce information requirements on their main parameters for ranking offers. Too much transparency may lead to seller abuse in competition to achieve the top rankings. Similarly, too much transparency of algorithms often leads to the abuse by malicious actors (e.g. spam).



Doorstep selling

Article 1(1) give the Member States the option to ban doorstep selling and commercial excursions on grounds of public policy or the protection of the respect for private life.

BusinessEurope is worried about this amendment which shifts from the full harmonisation approach of the UCPD which has proven to be an effective instrument at EU level against unlawful practices by rogue traders.

We believe that the appropriate rules are already in place to protect consumers. The Consumer Rights Directive provides for strong information requirements and a robust right of withdrawal and the Unfair Commercial Practices Directive already bans aggressive doorstep selling. Under point 25 of Annex I of the Directive (blacklist of commercial practices), “personal visits to the consumer’s home ignoring the consumer’s request to leave or not return” are prohibited. Enforcement should be the best answer with the new EU CPC framework being a step in the right direction in this regard.
