Cooperation on the enforcement of consumer protection laws


Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment (IA) accompanying the above Commission proposal (the proposal), submitted on 25 May 2016 and referred to Parliament's Committee on the Internal Market and Consumer Protection.

Regulation (EC) No 2006/2004 (the CPC Regulation) lays down a framework for cooperation between the relevant authorities in the EEA and the Commission in cases of 'intra-Community infringement' of consumer law. For this purpose it establishes a European enforcement cooperation network. In its annex, the CPC Regulation includes a list of EU legal acts in the field of consumer protection that are subject to this enforcement cooperation. It establishes a mechanism for mutual assistance between competent authorities establishing systems for the exchange of information and for requests for the adoption of enforcement measures. It also provides for the coordination of market surveillance and enforcement activities.

The objective of the CPC Regulation is to ensure the smooth functioning of the internal market and enhance the protection of the collective economic interests of consumers, rather than individual interests. Action under the regulation is not dependent upon individual complaints, but decisions are taken in the interest of consumers in general, irrespective of consumers' complaints or even awareness of any infringement.

In accordance with the review clause of the CPC Regulation (Article 21a) the Commission contracted an external evaluation to assess the effectiveness and operational mechanisms of the regulation and to examine the possibility of new legislative intervention. The outcomes of the evaluation were presented in a report from the Commission to the European Parliament and the Council in July 2014. The report concluded that the CPC Regulation had proved effective in safeguarding consumers' collective interests across the EU, but it also acknowledged that

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2 Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

3 Intra-community infringement is defined in the regulation as 'any act or omission contrary to the laws that protect consumers' interests, [as listed in the annex to the Regulation], that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found'.

4 Individual consumers can still seek redress with national authorities in a private action if they consider that their rights have been infringed.


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certain enforcement challenges had to be addressed. It noted that, especially in a fast developing digital world, 'better and more consistent enforcement of consumer protection rules should contribute to higher market transparency and reduce compliance cost for businesses operating across borders, boosting competition and innovation and making an important contribution to growth. A better cooperation mechanism at EU level can achieve a swift and cost-efficient response to infringements of EU consumer rules that concern several Member States'. This led the Commission to carry out the impact assessment and related studies that prepared the ground for the adoption of the proposal.7

The Digital Single Market Strategy8 affirms that there is a need for more rapid, agile and consistent enforcement of consumer rules for online and digital purchases to make them fully effective, and announced the Commission's intention to review the CPC Regulation. This intention was reiterated in the Single Market Strategy9 and in the Commission Work Programme for 2016.10

The European Parliament considers that the Digital Single Market 'requires up-to-date and practicable transparency and consumer protection mechanisms'11, and has called for better application and enforcement of consumer protection standards.12 In its resolution of 19 January 2016 on Towards a Digital Single Market Strategy13 it welcomed the Commission's undertaking to review the CPC Regulation.

Problem definition

The IA makes a structured investigation of the problem, exploring first the drivers, in a process that then leads to the identification of the problems and, subsequently, their consequences. Three problems are identified in the current CPC legal framework: (i) insufficient mutual assistance cooperation mechanisms, (ii) no efficient response to widespread infringements14 on an EU level, and (iii) difficult detection of infringements and lack of prioritisation of enforcement action. These problems limit the effectiveness and efficiency of cross-border enforcement cooperation in consumer markets. The exercise is supported, in particular, by evidence from coordinated screenings of online e-commerce websites (sweeps) carried out by enforcement authorities under the CPC Regulation, an external evaluation of the CPC Regulation and case-studies on complaints and actions under the CPC Regulation.

Within the ambit of the problem definition the IA explores the baseline (no change) scenario, which is illustrated with case studies and complimented by an analysis of how the problem will evolve if no action is taken. The problem definition exercise is recapitulated visually in a problem tree.15

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14 In the proposal a 'widespread infringement' is defined as '(1) any act or omission contrary to the laws that protect consumers' interests that harmed, harms, or is likely to harm the collective interests of consumers residing in at least two Member States other than the Member State where the act or omission originated or took place, or where the trader responsible for the act or omission is established, or where evidence or assets pertaining to the act or omission are to be found; irrespective of whether the act or omission is ongoing or has ceased; or (2) any acts or omissions contrary to the laws that protect consumers interests that have common features, such as the same unlawful practice, the same interest being infringed or that are occurring concurrently, in at least two Member States'.
15 IA, p. 24.
Objectives of the legislative proposal

The general objective of the Commission proposal is to 'develop more modern, efficient and effective CPC cooperation mechanisms to reduce the consumer detriment caused by cross-border and widespread infringements to consumer law in the EU and contribute to the completion of the Digital Single Market'.

The specific objectives are as follows:

- to reduce situations where important cross-border and widespread infringements are not detected or sufficiently addressed through the CPC framework,
- to reduce unnecessary delays and costs in consumer protection cooperation, and
- to reduce situations where CPC authorities reach diverging outcomes with regard to the same malpractice.

The objectives are clearly laid down. They also appear to be relevant to the problems and their drivers identified earlier in the IA, although one might maintain that a better explanation of the links between problems and objectives would have been useful. The objectives also appear to be specific, measurable, achievable and amenable to be set within a timeframe. In a support study that preceded the IA, and that was conducted externally on behalf of the Commission, the general and specific objectives are set forth in a more elaborate manner with numerous specific and operational objectives linked to each of the identified problems. The IA opts for a simpler presentation of objectives, where the specific objectives are fewer in number and worded in a more generic manner.

The IA appears to include operational objectives under the 'Monitoring and Evaluation' heading, even though it does not refer to them as such. They are the following:

- reduction in non-compliance rates and in related consumer detriment,
- improved consumer protection cooperation to address intra-Community infringements,
- improved effectiveness of consumer protection cooperation in tackling widespread infringements,
- improved market surveillance,
- improvement in priority setting, in strategy setting and in dedicated resources for enforcement cooperation at EU level.

Range of options considered

The IA identifies four policy options apart from the baseline scenario (option 1).

- Option 2 is an option with significant non-regulatory elements. It involves the adoption of implementing legislation and soft law measures to improve and clarify existing enforcement cooperation in consumer protection matters without extending the scope of the regulation. In addition, self-regulation would be used to increase business compliance.
- Option 3 involves a revision of the CPC Regulation to extend its scope and strengthen its efficiency vis-à-vis the resources employed. Increased efficiency would be achieved through the extension of the harmonised list of minimum powers for CPC authorities, the setting up of a harmonised framework for addressing widespread infringements and provision for a market surveillance mechanism and prioritisation of enforcement actions. This option contemplates two different coordinated enforcement procedures; which of these is triggered would depend on whether the widespread infringement reaches a certain threshold or not. If the threshold is not reached Member State authorities retain a central role in initiating and conducting the procedure. If, on the other hand, the threshold is reached the Commission has a more pivotal role, though it still does not have direct investigation or enforcement powers as these remain the prerogative of national authorities.

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16 IA, p. 29
18 The threshold set in the proposal is based on two criteria that both need to be fulfilled: the infringement must be such as to harm or be likely to harm (i) consumers in at least three quarters of the Member States (ii) accounting together for at least three quarters of the population of the Union.
- Option 4 is the same as option 3 but with some additional elements. The harmonised list of minimum powers of CPC authorities would be extended to a greater extent than under option 3. Furthermore, option 4 envisages the setting up of an audit system to verify the enforcement performance of Member States.
- Option 5 involves the adoption of a whole new regulation granting the Commission direct investigation, enforcement and sanctioning powers to address widespread infringements that meet a certain threshold\(^\text{19}\). This would be combined with option 3 or option 4 with respect to infringements that do not meet that threshold.

It seems to be immediately clear, even from the first presentation of the options, that option 2 would not attain all the specific objectives identified in the IA. On the other hand, it is arguable that option 5 goes beyond the general objective to enhance 'cooperation mechanisms', since the distinctive feature of option 5 is the direct powers granted to the Commission to tackle the most serious of widespread infringements, placing them outside the scope of cooperation mechanisms. The preferred option is option 3.

**Scope of the Impact Assessment**

For each of the options considered the IA starts by assessing to what extent they achieve the specific objectives and the general objective. It then goes on to assess other impacts including economic, environmental and social impacts, impacts on fundamental rights, cost impacts and impacts on legal systems. The IA assesses the feasibility of the options and the level of stakeholder support they enjoy. The IA also carries out 'special considerations' where the peculiarities of a particular option so require. It would therefore appear that the analysis is sufficiently complete in terms of its scope.

**Subsidiarity / proportionality**

Subsidiarity is tackled under the heading 'Why should the EU act?'. The IA highlights the challenges faced by national public authorities – whose action is constrained by jurisdictional boundaries – in the enforcement of consumer rights. It contrasts these jurisdictional limitations with the business models of big enterprises with an EU or even a global dimension. For this reason, the IA argues that EU-level powers need to be given to enforcement authorities and that public enforcement activities need to be coordinated so as to ensure consistent enforcement of consumer rights across the EU and efficient tackling of infringements of consumer rights legislation where such infringements span several Member States.\(^\text{20}\) Such jurisdiction and cooperation, the IA argues, cannot be achieved by individual actions by Member States, and can therefore be better achieved at Union level. It maintains also that action at EU level, rather than at the level of Member States, would bring about gains in terms of effectiveness and efficiency.

The IA refers to Article 169 of the Treaty on the Functioning of the European Union (TFEU), which states that the Union 'shall contribute to protecting the ... economic interests of consumers'. The legal basis of the proposal is Article 114 TFEU. With regard to the choice of instrument, the explanatory memorandum accompanying the proposal explains that it is essential for the instrument to be a regulation, as any requirement of transposition into national law would raise issues of jurisdictional boundaries.

Proportionality is dealt with under the assessment of impacts of the various options and under the comparison of the options. Issues of proportionality are raised in particular in the analyses of feasibility, budgetary impact and impact on fundamental rights. Matters related to proportionality carry significant weight in the choice of option 3 over option 4.

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\(^{19}\) The same threshold as in option 3.
\(^{20}\) IA, p. 28.
Certain special considerations concerning subsidiarity and proportionality are also made in the analysis of impacts with respect to the additional powers that would be granted to competent authorities under option 3. Although not explicitly mentioned, these considerations are applicable even for option 4 and possibly for option 5. The IA highlights in particular that the use of the additional powers of the competent authorities granted in virtue of the proposal would be limited to cross-border situations in which the same powers available at national law cannot be used because their use is limited to domestic matters only. It follows that if such powers are not available for use at national level, Member States would not be required to introduce them for domestic infringements as any such requirement would be disproportionate to the cross-border context of the objectives.

At the time of writing one national parliament, the Swedish Riksdag, had issued a reasoned opinion on non-compliance with the principle of subsidiarity. The deadline for submissions is 1 September 2016.

**Budgetary or public finance implications**

The reduction of unnecessary costs is part of one of the specific objectives identified in the IA. It is therefore fitting that budgetary and public finance implications are given substantial importance in the IA. A specific heading in the analysis of impacts of each option deals with the compliance costs that the Commission and the Member States would incur for each of the options. In this discussion it is not always clear how certain estimates or assumptions were arrived at. In particular, no explanation is afforded for the assumption that under option 5 there would be the same average number of decisions as there are in the EU competition area. This assumption is the basis of further assumptions and calculations to determine the costs of the conferral on the Commission of direct powers in regard to widespread infringements in consumer protection matters.

Annex VI to the IA examines the current cost of CPC cooperation and the envisaged future costs of CPC cooperation under the preferred option and calculates the estimated savings. In a simulation of the cost of a coordinated action to tackle a widespread infringement the IA estimates that the savings in total staff costs at EU level could range between €93 000 and €815 000, depending on (i) whether the trader agrees to and complies with a negotiated outcome or not and (ii) whether the widespread infringement meets the threshold or not.

**SME test / competitiveness**

The IA does not do a specific SME test. The general assumption is that economic impacts will have a corresponding effect on SMEs. Competitiveness is discussed fleetingly in the assessment of the economic impacts of the options. The discussion on both SMEs and competitiveness is markedly affected by the apparent lack of depth of the economic analysis in general.

**Simplification and other regulatory implications**

Simplification and the reduction of the administrative burden are inherent elements in the objectives of the proposal and as such are investigated quite thoroughly in the assessment of impacts in achieving the objectives of the proposal.

The analysis of the impacts of each option includes a subheading ‘Impacts on legal systems’. Under this heading the IA explores the adjustments that Member States would have to make to their legal systems to make them compliant with the specific option. This exploration is complemented by other subheadings such as ‘Feasibility’ and ‘Compliance costs’ (also as part of the analysis of impacts of the retained options) where the complexity and monetary costs of such changes are explored. Annex V analyses in some detail the impact of the preferred option on national enforcement systems and laws.

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21 IA, p. 45.  
22 IA, pp. 52 and 55.  
23 IA, Annex VI, p. 106.  
24 See below under Quality of data, research and analysis.
The administrative burden on traders is considered in the analysis of economic impacts. In outlining the preferred option the IA examines briefly the consistency of the preferred option with other EU policies, explaining that the proposal would constitute lex generalis i.e. the generally applicable law in consumer affairs, whereas other more specialised pieces of consumer legislation would constitute lex specialis, i.e. the specialised law applicable to specific circumstances.

**Relations with third countries**

The IA does not make an analysis of considerations specific to third country operators or consumers. In considering the economic impacts of option 5 it mentions briefly that this option would be more effective in ‘tackling malpractices committed by traders ... from third countries’. This statement is not elaborated upon any further.25

**Quality of data, research and analysis**

The IA was preceded by a study on the implementation of investigative and enforcement powers of national enforcement authorities arising from the CPC Regulation and on the national procedural rules in proceedings initiated or managed by those authorities. The study was conducted externally on behalf of the Commission.26 The IA was also preceded by a preparatory impact assessment, which was also conducted externally on the Commission's behalf.27

The analyses as to how and to what extent the options will reduce delays and costs and the analyses regarding the reduction in non-compliance rates and related consumer detriment generally appear to be well developed and backed up by data. Annex IV describes the data and case studies that support the IA in this regard. It describes the exercise of screening websites in five consumer sectors28, on the basis of which non-compliance rates and consumer detriment are estimated. The IA acknowledges the lack of detailed and systematic statistics on cross-border and widespread infringements and the difficulty in making quantitative estimates of the scale of impacts on compliance with EU consumer protection legislation. With regard to the analysis of the impacts of option 5, the seemingly unbacked assumption that the Commission would adopt the same number of decisions on average as under EU competition policy29 is the basis of impact analysis in terms of cost reduction, reduction of consumer detriment and compliance costs.30

The analyses on the impact on fundamental rights and on the impact on legal systems seem to evaluate quite thoroughly the positive and negative effects the various options would impose and what steps could be taken to mitigate the negative effects. Annex V provides a run-through of existing EU instruments on consumer law enforcement and of the impact of the current CPC Regulation on national enforcement systems. It outlines the investigation and enforcement powers of CPC authorities and investigates the impact of the preferred option on national enforcement systems and laws.

One might argue, however, that in certain instances the IA lacks depth in its analysis. The analysis on economic impacts puts emphasis on cost reduction and perhaps does not give sufficient prominence to macroeconomic effects. For options 3, 4 and 5, it is acknowledged that reduced non-compliance rates and less consumer detriment would increase consumer confidence in cross-border transactions, which would in turn boost cross-border trade and economic growth. This argument appears to remain however on a theoretical level with no data produced to

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25 See also below under Quality of data, research and analysis.
27 See footnote 17 above.
28 The five sectors are the following: clothing and sports goods, electronic goods, package travel, recreation and culture and financial services. These sectors were chosen on the basis of a number of factors including popularity for online shopping, economic importance, and results of previous screenings.
29 See above under Budgetary or public finance implications.
30 IA, pp. 51, 52 and 55.
back up the assertion. This seemingly unsupported assertion is then used in the analysis of social impacts as a basis for the argument, again apparently unsupported by data, that increased consumer confidence and more economic growth 'have an indirect positive effect on the levels of employment'.

**Stakeholder consultation**

The IA identifies the stakeholders affected by the problems and by the proposed responses to these problems. The IA mentions several initiatives undertaken for the purposes of gathering stakeholder views in the light of the proposal.

- Consumer organisations and national enforcers were consulted through established networks like the CPC Committee\(^\text{32}\), the European Consumer Consultative Group (ECCG)\(^\text{33}\) and the Consumer Protection Network.

- The European Consumer Summit is a yearly gathering of key European and international stakeholders in the field of consumer policy. The European Consumer Summit in March 2013 focused on enforcement of consumer legislation and deliberated on the results of the 2012 external evaluation of the CPC Regulation.

- An online public consultation was held between 11 October 2013 and 13 February 2014. There were 222 respondents to the public consultation with a variety of profiles, from public authorities and government entities to consumer associations, business interests and academic and research organisations, among others. In the public consultation stakeholders were asked to give their views (i) on the key challenges and possibilities for improvement in the enforcement of consumer rights, (ii) on how the methodology for identifying infringements could be improved, (iii) on how the capacity of national authorities to perform their duties under the CPC Regulation could be enhanced, and (iv) on how to tackle widespread infringements in the single market. Annex II to the IA gives a summary of the stakeholders’ views expressed in the public consultation.

- Two workshops were organised in June 2014 and March 2015 for experts from the Member States and EEA countries to discuss the review of the CPC Regulation.

- Annex II also mentions as having been important for gathering stakeholders views a conference focusing on enforcement cooperation under the CPC Regulation organised by the Italian Presidency of the Council of Ministers in July 2014.

It would appear that stakeholders' views are well reflected throughout the IA. The analysis of each of the options includes a subheading under which the IA considers the stakeholders' stance on the major elements of the option under discussion. Annex II then gives a more detailed outline of the stakeholders' position on key elements of the preferred option.

**Monitoring and evaluation**

The IA identifies core progress indicators corresponding to the operational objectives. It also lays down targets to be achieved for each operational objective. When it comes to evaluation, there seems to be a discrepancy within the text of the IA as to whether the targets set are to be achieved after seven years or after five years.\(^\text{34}\) The proposal sets a deadline of seven years from the date of application of the regulation for the Commission to present a report on its application, but it does not specify the operative period of the regulation that should be covered by the report.

\(^{31}\) IA, p. 42.

\(^{32}\) The CPC Committee is set up in Article 19 of the CPC Regulation.

\(^{33}\) The ECCG is the Commission’s main forum for consulting national and European consumer organisations and was set up by Commission Decision 2009/705/EC.

\(^{34}\) IA, p. 61.
Commission Regulatory Scrutiny Board (RSB)

The Board issued a positive opinion on 27 November 2015. The opinion includes some recommendations to expand and strengthen the argumentation used in the IA, and these appear to have been addressed in the final version of the IA.

Coherence between the Commission’s legislative proposal and the IA

It appears that the proposal follows what has been identified in the IA as the preferred policy option (option 3).

Although the preferred option is not for wholesale replacement of the existing regime, but for an extension of its scope, together with additions and improvements thereto, the Commission opts not to amend the existing instrument but to replace it with a new act. Given the extent of the changes, this seems to be a practical solution which benefits clarity and simplifies the decision-making process. The annex to the CPC Regulation is also amended so that the changes to the annex will become applicable immediately upon entry into force of the proposal. The CPC Regulation (including the amended annex) will cease to be in force one year after the entry into force of the proposal, and its place will be taken by the new regulation (the proposal) with its annex.

Annex VII to the IA states that apart from the main changes subject to the impact assessment, the proposal includes technical amendments ‘aimed at clarifying existing provisions or ensuring coherence with other instruments’. The IA also announces the intention of the Commission to replace the decision implementing the CPC Regulation to reflect the changes made in virtue of the proposal.

Conclusions

The IA appears to make a sound exploration of the existing problems. The link between the problems and the objectives could possibly have been better established, but the objectives and the options appear to be relevant to the problems identified. The argumentation in the IA seems reasonable and realistic and in certain aspects (in particular with regard to delay and cost reduction and the analyses on non-compliance rates and related consumer detriment) the analysis appears to be thorough and backed up by sound data. One might argue, however, that in other aspects (in particular in aspects related to the economy and competitiveness) a more profound analysis, with a better explanation of the assumptions made and more data to back up the arguments made, would have been better able to support the policy decisions taken in the proposal.

This note, prepared by the Ex-Ante Impact Assessment Unit for the Committee on the Internal Market and Consumer Protection (IMCO) of the European Parliament, analyses whether the principal criteria laid down in the Commission’s own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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35 IA, p. 111.