

Initial Appraisal of a European Commission Impact Assessment

EU consumer protection rules

Impact assessment (SWD(2018) 96, SWD(2018) 98 (summary)) accompanying two Commission proposals for directives of the European Parliament and of the Council i) amending Directives 93/13/EEC, 98/6/EC, 2005/29/EC and 2011/83/EU as regards better enforcement and modernisation of EU consumer protection rules, and ii) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above proposals on [better enforcement and modernisation](#) of EU consumer protection rules and on [representative actions](#) for the protection of the collective interests of consumers, submitted on 11 April 2018 and referred to the European Parliament's Internal Market and Consumer Protection Committee and Legal Affairs Committee.

Six directives adopted over the course of almost 20 years, from 1993 to 2011, are of direct relevance to the IA. The **first proposal** amends four of these directives. In reverse chronological order, these are the 2011 Consumer Rights Directive, the 2005 Unfair Commercial Practices Directive, the 1998 Price Indication Directive and the 1993 Unfair Contract Terms Directive. The proposal comes after a fitness check of consumer legislation and an evaluation of the Consumer Rights Directive showed that EU consumer legislation is fit for purpose, but could benefit from certain improvements.¹

The **second proposal** repeals the 2009 Injunctions Directive, which enables qualified entities, such as consumer organisations, to bring representative actions to protect *individual* consumers. Also as a result of the fitness check and following calls by Parliament, this proposal introduces, inter alia, an EU-wide *collective* redress mechanism, absent today. Finally, the 1999 Consumer Sales and Guarantees Directive is also of direct relevance to the IA, but is not changed by the proposals (IA, part 1, p. 8).²

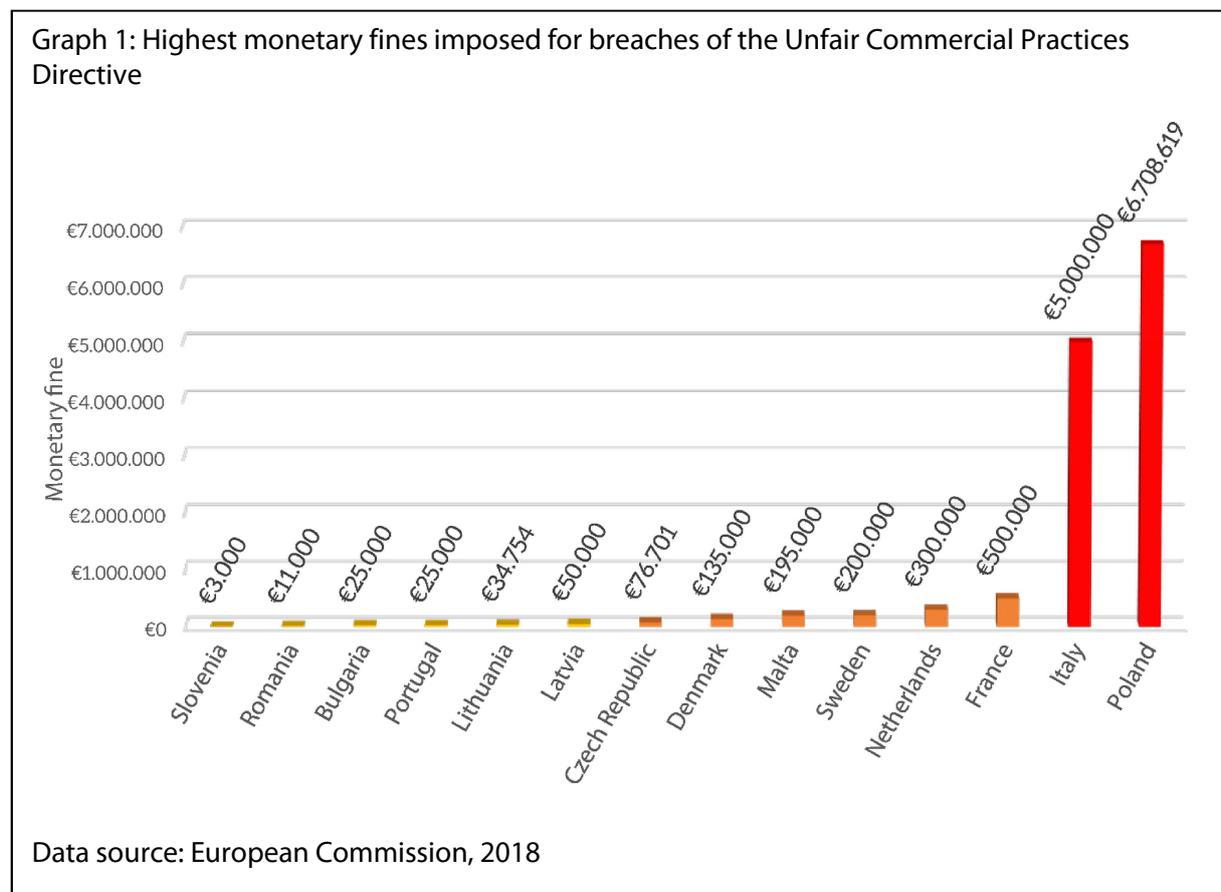
Problem definition

The IA highlights two main problems and seven causes. Generally speaking, the IA provides some indications about the scale of the problems and their drivers. These are mainly based on survey data in the first part of the IA, complemented by data also drawn from other sources presented in the annexes (see 'Quality of data, research and analysis' section below). The first problem, according to the IA, is that **many traders do not comply with EU consumer law**. This is because of ineffective mechanisms:

1. to stop and deter infringements;
2. to ensure that *individual* consumers get redress for harm suffered;
3. to provide *collective* redress to tackle mass harm situations.

An example illustrating this first problem is the Dieselgate scandal. Eight million cars sold in Europe had a 'defeat device' installed, giving false readings of CO₂ emissions (IA, part 1, p. 18). This is a breach of the Unfair Commercial Practices Directive. National provisions transposing the directive entail mainly maximum monetary fines ranging from less than €9 000 in Lithuania to €6.5 million in Hungary (IA, part 2, pp. 39-40). Eight Member States can also impose fines based on the trader's annual turnover, ranging from 3 % in Lithuania to 10 % in France, Poland, the Netherlands, Latvia and Sweden. However, in some of these Member States, there is a monetary cap.³ The highest fines actually imposed for breaches of the Unfair Commercial Practices Directive are shown in the table

below. These figures are based on a survey and were used in modelling by the Commission's Joint Research Centre, which divided the countries into three groups as shown below, with low, medium and high fines (IA, part 2, p. 25).



The second highest fine, €5 million, was imposed by the Italian Competition and Consumer Protection Authority on Volkswagen for the Dieselgate scandal (IA, part 1, p. 19, footnote 53). By contrast, US authorities imposed a €4 billion (€4 000 million) environmental penalty on Volkswagen, which is 800 times more than in Italy. US consumers could also choose to return the car and be compensated for its value or have it repaired. They were also entitled to a compensation payment of between €4 250 and €8 500 (IA, part 1, p. 19, footnote 55).⁴

Secondly, the IA states that **some consumer law rules are ineffective and entail unnecessary costs** for compliant traders. This is caused by the remaining four drivers:

- There is insufficient transparency on online marketplaces: for instance, consumers are not sure who is responsible if something goes wrong.
- The Consumer Rights Directive does not apply to 'free' digital services, such as cloud storage (e.g. Dropbox) and webmail (e.g. Gmail). The IA argues that these are 'paid' through personal data and that there are many similarities with paid provision of digital content, which is subject to the Consumer Rights Directive.
- There are outdated information requirements and some overlapping requirements between the Unfair Commercial Practices Directive and the Consumer Rights Directive.
- There are some imbalances in the right to withdraw from distance and off-premises sales: in distance sales, a consumer may withdraw even if they have unduly used the goods. They can be reimbursed even before the trader has received the returned product, if they send proof that it has been sent back.

The consequences of these two problems are listed, but are not elaborated upon in depth. These are defined as: ‘consumer detriment’, ‘unfair competition between compliant and non-compliant traders’ and ‘lowered trust leading to sub-optimal frequency and volume of cross-border transactions, both for consumers and traders’ (Figure 2, IA, part 1, p. 16).

Objectives of the initiative

The IA does not define **operational** objectives, which should have corresponded to the causes of the problems. This appears to be a methodological weakness, mainly because it contributes to narrowing down the range of options considered, which are built around the **specific** objectives instead. These correspond to the problems and aim to ‘improve compliance with EU consumer law’ and ‘modernise consumer protection rules and eliminate unnecessary costs for compliant traders’ (IA, part 1, p. 36). **General** objectives broadly correspond to the consequences, even though there is a partial shift in the wording. The general objectives listed in the IA are to ‘protect the economic interests of consumers and ensure a high level of consumer protection’ and ‘promote the smooth functioning of the internal market’ (IA, part 1, pp. 16 and 36).

Range of options considered

The range of options considered in the IA are built around the two specific objectives. To achieve the first, the IA discarded from the outset self-regulation and co-regulation as too weak, and more far-reaching options as unfeasible or disproportionate (IA, part 1, pp. 37-38). After detailed analysis and comparison with the baseline, the Commission selected as its preferred course of action option 3, which, however, encompasses both options 1 and 2.

Table 1: The three options considered for improving compliance with EU consumer law

Option	Content of the options in the IA
1.	<p>‘Effective, proportionate and dissuasive’ penalties in all four directives. Enforcement authorities would need to take into account a list of common non-exhaustive criteria when deciding whether to impose penalties. Criteria to determine the amount of the fine would include the trader’s turnover as well as fines imposed in other Member States.</p> <p>Regarding the turnover-based fine, the IA presents a range from 1-2 % to 10 %, based on national and EU examples. It also indicates that deterrence and minimum harmonisation should be the guiding principles behind the choice of the percentage (IA, part 1, p. 39).</p>
2.	<p>Option 1 + individual consumer redress. A consumer harmed by unfair commercial practices would have access at least to:</p> <ul style="list-style-type: none"> - a contractual remedy: he/she could terminate the contract; - a non-contractual remedy: he/she would have the right to compensation for damages, not only from the contractual counterparts, for instance the seller, as it is the case now, but also from the producer.
3.	<p>Option 2 + amended representative action. Qualified entities, such as consumer organisations, could request at the same time, from both courts and administrative authorities:</p> <ul style="list-style-type: none"> - an injunction order, to stop or prohibit a practice by a trader; and - a redress order, including compensation for the harm caused by the infringement. <p>Member States would also encourage out-of-court settlements between qualified entities and traders.</p>

Source: Commission, author.

To achieve the second specific objective, the IA discarded from the outset the requirement for online marketplaces to verify whether third-party suppliers qualified legally as traders or consumers. This was considered not coherent with previous legislation and too burdensome for the marketplaces (IA, part 1, p. 44). Furthermore, the IA analysed in detail self-regulation and co-regulation, as an alternative

to the options numbered in this briefing as 5 and 6. After comparison with the baseline, it concluded that all these options were less effective than the ones presented below.

Table 2: The four options considered for modernising consumer protection rules and eliminating unnecessary costs for compliant traders

Option	Content of the option in the IA
4.	<p>Online marketplaces would have to inform consumers before the conclusion of the contract, in clear and comprehensible terms, about:</p> <ul style="list-style-type: none"> the criteria used for ranking the offers as a result of the consumer's query; whether the third party offering the product is a trader or not, based on the trader's self-declaration; whether EU consumer rights apply to the contract; which trader, if any, is responsible for ensuring consumer rights.
5.	<p>The Consumer Rights Directive would be extended to 'free' digital services. Therefore:</p> <ul style="list-style-type: none"> Traders would be required to provide consumers with pre-contractual information. Consumers could cancel the digital service within 14 days. If so, they would have the right to erase personal data and the right to data portability. The trader would have to refrain from using the data.
6.	<p>The trader would no longer be required:</p> <ul style="list-style-type: none"> to inform consumers already at the advertising stage about their complaint handling policy; to provide a fax number, where available, before conclusion of a distance or off-premises contract; to provide an e-mail address. They could also communicate via web-forms and chats, provided they allowed the consumer to record the communication on a durable medium.
7.	<p>The trader would no longer be obliged:</p> <ul style="list-style-type: none"> to accept the return of the goods also when the consumer has used them more than necessary; to reimburse the consumer if the consumer presents proof that the goods have been sent back, before the trader has received them.

Source: Commission; author.

The IA states at least three times that there are no viable alternatives to the options considered, based on research, evaluation and stakeholder input. However, at first sight a different calibration of some options would seem to be possible and would have added value to the findings of the evaluation. For instance, discussing at least two thresholds for the fines would have been useful.⁵

Scope of the impact assessment

The IA follows a structured approach and assesses all options against the objectives and according to the extent to which they have additional effects. Firstly, the IA assesses all options against both specific objectives (compliance and reducing business costs) and general objectives (consumer protection and the internal market). However, it would have been useful to define also operational objectives and assess a number of options against these as well (or instead of general objectives), in line with the Better Regulation Guidelines and standard practice. This was not done.

Secondly, the other effects analysed in the IA, where applicable, are:

- costs and savings for three categories of stakeholders: traders, authorities and, in the area of injunctions, qualified entities (see 'SME test/competitiveness' below);

- coherence with EU law (see ‘Simplification and other regulatory implications’ below);
- social and environmental impacts; social impacts include the expected positive impacts on vulnerable consumers, as opposed to broader consumer protection, which falls under the general objectives;
- the degree of legal change required in Member States. The IA presents relevant information for each of the Commission’s preferred options, but does not provide an overview.⁶

Finally, the IA presents some information on third countries, such as the quoted penalties for the Dieselgate scandal in the US, but does not analyse third country impacts in depth.

Subsidiarity / proportionality

The legal basis of the proposals is Article 114 TFEU on the completion of the internal market and Article 169 TFEU on consumer protection. The arguments substantiating the need to act at EU level and the added value of EU action largely reiterate the reasoning expressed elsewhere. Among the new elements, the IA quotes two European Parliament resolutions: the 2012 resolution on ‘Towards a coherent European approach to collective redress’ ([P7_TA\(2012\)0021](#)) and the 2017 recommendation to the Council and the Commission following the enquiry into emission measurement in the automotive sector ([P8_TA\(2017\)0100](#)). Two national parliaments have so far issued reasoned opinions regarding the proposals on [enforcement](#) and on [representative actions](#). Regarding the enforcement proposal, the Austrian Federal Council argues that new systems of penalties, including turnover-based monetary fines, would go against the principles of proportionality and subsidiarity. Regarding the proposal on representative actions, the Austrian Federal Council argues, inter alia, that the new system would go against Article 47 of the EU Charter of Fundamental Rights (right to an effective remedy and to a fair trial). It also argues that the application of the directive should be limited to cross-border cases. The Swedish Parliament has issued the same reasoned opinion on both proposals. In the courtesy translation, it explains that it shares the Commission’s objectives, but ‘it has objections regarding the parts of the proposals that contain instructions on how revenues from fines or equivalent financial penalties should be allocated’. These objections relate both to proportionality and subsidiarity. The deadline for submission of opinions is 10 July 2018.

Budgetary or public finance implications

The IA lists a number of savings and costs for national authorities. These would relate to the three options to improve compliance as well as to the changes regarding ‘free’ digital services and online marketplaces. The main argument in the IA is that these options would entail enforcement costs or initial familiarisation costs for national authorities and courts, which the Commission expects to be offset by an overall indirect positive impact. The enforcement proposal is not expected to have any cost for the EU. The proposal on representative actions mentions limited costs to be met mainly by existing EU resources, for instance to coordinate qualified entities and exchange best practices.

SME test / Competitiveness

Regarding competitiveness, reducing the competitive advantage enjoyed by non-compliant traders is one of the expected impacts of the initiative (IA, part 1, p. 65). Surveys quoted in the IA show that the majority of business respondents ‘did not consider collective redress procedures to have any negative impact on their businesses’ competitiveness’ (IA, part 1, p. 60). Moreover, the proposed turnover-based fines aim to correct the imbalance of monetary fines currently in place against SMEs in most Member States. All these benefits for SMEs and other companies are described, but not quantified. Conversely, the IA presents cost estimates for SMEs and large companies, warning that these ‘should be considered as only indicative and treated with caution’ (IA, part 2, p. 21, footnote 47), as they are based on limited data from non-representative surveys, sometimes from just a few companies. However, costs, and particularly the upper range estimates, are significantly higher for SMEs (IA, part 2, pp. 20-22).

Table 4: Estimated benefits and costs for businesses in the Commission IA

	Costs for SMEs (EUR)				Costs for large companies (EUR)			
	One-off		Recurrent		One-off		Recurrent	
	<i>Median</i>	<i>Range</i>	<i>Median</i>	<i>Range</i>	<i>Median</i>	<i>Range</i>	<i>Median</i>	<i>Range</i>
Initial familiarisation costs to improve compliance with EU consumer law	638	0-572 000	655	0-190 000	108	0-5 000	0	0-15 000
Transparency obligations for online marketplaces	50	48 000	0	0-84 000	0	0-2 200	0	0-1 500
Extending rules on 'free' digital services	0	48 000	50	0-169 000	0	0	0	0
Rights of withdrawal	0	0-48 000	50	169	0	0	0	0

Source: Commission; author.

Simplification and other regulatory implications

The Commission states that the IA focuses on the six directives listed above, but took into account a number of other recent EU instruments, such as: the 2017 Consumer Protection Cooperation Regulation; the 2016 General Data Protection Regulation; the 2015 directive on consumer alternative dispute resolution; the 2015 proposal for a directive on contracts for the supply of digital content; and the 2013 Commission recommendation on collective redress (IA, part 1, pp. 8-12). Moreover, coherence with EU law is one of the criteria used to rank the options. The IA mentions the amended proposal for a directive on aspects of contracts for the sales of goods (COM(2017)637) (IA, part 1, p. 11, footnote 23; p. 19, footnote 60; and p. 58), but does not analyse it in depth.

Quality of data, research and analysis

The Commission states that the IA mainly builds on three strands of work: the 2017 fitness check on EU consumer and marketing law; the 2017 evaluation of the Consumer Rights Directive and the 2018 report on the implementation of the recommendation on collective redress. The analysis clearly shows in-depth work and great expertise on the subject. It provides both qualitative and quantitative research. The following methods stand out in the IA: a behavioural modelling performed by the Commission's Joint Research Centre, which shows correlation, but not causality, between the reform and desired outcome (IA, part 3); and a behavioural experiment where 1 600 consumers visited a mock-up online marketplace indicating the name and legal status of the supplier (IA, part 1, p. 64).

However, one weakness is that the text is difficult to follow and it is not easy to understand what is important. For instance, the presentation in the same table of cost ranges, average costs, median costs, costs for the whole retail trade industry, sometimes precise to the nearest euro, is transparent, but not reader-friendly (IA, part 2, pp. 20-23). Secondly, the IA systematically provides a breakdown of stakeholder views and sometimes these are precise to the nearest decimal. In both cases, the figures should have been rounded. Generally speaking, a more targeted selection of information would have facilitated the consideration by the reader of the choices made by the Commission.

Stakeholder consultation

The Commission carried out a broad consultation strategy consisting of an online public consultation lasting three months, receiving over 400 responses, and seven targeted consultations of stakeholders. These included the feedback provided on the inception impact assessment.

Regarding the quality of the consultation, the IA announces that it has advertised the consultation strands broadly, including via online media such as Twitter and Facebook. It systematically quotes the consultation results and admits transparently when there were diverging opinions. However, the

large space devoted to consultation comes at the expense of useful and more sound information, such as data reported by Member States, which are shifted to the annexes. In terms of presentation, the IA quotes extensively from the 2017 Consumer Conditions Scoreboard, but unfortunately does not use any of its user-friendly [infographics](#) or [maps](#).

The IA rightly notes that any consultation is not statistically representative of the target population. This applies also to the consultation of SMEs carried out through the Enterprise Europe Network. The IA reports that this network's partner organisations can select the most suited companies to respond, but that it cannot guarantee geographical balance. In this case, approximately half of the 291 replies came from three countries: Poland, Italy and Portugal (IA, part 2, p. 15). As this network is co-financed under the EU programme for competitiveness for SMEs (COSME), it would be useful to enquire whether it could achieve a better geographical balance.

Monitoring and evaluation

The IA presents a monitoring and evaluation framework consisting of 11 indicators complemented by Eurostat data and a public consultation. Moreover, Member States would provide data relating to representative actions. Generally speaking, however, the monitoring framework relies mainly on surveys. 4 of the 11 indicators relate to the survey published every two years for the Consumer Conditions Scoreboard. The remaining seven indicators relate to targeted surveys with consumers, qualified entities, online marketplaces and providers of 'free' digital services to be carried out four years after the entry into force of the new legislation. Data collection is usefully time-bound: the targets are to be achieved within five years after entry into force. However, in one third of the cases, the target figure to be achieved is lower than the current figure (IA, part 1, pp. 93-94).

The monitoring indicator for representative actions relating to data provided by Member States is broken down into more detailed elements in the corresponding proposal. The remaining 10 survey-based indicators are not taken up in the two Commission proposals. The IA announces an evaluation to be carried out five years after the entry into force of the new rules and this is taken up in the proposal on representative actions (article 18, paragraph 1). As the IA noted that surveys yielded insufficient data for costs, it would have been interesting to know how the Commission intends to remedy this methodological weakness. One option could be to find additional sources of hard data going beyond stakeholder surveys.

Finally, the Commission proposal on representative actions adds an assessment related to air and rail passenger rights that the Commission should carry out by one year after the entry into force of the legislation. Should the Commission conclude that air and rail passengers already enjoy a level of protection comparable to that of the proposed directive on representative actions, the following two pieces of legislation may be removed from the scope of application of the directive: the regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (No 261/2004); and the regulation on rail passengers' rights and obligations (No 1371/2007). The evidence base behind the selection of these two pieces of legislation among the 59 in the scope of the proposal is not quoted in the IA. It is also unclear whether the Commission assessment would be publicly reported to the co-legislators.

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board (RSB) issued [two opinions](#) on this IA in the first quarter of 2018: a negative opinion following the meeting on 10 January 2018 and a positive opinion relating to the text it received from DG JUST less than three weeks later, on 29 January 2018. A novelty is that the RSB opinions now include quantification tables extracted from the *draft* non-public version of the IA report submitted to the Board. This novelty introduces more transparency to the process, something Parliament has always advocated. The RSB's published opinion simply 'takes note' of the quantification, but does not include any consideration on it. In this case, the two quantifications do not show any substantive difference (IA, part. 2, pp. 18-23).

DG JUST explains how it has taken both opinions into account (IA, part. 2, pp. 2-4). For instance, the recommended need to 'discuss potential risks, unintended consequences and trade-offs' was addressed in three new pages analysing some risks highlighted by stakeholders. The main argument is that these risks have already been carefully considered in the IA and mitigated by some legal provisions (IA, part 1, pp. 87-89). Secondly, the request to conclude the impacts' analysis 'with an overall assessment on the size of the legal changes for different group of Member States' was addressed with the information summarised in endnote 6 below. Finally, the advice to have a shorter and more reader-friendly text has resulted in a text of 300 pages split across three documents.

Coherence between the Commission's legislative proposal and IA

The Commission's legislative proposal is coherent with the conclusions reached in the IA. However, in the proposal, the maximum amount of fines is set at a minimum of 4 % of the trader's annual turnover, while the IA presents a range from 1-2 % to 10 %. The IA also indicates that deterrence and minimum harmonisation should be the guiding principles for the percentage chosen (IA, part 1, p. 39).

Conclusions

The IA is aimed at underpinning new legislation in the field of consumer protection, as called for in various European Parliament resolutions. It represents a considerable body of work, based on extensive evaluation and consultation. Methodological weaknesses include the narrow range of options to calibrate the evaluation findings. Secondly, there are some presentation issues, which do not facilitate consideration of the Commission's choices. For instance, the large space devoted to consultation comes at the expense of useful and more sound information.

ENDNOTES

¹ See N. Sajn, [Modernisation of EU consumer protection rules](#), legislation in progress, EPRS, European Parliament, June 2018.

² A seventh directive, the 2006 Misleading and Comparative Advertising Directive, is outside the scope of the IA and the proposals.

³ In Cyprus, Hungary, Latvia and Sweden, the turnover-based fine cannot exceed the monetary fine. The threshold is 3 % in Lithuania, 5 % in Cyprus and Hungary and 10 % in Latvia and Sweden.

⁴ In June 2018, Volkswagen was fined €1 billion by German state prosecutors for its *criminal* role in the Dieselgate scandal, hence beyond consumer protection rules. Civil claims and a shareholder lawsuit are still ongoing in Germany.

⁵ NB: in the IA, option 1 addresses drivers 1 and 3. Options 2 and 3 address drivers 1, 2 and 3. The remaining options address the corresponding drivers. This appraisal numbers the options differently.

⁶ IA, part 1, pp. 54, 58, 66, 71, 73 and 75; tables 1, 3 and 4 in Annex 7 (part 2, pp. 39-40; 43-44 and 53); table 8 in Annex 8 (part 2, p. 65); and table 1 in Annex 10 (part 2, p. 114).

This briefing, prepared for the Internal Market and Consumer Protection (IMCO) and the Legal Affairs (JURI) committees, analyses whether the principal criteria laid down in the Commission's own Better Regulation 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.

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