

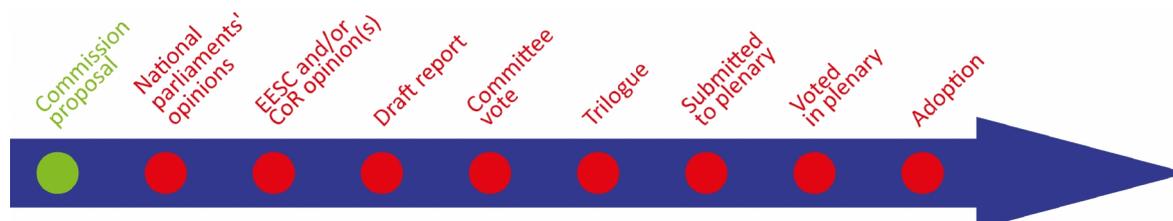
# Modernisation of EU consumer protection rules

## A new deal for consumers

### OVERVIEW

On 11 April 2018, the European Commission published a proposal for a directive on better enforcement and modernisation of EU consumer protection, as part of its 'new deal for consumers' package of measures. The proposal comes after a fitness check of consumer legislation and an evaluation of the Consumer Rights Directive showed that the EU consumer legislation is fit for purpose, but could benefit from certain aspects being clarified and brought into line with the reality of the digital economy. The proposal focuses on various consumer issues, including penalties for infringements, transparency on online marketplaces, protection for consumers of 'free' digital services and dual quality of products. It would amend the Unfair Commercial Practices Directive, the Consumer Rights Directive, the Unfair Contract Terms Directive and the Price Indication Directive. The proposal is in now under consideration in the European Parliament and the Council of the EU.

<b>Proposal for a directive on better enforcement and modernisation of EU consumer protection rules</b>		
<i>Committee responsible:</i>	Internal Market and Consumer Protection	COM(2018) 185 11.4.2018
<i>Rapporteur:</i>	Daniel Dalton (ECR, United Kingdom)	2018/0090 (COD)
<i>Shadow rapporteurs:</i>	Evelyne Gebhardt (S&D, Germany) Julia Reda (Greens/EFA, Germany) Marco Zullo (EFDD, Italy)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Publication of draft report	



## Introduction

On 11 April 2018, the European Commission published a [proposal](#) for a directive on better enforcement and modernisation of EU consumer protection rules. It is a part of the 'new deal for consumers' package of measures, which also includes a proposal for a directive on representative actions for the protection of the collective interests of consumers, revising the Injunctions Directive.

The package follows the [fitness check](#) of EU consumer and marketing law and the [evaluation](#) of the Consumer Rights Directive (both May 2017), which showed that EU consumer legislation was generally fit for purpose but that some aspects could benefit from improved enforcement and modernisation to adjust to the digital economy. The package also comes on the heels of the 'Dieselgate' scandal, which showed that EU consumers and national authorities were much less able to get compensation and impose penalties on Volkswagen than their counterparts in the USA.<sup>1</sup>

The proposed directive focuses on a range of issues that were identified by the fitness check and the evaluation, but that have not yet been addressed by other legislative and non-legislative measures. It therefore covers a range of slightly unrelated topics, such as harmonising penalties for infringements and possibilities for individual consumer redress, increasing transparency on online marketplaces, extending protection for consumers of 'free' digital services and addressing the issue of dual quality of products. The proposal would amend four of the seven main horizontal directives that make up the core of EU consumer legislation and that apply to all sectors of economy: the Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive (CRD), the Unfair Contract Terms Directive (UCTD) and the Price Indication Directive (PID).<sup>2</sup>

## Existing situation

According to the [2017 Consumer Conditions Scoreboard](#), in 2016 one in five consumers encountered at least one problem that they thought could be cause to file a complaint. This figure has been roughly unchanged since 2008, according to the fitness check report. In 2016, a third of those who could have complained decided not to, mainly because they thought the amount in question was too small or because they thought it would take too long. Of those who did complain, 63.4 % were satisfied with the way their complaint was handled.

In addition, the scoreboard showed that 17 % of consumers were exposed to unfair commercial practices. This was lower than the 24 % of 2014, but regional differences were significant – 14 % in the EU-15 and 27 % in the EU-13 (the lowest exposure, 3.4 %, was reported in Austria, while the highest, 41 %, was reported in Croatia). In addition, 30 % of retailers also came across competitors using unfair commercial practices. This was 3.6 percentage points lower than in 2014, but the differences between Member States were also pronounced here, with the highest percentage in Poland (57 %) and the lowest in Denmark (13.5 %).

While the exact figures for the detriment to consumers are not available, a recent [study](#) of six markets – mobile phone services, clothing, train services, large household appliances, electricity services, and loans, credit and credit cards – estimated the detriment to consumers in 28 Member States at between €20.3 and €58.4 billion over 12 months.<sup>3</sup>

## Penalties for infringements

The Commission considers that one of the reasons for non-compliance with the consumer directives is that penalties are not sufficient to deter infringements. Of the four directives revised by this proposal, three – the CRD, UCPD and PID – require Member States to put in place 'effective, proportionate and dissuasive' penalties for infringements. The UCTD does not set out such requirements explicitly, but 11 Member States have included penalties in their national laws that national authorities can use to sanction companies that do not comply with the UCTD. The rules for penalties for breaches of all four directives vary greatly between Member States, however. For

instance, the fines for UCPD infringements can reach just €8 688 in Latvia and up to 10 % of a company's annual turnover in France, Poland and the Netherlands.

## Individual remedies

The Commission also deems ineffective the individual remedies that consumers can claim when faced with unfair commercial practices. Although the UCPD bans aggressive and misleading commercial practices, it does not harmonise the rules on what consumers can do. The Commission's 2017 [Consumer Market Study](#) shows that 27 % of consumers who had had problems with such practices did not take any action, 36 % because they did not expect a satisfactory solution. Although 14 Member States refer to individual remedies in their laws transposing the UCPD, in most Member States only remedies relating to breach of contract (contractual remedies) are available (e.g. the right to terminate the contract and get a refund), rather than remedies unrelated to contracts (non-contractual remedies), such as some form of damages. This famously became an issue in the Dieselgate scandal, as EU consumers, unlike their US counterparts, were only able to seek remedies from the car dealer (the contractual partner) and not from the car producer, which was in fact responsible for the marketing of cars with misleading environmental claims.

## Online marketplaces

The fitness check and the evaluation also found problems with online marketplaces – platforms that act as intermediaries between consumers and traders.<sup>4</sup> According to the Commission's [exploratory study](#) of consumer issues in online peer-to-peer platform markets, neither consumers (60 % of them), nor the traders or the marketplaces are completely sure who is responsible if something goes wrong. One in six consumers is not sure who is responsible, 40 % of suppliers do not know their rights and responsibilities, and marketplaces also have differing understandings of their rights and responsibilities. In addition, consumers often do not know who they are concluding the contract with on the online marketplace and whether they are entitled to EU consumer legislation protection (the consumer protection directives apply only if consumers buy products or services from a professional seller or company, but not if they buy something from a private individual).

National legislation in some Member States seeks to address this issue: 17 Member States require online marketplaces to indicate whether a contract is concluded with the marketplace itself or a third party; 15 Member States require an indication of whether the seller is a professional trader or not; and 12 Member States require an indication of whether consumer laws apply.

Online marketplace search rankings were also identified as an issue. Products ranked top have a 47 % higher chance of being chosen and 80 % of consumers only look at the first page of results, according to the Commission's impact assessment. However, consumers are often not aware that ranking is not necessarily based on relevance and does not always list the [best-priced](#) items first.

## 'Free' digital services

Inconsistencies in consumer legislation were found with regard to 'free' digital services. While the Consumer Rights Directive applies to contracts for the supply of both paid and 'free' digital content (such as apps, games, videos and computer programmes), it only applies to paid digital services (such as content platforms, cloud storage, webmail and social media), while 'free' digital services (usually 'paid' for by personal data) are excluded.<sup>5</sup> This means that consumers of free digital services are not covered by the CRD provision on pre-contractual information or the 14-day cooling-off period. Businesses have complained that this creates legal uncertainty, as the distinction between digital content and digital services is sometimes difficult to determine. Additional inconsistencies could arise if the proposed [Digital Content Directive](#) is adopted, as it would provide remedies for consumers in contracts for both paid and free digital services and both paid and free digital content.

## Dual quality of branded products

Another issue covered by the proposal is the dual quality of branded products – the practice of marketing products in some Member States with the same (or a similar) brand name and packaging but with different characteristics than in other Member States. Since the UCPD does not explicitly ban this practice, this has been considered lawful (including by the European Commission), as long as the composition of the products was properly labelled. But after tests in a number of Member States showed that products (mainly food) had a different composition, taste or other sensory characteristics than in other Member States, in 2017 the Commission issued a notice laying down criteria that national authorities in Member States could use, on a case-by-case basis, to find out whether this practice was unfair and therefore not allowed.<sup>6</sup>

## Parliament's starting position

Parliament is traditionally in favour of strengthening consumer protection and has addressed some of the issues covered by this proposal in its resolutions. During its previous term, in its [resolution](#) of 4 February 2014 on the implementation of the Unfair Commercial Practices Directive, it warned that consumers hesitate to ask for redress when they think that the amount concerned is not very high, and that they are not sufficiently aware of the support available to them from both consumer associations and the network of European Consumer Centres. In 2017, during the negotiations with the Council on the revised [Consumer Protection Cooperation Regulation](#), Parliament insisted on measures for consumer redress that would 'prevent or reduce the risk of recurrence or repetition of infringements'. It also advocated for the power for national authorities to impose sanctions, order the compensation for consumers or restitution of profits for cross-border infringements.<sup>7</sup>

In its [resolution](#) of 15 June 2017 on online platforms and the digital single market, Parliament stressed the need for clear differentiation between sponsored content and any other content on the online platforms and to provide their users with 'clear, impartial and transparent information on the criteria used to filter, rank, sponsor, personalise or review information presented to them'. It also called for an assessment of existing legislation and self-regulation mechanisms to determine if they provide adequate protection to users of platforms. It asked the Commission to provide guidance for online platforms on their existing obligations concerning consumer protection.

In the ongoing negotiations on the proposal for a directive on contracts for the supply of digital content, Parliament has been in favour of same rules for contracts for paid and free digital services, to ensure a level playing field for the differing business models, but has insisted on making a distinction between digital content and digital services.<sup>8</sup>

In its previous term, in its June 2013 [resolution](#) on a new agenda for European consumer policy, Parliament warned that various surveys highlighted consumers' concern about 'possible differences in the quality of products with the same brand and packaging which are distributed in the single market'. Stressing that any form of discrimination between consumers was unacceptable, Parliament called on the Commission to carry out a meaningful investigation and check whether EU legislation needed to be changed. Over the years, MEPs have worked to put the issue on the Commission's agenda and the Committee on the Internal Market and Consumer Protection (IMCO) is currently working on an own-initiative [report](#) on dual quality of products in the single market, with a vote in the plenary expected in September 2018.

## Preparation of the proposal

The proposal follows the findings of the fitness check of EU consumer and marketing law and of the evaluation of the Consumer Rights Directive (CRD), published in May 2017.

The [fitness check](#) focused on six directives<sup>9</sup> and concluded that most of the provisions are fit for purpose, but warned of still insufficient enforcement of the rules, lack of awareness about consumer rights and limited redress opportunities. The [evaluation](#) of the CRD showed that, while the directive

had contributed to ensuring a high level of consumer protection, awareness-raising activities were necessary, alongside targeted legislative interventions. These interventions would need to extend the scope of the directive to free digital services, clarify the rules applicable to digital content contracts, introduce transparency requirements for online marketplaces, simplify the CRD information requirements for businesses that overlap with the UCPD, reduce the burden on traders regarding the consumer's right to withdrawal and take into account modern means of communication between traders and consumers.

The Commission organised consultations with stakeholders, including a targeted panel consultation with SMEs, targeted consultations with Member States' national authorities and consumer organisations, and consultations within the REFIT stakeholder expert group. The online [public consultation](#) took place between 30 June 2017 and 8 October 2017 and received 414 responses (294 from individual citizens, 133 from companies, 80 from business associations, 30 from consumer associations, 31 from Member State and 46 from other public bodies/institutions, professional consultancies/law firms, regional associations, etc).

This all fed into the [impact assessment](#) (see [executive summary](#)),<sup>10</sup> which focused on ineffective mechanisms to stop and deter consumer law infringements, ineffective mechanisms for individual and collective consumer redress, and also options for modernising consumer protection and eliminating unnecessary costs for compliant traders.

The impact assessment considered three options for improving compliance with EU consumer law: (1) improving enforcement to stop and deter infringements; (2) providing individual remedies for victims of unfair commercial practices in addition to measures in option 1; and (3) improving mechanisms for collective redress in mass harm situations, in addition to options 1 and 2. Some options, such as industry self-regulation or co-regulation and more far-reaching measures such as allowing administrative bodies to issue penalties, were discarded at an early stage. Option 3 was selected as the preferred option, as it was estimated that it would reduce consumer detriment and increase consumer trust, while promoting fairer competition to the benefit of compliant traders.

The impact assessment also presented two options for lack of transparency and legal certainty on online marketplaces and for insufficient consumer protection and legal certainty for 'free' digital services, and one option for overlapping and outdated information requirements and for imbalances in the right to withdraw from distance and off-premises sales. It was estimated that the preferred options would lead to better protection for consumer using online marketplaces and free digital services, and provide some savings for businesses without reducing the level of consumer protection.

EPRS is preparing an initial appraisal of the Commission's impact assessment.

## The changes the proposal would bring

The proposed directive would amend four horizontal consumer directives: the Unfair Commercial Practices Directive ([UCPD](#)), the Consumer Rights Directive ([CRD](#)), the Unfair Contract Terms Directive ([UCTD](#)) and the Price Indication Directive ([PID](#)).

An article on **penalties** would be inserted in all four directives.<sup>11</sup> It would require Member States to ensure that their courts and authorities decide on penalties based on a set of parameters that would be the same throughout the EU. In case of widespread cross-border infringements,<sup>12</sup> national authorities would have the power to impose fines up to a maximum threshold not lower than 4 % of a trader's turnover.

The proposed amendments to the UCTD would give consumers access to **individual remedies** when harmed by unfair commercial practices. Contractual remedies would have to include at least the right to contract termination, while non-contractual remedies would have to include at least the right to compensation for damages.

**Transparency of online marketplaces** would be improved by amending both the UCTD and the CRD. Online marketplaces would be required to clearly inform consumers about how the offers are ranked in a search and paid placements would have to be clearly indicated. Failure to do so would be added to a list of commercial practices which are considered unfair in all circumstances under the UCPD.<sup>13</sup> Online marketplaces would also have to clearly indicate whether consumers are concluding a contract with a professional trader or a private individual; whether consumer legislation applies; and whether the supplier of the online marketplace is responsible for ensuring consumer rights are upheld.

The scope of the Consumer Rights Directive would be extended to cover **free digital services**. The amendments would extend the definition of 'services' to include digital services, and that of 'service contract' to include digital service contracts, which would now also cover contracts where consumers provide the trader with personal data.

The proposed directive would introduce some **simplifications for businesses**. The CRD would allow traders to use online communications such as web forms and chats as alternatives to traditional e-mail for communication with consumers, provided that consumer is able to keep the correspondence on a durable medium. Fax would be deleted from the list of possible means of communication with consumers. In addition, traders would no longer be required to accept within the 14-day cool-off period goods that consumers have already used, and would not have to reimburse the consumer before they have received the goods returned.

The proposed directive would introduce some new unfair commercial practices. **Dual quality of products** – defined as 'any marketing of a product as being identical to the same product marketed in several other Member States, while those products have significantly different composition or characteristics' – would be added to the list of misleading commercial practices, but not to the list of commercial practices that are considered unfair in all circumstances. This means that national authorities could decide whether or not these practices are illegal on a case-by-case basis.

Additionally, Member States would be allowed to ban some **particularly aggressive or misleading off-premise selling practices**, specifically unsolicited visits to consumers' homes and commercial excursions whose aim is to promote or sell products to consumers. Member States would have to notify the Commission that they have introduced such bans, which could be justified on the grounds of public policy or the protection of the respect of private life. Such bans are currently not allowed by the UCPD, which is a maximum harmonisation directive, meaning that Member States are not allowed to introduce additional measures, but they exist in certain Member States.

## Advisory committees

The European Economic and Social Committee (EESC) is planning to issue a single [opinion](#) on the whole 'new deal for consumers' package (rapporteur Jarosław Mulewicz, Group I, Poland).

## National parliaments

The [deadline](#) for the submission of reasoned opinions on the grounds of subsidiarity is 10 July 2018.

## Stakeholders' views<sup>14</sup>

[BEUC](#), the European Consumer Organisation, welcomes the proposal, especially the proposed maximum penalties for infringing companies. In its [paper](#) 'Plugging the gap in consumer rights: what a new deal for consumers should look like in 2018', BEUC also advocated introducing a standard remedy for non-compliance in the CRD, and an EU-wide standard for individual rights and remedies for consumers in the UCPD, without lowering the existing level of protection in some Member States. It further advocated holding platform operators liable for misleading information, guarantees, or statements and to consider them suppliers when they have a predominant influence over their suppliers. BEUC supported updating the UCPD so that the monetisation of data would be considered a business practice, and was in favour of adding the organised second-hand resale of

tickets at more than face value, the marketing of unhealthy food to children and unfair green claims to the list of banned unfair practices.

[Business Europe](#) criticised the Commission's decision to introduce new legislation instead of continuing to focus on 'public enforcement, efficient out-of-court dispute resolution tools and awareness of the many rules among both consumers and businesses'. It said that EU citizens already enjoy the most efficient and strongest consumer protection in the world, while the level of compliance of European companies remains high.

[UEAPME](#), the European association of craft, small and medium-sized enterprises, said that the Commission had missed a chance to simplify consumer legislation and that it put too much emphasis on enforcement. It warned that the directive could disproportionately affect SMEs and especially took issue with the proposed possibility for Member States to restrict door-to-door sales, saying that such practice should not always be considered unfair and misleading. On the other hand, it welcomed changed obligations for traders regarding the 14-day right of withdrawal.

[EDIMA](#), the European association representing online platforms and other innovative companies, said the EU consumer laws are fit for purpose and consumers can be protected through enforcement of existing legislation. It also cautioned against 'additional unnecessary red tape'.

[ETNO and GSMA](#), which represent the interests of mobile operators in the EU and worldwide, argue that it is essential that existing regulation be properly enforced before introducing 'new, and perhaps unnecessary, rules'. They would also welcome a more harmonised approach, 'ensuring that consumer protection rules are respected and enforced equally across all industries'.

## Legislative process

In the European Parliament, the Committee on the Internal market and Consumer Protection is responsible for the file, with Daniel Dalton (ECR, United Kingdom) appointed rapporteur.

In the Council, examination of the proposal began in the working party on consumer protection and information in April 2018.

## EP SUPPORTING ANALYSIS

Juul M., [Lawsuits triggered by the Volkswagen emissions case](#), EPRS, May 2016.

Mańko R., [Contracts for the supply of digital content and digital services](#), EPRS, February 2018.

Mańko R., [Towards new rules on sales and digital content](#), EPRS, March 2017.

[An economic review of the collaborative economy](#), Policy Department for Economic and Scientific Policy, December 2016.

[Online Platforms: How to Adapt Regulatory Framework to the Digital Age?](#), Policy Department for Economic and Scientific Policy, January 2017.

Šajn N., [Dual quality of branded food products](#), EPRS, June 2017.

Tymowski J., [Revision of consumer law directives \(including injunctions\): the 'New Deal for Consumers'](#), Implementation Appraisal, EPRS, April 2018.

Valant J., [A European agenda for the collaborative economy](#), EPRS, November 2016.

## OTHER SOURCES

[EU consumer protection rules: enforcement and modernisation](#), European Parliament, Legislative Observatory (OEIL).

## ENDNOTES

- <sup>1</sup> For more on the Dieselgate scandal, see EPRS briefing [Lawsuits triggered by the Volkswagen emissions case](#).
- <sup>2</sup> The other three directives that are considered to make up the core horizontal consumer directives are: the [Sales and Guarantees Directive](#) (whose provisions on digital contracts are in the process of being amended by the proposed [Digital Contracts Directive](#)), the [Misleading and Comparative Advertising Directive](#), and the [Injunctions Directive](#) (whose revision has also been proposed under the 'new deal for consumers' package).
- <sup>3</sup> The study measured 'revealed personal detriment', defined as 'negative outcomes for individual consumers that they become aware of following the purchase or use of a good or service, measured relative to what would reasonably have been expected given the type of transaction'. It included variables such as loss of value as a result of the problem as well as the cost of sorting out the problem. It measured pre-redress and post-redress financial detriment separately.
- <sup>4</sup> The [Online Dispute Resolution Regulation](#) defines them as 'a service provider [...] which allows consumers and traders to conclude online sales and service contracts on the online marketplaces website' (Article 4). Examples include Amazon, eBay and AirBnb.
- <sup>5</sup> The definition of a 'service contract' in the CRD includes a requirement that 'the consumer pays or undertakes to pay the price' of the service.
- <sup>6</sup> For more, see the EPRS briefings on the [Dual quality of branded food products](#) and the [European Commission guidelines on dual quality of branded food products](#).
- <sup>7</sup> The negotiating team had a mandate from plenary based on the IMCO [report](#).
- <sup>8</sup> Parliament's position is based on the IMCO and JURI committees' [report](#).
- <sup>9</sup> In addition to the three directives amended by the new Commission proposal (the Unfair Commercial Practices Directive, the Unfair terms in consumer contracts and the Price Indication Directive), the fitness check also analysed the [Consumer Sales and Guarantees Directive](#), the [Misleading and Comparative Advertising Directive](#) and the [Injunctions Directive](#).
- <sup>10</sup> The impact assessment received a negative opinion from the [Regulatory Scrutiny Board](#) in December 2017 and a positive one in January 2018.
- <sup>11</sup> This would become the new Article 13 of the UCPD, new Article 24 of the CRD, new Article 8b of the UCTD and new Article 8 of the PID. This is the only article that would be changed in the UCTD and the PID, while the rest of the changes introduced by the proposed directive amend the UCTD and the CRD.
- <sup>12</sup> Widespread cross-border infringements are defined by the [Consumer Protection Cooperation Regulation](#) as harming consumers in at least three Member States, or two Member States other than the Member State of the trader.
- <sup>13</sup> In practice, it would be added to Annex I under Point 11 which deals with hidden advertising.
- <sup>14</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

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