Enforcement of consumer protection legislation

SUMMARY

European consumers enjoy a high level of rights, but when the rules protecting them are broken, they need to be enforced. The main goals of enforcement are to prevent and punish infringements, and to enable consumers harmed by infringements to get wrongs put right (consumer redress).

In the 2019 consumer conditions scoreboard poll, one in five consumers said that they had encountered problems when buying a product or service in the previous 12 months. However, whereas two thirds of them had complained – and were generally happy with the outcome, the other third decided not to do anything because they expected complaining to require too much time and effort, with an uncertain result.

When it comes to faulty products, individual consumers can demand redress directly from sellers, and if this is unsuccessful, they can sue them in court. However, individual lawsuits are highly problematic, as, for instance, the costs often exceed the value of the claim. The EU therefore requires Member States to ensure that consumers have access to alternative dispute resolution mechanisms, while the Commission runs an online dispute resolution platform. Consumers can also collectively seek injunctions to stop or ban infringements, and the EU institutions are also working on enabling consumer organisations to demand compensation in court.

Consumer protection rules are also enforced by national public authorities, including through implementation of some EU-level enforcement rules. The Consumer Protection Cooperation Regulation harmonises the powers of national competent authorities and lays down rules on their cooperation with counterparts in other Member States, while the EU has moved to harmonise maximum fines for widespread infringements of consumer protection rules.

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Introduction

EU consumers enjoy a high level of rights, protecting them from unsafe and faulty products, unfair contract terms, and misleading and aggressive commercial practices. However, experts warn of a gap between theory and practice, because when rules are broken, they still need to be enforced.1

Enforcing consumer laws has two main goals:

- **preventing and punishing infringements** – mainly by public authorities seeking to remove bad practices and products from the market, through bans, fines, recalls, etc. This type of enforcement protects consumers from rogue traders and traders abusing their position, but can also protect businesses from unfair competition from traders that do not stick to the rules;

- **consumer redress** – achieved mainly through private enforcement and collective actions, whereby consumers harmed by infringements seek to get the wrongs rectified, for instance, by getting a faulty product repaired or getting their money back.

The 2017 fitness check of EU consumer legislation found issues with both these components. It pointed at limited redress possibilities for consumers and divergent enforcement across Member States. Member States have developed a different mix of enforcement mechanisms, so while some of them, such as Nordic countries, rely mainly on enforcement by public authorities, others, such as Spain, Italy and France, rely more on consumer organisations. In some instances, the difference between these actors is blurred. In Germany and Austria, for instance, enforcement relies on consumer organisations, which are in turn heavily subsidised by the state.2 Consumers and public authorities can also work hand in hand, as the threat of private lawsuits can deter traders from using illegal practices in the first place, while public authorities can help consumers obtain redress by requiring it from traders, or by collecting evidence for their public investigations, which can later be used by consumers to bring their own private claims.

While the EU has less authority in procedural than in substantive matters, some procedural rules have been introduced at Union level as well, in response in particular to increased e-commerce and cross-border shopping. The EU has also laid down some common rules for consumer redress.

Consumer conditions scoreboard

The Commission’s consumer conditions scoreboard (CCS), which measures ‘factors that make it easier or harder for consumers to make choices that improve their welfare’, shows an uneven state of consumer protection in different Member States: in 2019, the highest-scoring Member State was Sweden, with 71.4 points out of 100 in the CCS composite index, while the Member State with the lowest score was Croatia with 53.2.

It shows that over a fifth of EU consumers experienced problems when buying goods or services in the previous 12 months – a share largely unchanged since 2008. In addition, a large number of consumers was exposed to unfair commercial practices: 35.7 % said they had experienced being pressured by persistent calls or messaging from domestic traders, 25 % had come across fake limited-time offers and 19 % had been offered a product advertised as free of charge that actually entailed charges.

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The scoreboard also hinted at some of the problems with enforcement: while most of those who had a reason to complain did so, about a third decided not to, citing their belief that it would take too long (42.8%), the sums involved were too small (39.7%), or the complaint would not produce a satisfactory solution (36.6%). About a fifth said they were unsure about their rights or did not know where and how to complain. Knowledge of consumer rights was also shown to be an issue. When asked three questions about their rights, on average less than half of consumers (44.8%) gave correct answers. Retailers were asked five questions, with 55.6% correct answers on average.

What individual consumers can do

The main goal of enforcement by individual consumers is to acquire remedies for the harm suffered. At EU level, consumer access to remedies is most clearly defined when it comes to faulty products. The Consumer Sales and Guarantees Directive regulates certain aspects of contracts for sales of goods. Whenever consumers buy a product, they enter into a contract with the seller; the directive holds the seller liable for non-compliant goods for two years from delivery. This is the legal guarantee, during which consumers have a right to repair, replacement, discount or reimbursement. The Consumer Rights Directive additionally requires traders to remind consumers of the existence of the legal guarantee and inform them of their complaint handling policy.

Although consumers ultimately have the right to enforce these rights in court, most disputes over faulty products are solved by complaining directly to the seller’s in-house consumer services. According to the consumer conditions scoreboard, this is what most consumers do; 67.5% of those who complained went directly to the retailer or service provider and 62.1% of those were satisfied with the result. Only 1.9% of consumers turned to the courts with their disputes, and 45.7% of them were satisfied.

If consumers do decide to go to court, the presumption in the first six months is that the goods were faulty at the time of delivery (unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity) and the seller must prove that this was not the case. This is called ‘the reversed burden of proof’. During the rest of the legal guarantee, the burden of proof is on the consumers, which means they have to prove that the product was faulty at the time of delivery. These rules will slightly change from 2022 when the new Sale of Goods Directive and the Digital Content and Digital Services Directive start to apply. While the minimum legal guarantee will remain two years, the reversed burden of proof will be for one year, except in case of digital content and services delivered over a period of time, where both the length of the legal guarantee and the reversed burden of proof cover the whole period during which the content or services are to be delivered.

Nevertheless, several barriers still face consumers trying to access the available remedies. First, they need to know their rights. As the consumer conditions scoreboard shows, this is not always the case; less than 40% of polled consumers gave a correct answer to a question about the legal guarantee.3 In addition, given the usually low value of consumer claims, some consumers conclude that complaining is not worth their effort and time. This is even more true when it comes to possible litigation in court, as consumers seem to find this prospect overwhelming, without even considering the fact that legal fees often exceed the value of claims and the result is uncertain. Cross-border disputes are even more complicated, owing to distance, language, and differences in legal systems.
That is why for effective consumer policy it is important to offer consumers out-of-court dispute resolution mechanisms and possibilities for collective action (see below).

While the remedies for faulty products are clear, getting redress for breaches of legislation such as the Unfair Commercial Practices Directive (UCPD), which does not spell out the specific remedies available to consumers, is much less straightforward. The directive leaves it to the Member States to lay down adequate and effective means of enforcing the rules. As a result, half of Member States make a direct link between consumer remedies and breaches of the UCPD in their national legislation, while the other half does not (but in some of those, consumers are still able to access some remedies under general civil law). The changes to the UCPD, adopted in 2017 and to be applied from 28 May 2022, will require all Member States to guarantee consumers access to remedies, 'including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract'.

Compensation and faulty products

Legal guarantees under the sales-related directives do not cover consumers’ right to compensation, but only to repair, replacement, price reduction or reimbursement. Compensation for defective products is governed by the 1985 Product Liability Directive, which holds the producer (or, if the producer is outside the EU or cannot be identified, the importer or supplier) liable for damage caused by a defect. Consumers must prove the damage, the defect and the causal relationship between them, but are not required to prove negligence on the part of the producer. However, the directive’s scope is limited to cases where the defect causes death, personal injury or damage or destruction of another item of property, provided the other item is worth at least €500, is intended for private use or consumption and was indeed used in that way. Possible non-material damage is beyond the scope of the directive and is left to be regulated by the Member States. In its 2020 work programme, the von der Leyen Commission has announced that it will look into the need to update the directive to bring it into line with the challenges of the digital age, in the light of artificial intelligence in particular.

Out of court dispute resolution

As litigation can be highly problematic for consumers, some Member States began introducing alternative dispute resolution mechanisms in the late 1960s. In 2013, the EU adopted the Alternative Dispute Resolution (ADR) Directive, alongside with the Online Dispute Resolution (ODR) Regulation. The ADR Directive requires Member States to ensure that consumers have access to 'high-quality, transparent, effective and fair' out-of-court redress mechanisms, for both domestic and cross-border disputes regarding obligations stemming from sales or service contracts. ADR procedures must be accessible to consumers without hiring a lawyer and free or available for a nominal fee. Member States can use ADR entities in another Member State, or regional, transnational or pan-European ADR entities. A 2019 Commission report found that the system is still not fully exploited however.

The ODR Regulation enabled the Commission to launch a European ODR platform in 2016. A multilingual website, it allows consumers to submit complaints over domestic and cross-border purchases of products or services made online. The platform then informs the trader of the complaint, translates the necessary information, and identifies the competent ADR entity. It requires both parties to agree on the ADR entity within 30 days or the case is closed.

The consumer conditions scoreboard shows that few complaints are handled by out-of-court dispute resolution entities: 5.5 % of consumers who complained about their purchases tried to use them and most (54 %) were satisfied with the result. The scoreboard also shows that awareness of these mechanisms is low among traders: about half (51 %) knew of their existence and only 30 % participated in ADR schemes, either because they did not want to or because no ADR bodies were available in their sector.

When it comes to the ODR platform, according to the 2019 Commission report, there were 120 000 submissions in the first two years, but consumers and businesses agreed on the ADR entities in only 2 % of cases. More than 40 % of the disputes submitted resulted in the parties finding a solution among themselves, however, suggesting that the Commission inadvertently created a platform that is used mainly to facilitate direct settlements between consumers and traders.
The EU also set up a network of the European consumer centres (ECC-Net) in 2005. The consumer centres, one in each Member State, Norway and Iceland, offer consumers free advice on their rights and advice on solving cross-border disputes with the sellers on their own. The centres can also help contact sellers in another Member State. ECC-Net handles about 40,000 consumer complaints every year, with more than two thirds of cases resolved successfully.

What consumers can do collectively

Issues that hinder the uptake of individual redress can be overcome by enabling consumers to demand redress collectively. Increased globalisation and digitalisation are considered to increase the risk of mass harm situations, where a large number of consumers are harmed at the same time or by the same trader or practice. Collective actions can help consumers in such situations to share legal and expert costs, for instance when expensive technical expertise is necessary, and also relieves the courts of the burden of hearing a large number of individual cases. The mere possibility of a collective action can act as a deterrent against infringements, especially in cases that are of low value for individual consumers, but which, if scaled up, can represent a large profit for the infringing company and an unfair advantage compared with those who comply with the rules.

However, consumers in the EU cannot sue collectively to demand compensation for breaches of consumer law in all Member States. Currently, EU legislation gives them access only to injunctions – court orders (and in some countries, orders by administrative authorities) stopping or banning a practice violating consumer law. The 2009 Injunctions Directive requires Member States to accredit qualified entities that can initiate injunctive actions in front of courts or administrative authorities, and recognise the qualified entities accredited in other Member States in cases of cross-border infringements. The qualified entities can be consumer organisations or independent public bodies or both, depending on the Member State. The fitness check of consumer legislation showed that while consumer organisations have been accredited as qualified entities in most Member States in two (Latvia and Finland) only public authorities are qualified.

Although in 2013 the Commission recommended that all Member States enable collective redress, according to the 2018 Commission report, consumers can sue collectively to demand compensation in only 13 Member States. This could change if the 2018 proposal for a directive on representative actions for the protection of consumers' collective interests is adopted. Interinstitutional negotiations between Parliament, Council and the Commission are still ongoing, but, depending on what is agreed, the new directive may require Member States to designate consumer organisations as qualified entities that can initiate proceedings; enable representative actions for infringements of a wide set of consumer legislation, including the Product Liability Directive; and promote collective out-of-court settlement, subject to court or administrative authority scrutiny.

How public authorities protect consumers

Public authorities generally focus their efforts on protecting the collective interest of consumers by preventing and punishing infringements of consumer law. However, with the rise in e-commerce and cross-border shopping, public authorities are increasingly faced with complications, as they can effectively have jurisdiction only on their own territory. Therefore, some EU-level mechanisms have been set up to facilitate enforcement in the intra-EU cross-border context as well.

Consumer protection cooperation

The principal piece of legislation at EU level in this field is the Consumer Protection Cooperation (CPC) Regulation, in application since January 2020. The previous, now repealed version, adopted in 2004, required all Member States to establish a public authority for consumer protection, including those that had previously relied solely on private law enforcement. It established a CPC network, which enables cooperation between different Member States’ consumer protection authorities.
Since January 2020, new procedures apply for this cooperation in cases of cross-border infringements of consumer protection laws. These include a new EU-wide alert system, expected to enable faster detection of new threats; authorisation for consumer organisations to send ‘external alerts;’ a mutual assistance mechanism and coordinated actions for infringements spanning multiple Member States, including actions coordinated by the European Commission when infringements affect at least two thirds of EU countries, representing at least two thirds of the EU population (widespread infringements with an EU dimension).

Member States’ consumer protection authorities must enjoy certain minimum investigation and enforcement powers, such as the power to obtain commitments from traders to stop an infringement, and the power to impose penalties, remove content, restrict access to or take down infringing websites. National consumer protection authorities also have to have the power to order measures to benefit consumers affected by infringements: the power to receive or seek to receive commitments from traders for remedial measures, such as repair, replacement, price reductions, termination of a contract or reimbursement. They also have to have the power to provide consumers with information on how to seek compensation for infringements under national law.

Market surveillance and general safety of products

EU rules on safety of consumer products are enforced by market surveillance authorities in each Member State. The 2001 General Product Safety Directive applies to all consumer products (except when sector-specific legislation contains more specific provisions), while the 2008 Accreditation and Market Surveillance Regulation applies to both consumer and non-consumer products that are harmonised by EU legislation. Member States are free to decide how market surveillance activities are organised at national level, as long as they establish or nominate the competent national authorities in charge of ensuring that the products placed on the market are safe and compliant with EU legislation. These authorities are required to organise appropriate checks on products, ban dangerous products, organise or order withdrawal or recalls of dangerous products and alert consumers to risks. They are also required to alert their counterparts in other Member States of products dangerous products through the EU’s rapid alert system Safety Gate (previously RAPEX).

Market surveillance authorities are also in charge of controls of harmonised products imported into the internal market. Penalties for infringements are decided by Member States.

The European Commission attempted to reform the system in 2013, when it proposed a product safety and market surveillance package. However, negotiations on the package were blocked in Council when Member States disagreed on mandatory marking of place of origin for all products. In the meantime, the market surveillance of harmonised products was reformed by the new regulation on market surveillance and enforcement in 2019, prompting the current Commission to announce in its work programme that by July 2020 it would withdraw the 2013 package, owing to the failure to reach an agreement and the fact that the new regulation made parts of it obsolete. The new regulation, which takes effect in 2021, will introduce EU-level market surveillance coordination by the Union Product Compliance Network; harmonise the minimum investigative and enforcement powers of market surveillance authorities in a manner similar to the CPC Regulation; and introduce stricter controls for goods imported into the internal market. The Commission’s revised 2020 work programme also announced a revision of the General Product Safety Directive by mid-2021.

Harmonisation of fines for infringements

Additional public enforcement elements have been added to the new directive on better enforcement and modernisation of EU consumer protection rules, which from May 2022 will harmonise maximum fines for infringements of the Consumer Rights Directive, the Unfair Commercial Practices Directive and the Unfair Contract Terms Directive across the EU. The 2017 fitness check of consumer legislation showed that such maximum fines differ vastly. For instance, for unfair commercial practices they can be as low as €8 666 in Lithuania and €13 157 in Croatia or up to 10% of company’s annual turnover in France, Poland and the Netherlands. The new
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directive requires Member States to enact in their laws maximum fines for widespread infringements of the three directives of at least 4% of a company's annual turnover in affected Member States and to apply harmonised criteria for the imposition of penalties.

What happens next

Much of the EU's consumer protection legislation was revised during the last parliamentary term, and most is not yet in application. The only outstanding proposal is the one on representative actions for protection of consumers' collective interests. Interinstitutional negotiations began in January 2020 and it is a Commission priority for 2020. Parliament has called repeatedly for an EU-wide system of collective redress for consumers, e.g. in its resolutions of 25 April 2007, 2 February 2012, and the recommendation of 4 April 2017. The European consumer organisation BEUC has called the lack of compensation for harm suffered by consumers 'a major loophole' in Member States' legal systems, 'allowing businesses to retain illegal profits'. It has also called for a special EU fund to help consumer associations or other qualified entities launch collective actions at EU level.

The new CPC Regulation has applied since January 2020, and it is too early to evaluate its effectiveness. The Commission must report on its implementation by 2023 and prepare legislative proposals if necessary. However, even before the new regulation entered into application, BEUC criticised the 'weak provisions' fostering cooperation between authorities and consumer associations and the fact that the regulation does not allow one enforcement decision to be issued across the EU, 'particularly if there is disagreement between the public authorities'.

The new Market Surveillance and Compliance Regulation will apply from July 2021, with the first comprehensive evaluation of its implementation due by the end of 2026. During negotiations on the new regulation, Parliament advocated for stronger EU-level coordination of market surveillance activities, mandatory peer-review of national market surveillance authorities, requiring Member States to have an appropriate number of 'internet inspectors', and a stronger role for consumer organisations in the functioning of the Union Product Compliance Network; not all of this was reflected in the final text of the market surveillance regulation, however. The revision of the General Product Safety Directive announced in the Commission's 2020 work programme (see text box above) would conclude the market surveillance reform, first attempted in 2013 with the product safety and market surveillance package, which will be withdrawn.

On enforcement by individual consumers, the provisions of the Sales of Goods and Digital Content and Services Directives will apply from 2022. The minimum two-year legal guarantee during which consumers can demand repair, replacement, price reduction or reimbursement for faulty products will remain, but the reversed burden of proof will last one year (instead of six currently). The Commission's proposal for the reversed burden of proof to match the legal guarantee (i.e. to apply throughout the two years from delivery) was rejected by the co-legislators, except for digital services supplied over a period of time (e.g. cloud services). The Commission must evaluate implementation of the two directives by 2024, but has already announced (as part of the 2020 Circular Economy Action Plan) its intention to revisit the guarantees system. The Commission has also announced that in 2020 it could consider revisions to the Product Liability Directive, especially following the report and recommendations of its expert group regarding the weaknesses of the liability regime for artificial intelligence and other emerging digital technologies.

While the ADR Directive was not revised in the last term, in its recommendations for the 2019-2024 Commission, BEUC called for a change to prevent traders from refusing to take part in the ADR process, asking the Commission to look into whether the ADR should be mandatory in certain sectors, especially where consumers are most vulnerable, or whether Member States could encourage traders to get involved. In its resolution of 12 April 2016, Parliament noted that the ADR and ODR are 'key tools for improving the single market for goods and services', but that consumers are mostly unaware of them, encouraging the Commission and Member States to raise awareness. In its recommendations, BEUC has generally called on the Commission to look into possibilities for
enforcement and redress in connection with each new consumer right, and include specific proposals where relevant. It has also called for inclusion of enforcement provisions in all new legislation or all evaluations of legislation affecting consumers.

MAIN REFERENCES


ENDNOTES


3 The fact that only 31% of retailers answered the same question correctly emphasises the importance of consumers knowing their rights, in order to be able to insist on them.

4 See p. 57 of Part 2 of the Commission’s impact assessment accompanying the proposals for directives on better enforcement and modernisation of EU consumer protection rules and on representative actions for the protection of the collective interests of consumers, SWD(2018) 96.

5 See Article 3(5) of the Directive on the better enforcement and modernisation of Union consumer protection rules.

6 Although Member States were supposed to implement the directive by mid-2015, implementation throughout the European Union was assured only at the end of 2018, so these mechanisms have been in use for a relatively short time.

7 22 Member States have accredited both consumer organisations and public authorities, while in four (Austria, Germany, Greece and Romania) only consumer and business organisations can be qualified entities. See p. 84 of Part 2 of the Commission’s impact assessment accompanying the relevant proposals, SWD(2018) 96.

8 Including two – Finland and Poland – where such collective actions can be initiated only by public authorities.

9 There is a degree of overlap with the Accreditation and Market Surveillance Regulation as they both apply to consumer harmonised products. In general, the Accreditation and Market Surveillance Regulation applies, except when the provisions in the General Product Safety Directive are ‘more specific’.

10 See impact assessment accompanying the proposals for directives as regards better enforcement and modernisation of the EU consumer protection rules and on representative actions for the protection of the collective interests of consumers, SWD(2018) 96, p. 39 of Part 2.

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