

The Consumer Voice in Europe

## PROPOSAL FOR A BETTER ENFORCEMENT AND MODERNISATION OF EU CONSUMER PROTECTION RULES

BEUC response to the Commission ex-post consultation



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## Why it matters to consumers

Throughout the business-to-consumer commercial transaction, it is the consumer who is in a weaker position vis-à-vis the business. This is even more the case in the digital world, where consumers shop at a distance and increasingly rely on online platforms for the decision-making process. Many traders provide their products or carry out their services in exchange for consumer data. This reality should be reflected in the law, which should ensure transparency of online marketplaces, give enforceable rights to consumers, and provide dissuasive sanctions against rogue traders.

Among the most important consumer rights is the right to return a product bought online. Consumers value the possibility to test a product as they would do in a brick and mortar store. It would undermine consumer trust in the digital single market and send a wrong signal to EU citizens if this important right were watered-down.

## Summary

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1. BEUC welcomes the Commission proposal on the modernisation and better enforcement of EU consumer law but several aspects need to be improved to ensure a high level of consumer protection.
2. The right of withdrawal is the best-known consumer right. We strongly oppose the idea to water-down consumer protection. Given the high rate of non-compliance of traders with this essential consumer right, the focus here should be on its better enforcement. The proposals to weaken the right of withdrawal should be deleted.
3. It is key that the according to the proposed directive consumers should be able to seek redress in case of unfair commercial practices. However, further remedies should be envisaged and more concrete conditions for the exercise of those remedies should be examined.
4. We support the inclusion of turnover-penalties for infringing companies. However, the legislator should also introduce penalties expressed in a sum of money, as in the case of the General Data Protection Regulation (GDPR).
5. It is positive to grant consumers a right of withdrawal and right to information under the Consumer Rights Directive where they provide personal data as a counter-performance. However, they should also be protected if they pay with non-personal data. Changes to other Directives in this respect should be undertaken as well.
6. Whilst BEUC supports better transparency for consumers on online marketplaces, the important question of liability has not been addressed. Online platforms should be liable for their own promises, where they fail to remove misleading information, and where they have a predominant influence over the supplier.

BEUC welcomes the Commission proposal on the modernisation and better enforcement of EU consumer law because EU consumer law is not fit for practice when it comes to the digital world: Consumers increasingly rely on online platforms in their decision-making process and many traders provide their products or carry out their services in exchange for consumer data rather than money. This reality should be reflected in the law, which, at the same time, should give better rights to consumers and provide dissuasive sanctions against traders who do not respect the rules.

An area where traders do not respect consumer rules is the right to return products bought online. The lack of compliance by traders should be a wake-up call to the legislator to better ensure consumer law enforcement. A deterioration of the current level of protection would be the wrong signal to citizens.

**We have outlined some important BEUC policy demands below:**

## **1. Redress – Article 1**

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### **Inserting individual remedies in the Unfair Commercial Practice Directive**

We strongly support the proposal that consumers can seek redress in case of unfair commercial practice (Article 11a Unfair Commercial Practice Directive). Besides the right to compensation and the right to contract termination, further remedies, such as to ask for specific performance or right of restitution should be envisaged. In order to ensure that consumers are equally protected against unfair practices and ensure access to justice, more concrete conditions for the exercise of those remedies should be examined. Also, there should be clear definitions of what those remedies entail.

There should also be a standard remedy for non-compliance in the Consumer Rights Directive, for example the consumer is not bound by the contract if the trader does not meet his/her obligations. This should be without prejudice to remedies provided under national laws.

## **2. Penalties – Articles 1(5), 2(10), 3, and 4**

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### **Amending the Directives on Unfair Commercial Practices, Unfair Contract Terms, Consumer Rights, and Price Indication**

We strongly support the update of EU consumer law to ensure that there are truly dissuasive penalties for infringing companies available. We also support that those penalties should amount to a significant percentage of companies' annual turnover and that they should take into account the EU wide dimension of the infringement. However, the legislator should examine the possibility take the General Data Protection Regulation (GDPR) as an example. The GDPR sets out a maximum fine of 10 million euros or refers to a penalty of 4% of the trader's annual turnover, whichever is higher.

### 3. Transparency of online platforms – Articles 1 and 2

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#### Amending the Directives on Unfair Commercial Practices and Consumer Rights

We welcome the proposed clarification in the Unfair Commercial Practice Directive to make clear that online platforms must indicate search results that contain 'paid placements' (No. 11 Annex I).

We also welcome the proposed information requirements under the Consumer Rights Directive for contracts concluded on online marketplaces regarding transparency related to ranking criteria, information on the status of the trader/consumer, whether EU Consumer Law applies, and who is the responsible contracting party (Article 6a). However, consequences and standard remedies are missing if traders do not comply with those requirements.

In general, rules on the liability of online marketplaces are missing in the Proposal. Operators of those platforms should be liable

- In line with the *Wathelet v Biethères*<sup>1</sup> judgment, if they fail to inform the consumer that a third party is the actual supplier of the goods or service, thus becoming contractually liable vis-à-vis the consumer;
- If they fail to remove misleading information given by the supplier and notified to the platform operator;
- For guarantees and statements made by the platform operator;
- If they have a predominant influence over the supplier or the service.

What is also missing are rules for a better, more transparent user feedback/review system. This should be introduced in EU consumer law.

### 4. Right of withdrawal – Article 2

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#### Amending the Consumer Rights Directive

It is troubling that the European Commission suggests deteriorating the best-known consumer right by removing the right of consumers to return the goods in cases where those have been used more than necessary to test them (Article 14). First, no conclusive evidence demonstrating a large-scale misuse or a necessity to change the Consumer Rights Directive has been provided. It is inexplicable and against better regulation to base such an impactful change of law on a survey and mere statements of a few SMEs (99!), companies (17!), and individuals (73!) across the Union. The Commission itself states that "very few respondents provided quantitative data/estimates"<sup>2</sup>. On the contrary, all the Commission's data suggest a severe lack of compliance by traders, signalling the need to protect, rather than deteriorate, consumers' right of withdrawal<sup>3</sup>.

Then, where consumers have used the goods more than necessary to test them, traders already enjoy the right to compensation for the diminished value, which can go as high as the product price. In such a case, the consumer would only be partially reimbursed or receive no money back at all.

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<sup>1</sup> C-149/15, ECLI:EU:C:2016:840.

<sup>2</sup> Impact Assessment, SWD/2018/096 final, 2.4.5.

<sup>3</sup> Commission's Staff Working Document to CRD Report {SWD (2017) 169 final; at 30; 86-87; etc.

Similarly, there is no need for a rule which allows traders to withhold performance until he has received back the product (Article 13). There is no evidence for a large-scale problem and therefore no need to undermine consumer's trust in the digital single market.

We urge the legislator to maintain this consumer right intact and to rather investigate how to strengthen it and ensure better enforcement.

## **5. Payment with data – Article 2**

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### **Amending the Consumer Rights Directive**

More and more traders provide their products, or deliver services, against data as remuneration. The value of personal data in business models today is without doubt. It is crucial that consumers are well protected at every stage of the transaction process, hence have a right to receive information before

BEUC supports the proposal to apply the provisions on the right of withdrawal and information requirements under the Consumer Rights Directive to situations where consumers provide personal data as a counter-performance if they sign up to a digital service. However, consumers should also be protected if they provide non-personal data in exchange of the service. The boundaries between personal and non-personal data is becoming increasingly blurred and non-personal data can very easily become personal data or the other way around, through crossing of data and using of algorithms. A broad scope would therefore ensure legal certainty.

As a general principle and in order to ensure contract justice, the scope should be extended to cover all kinds of counter-performance in exchange of goods, services, or digital content products<sup>4</sup>. Also, the current information requirements should be adapted. Traders should always inform consumers about the purpose to monetise the consumer's data. Finally, similar changes to other Directives are necessary, at least the Unfair Commercial Practices Directive, in relation to the definition of "price" and the unfairness of marketing such services as being provided for "free".

END

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<sup>4</sup> Our Member Which? has expressed a different position in respect of this proposal where the data has been provided *passively* rather than *actively*. Their position is that it would be better to focus on specific concerns, such as harm in relation to established large providers of 'free' digital content, and to consider how best to address those concerns, rather than pursue a general approach, which may not be effective and could risk dampening innovation.