IMCO Hearing 11th July 2018

UEAPME[1] position on New Deal for Consumers - the Omnibus: Proposal for a directive on better enforcement and modernisation of EU consumer protection rules

On penalties for infringements of consumer law

The package on the "New Deal for Consumers" contains a targeted revision of the European consumer law. The revision follows the Fitness Check of consumer and marketing laws and the parallel evaluation of the Consumer Rights Directive which had the aim to identify excessive regulatory burdens, overlaps and inconsistencies that may have appeared over time.

UEAPME states that the result is a missed chance to simplify the consumer acquis and that too much emphasis is put on enforcement.

Indeed, although no one questions the necessity to protect consumers' rights, the proposal deals nearly exclusively with enforcement and penalties. Given the complexity of consumer law, the risk for SMEs with no legal department committing unintentional infringements is particularly high. Hence, it is quite disappointing that the Commission did not take into account our request to reduce formalities and simplify the acquis, without reducing the level of consumer protection. The Commission itself justified the proposals by referring to recent large-scale cross-border infringements of EU consumer law, such as the "Dieselgate" scandal and massive flight cancellations. Once again SMEs will pay for the misbehaviour of some big players as it occured with the geo-blocking legislation and the GDPR. As different reports indicate, non-compliance is most of the time an issue for some specific (mainly not-SME) sectors. In addition, while the objective of the Commission is to tackle widespread infringements harming consumers in several Member States, the proposed texts leave a lot of room for interpretation and can disproportionately affect SMEs.

The provisions on sanctions are lacking the necessary sense of proportion: minor mistakes of traders not engaged in cross-border activities at all can nevertheless be "widespread infringements"

- The explanatory Memorandum of the proposal suggest that the drastic sanctions would address major cross-border infringements, when in fact the envisaged fines of at least up to 4 % of a trader's turnover would threaten e.g. also e-commerce traders who - according to their own business plan - do not have any intention to engage in cross border trade.

- This is a consequence of the Geo-Blocking-Regulation. The interplay with this Regulation (becoming applicable in December 2018) has obviously not been taken into account when drafting the proposal:

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

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If an e-commerce trader who actively directs his commercial activity only towards his own country of establishment (or may be one other MS) makes any mistake, for example with regard to the information on the withdrawal-right, this mistake constitutes, according to the proposal, a widespread infringement, respectively even a widespread infringement with EU-dimension.

The Geo-Blocking-Regulation forces any trader to open up their websites in order to enable the conclusion of contracts for consumers irrespective of their place of residence within the EU (if they organize the delivery themselves). The notion "infringement" according to the CPC-Regulation does not require a real harm but an act or omission contrary to Union laws that is only "likely" to harm the collective interests of consumers. Thus, a mistake could "potentially harm" the interests of Consumers in every EU-Member State and the proposed sanction would apply in such cases as described in our example as well.

We share the Commission's concerns about insufficient compliance to the consumer protection rules in the EU in some sectors. We question however whether the introduction of harmonised maximum penalties linked to the company's annual turnover is likely to remedy the issue. In addition, Companies can have lots of turnover but they can still make negative profit. Rather that imposing larger fines, focus should be placed on **prevention** by raising awareness of consumer's rights, promoting efficient out-of-the-court dispute resolution tools and encouraging further coordination between the Member States. Where appropriate, penalties should remain proportionate and be reserved for serious and deliberate violations of consumer rights. While we welcome the objective of the Commission to tackle widespread infringements harming consumers in several Member States, we note that the proposed texts will disproportionately affect SMEs. In fact, smaller market players may face high risks and heavy burden for unintentional infringements.

In summary:

- Monetary fines for infringement of consumer law should only be the last resort. Given the complexity of consumer law, the risk for SMEs with no legal department is particularly high to commit unintentional infringements.
- Financial sanctions are only appropriate if the violation was intentional and/or is committed repeatedly.
- In addition, fines could create incentives to make a business out of complaining against consumer law infringements. This could aggravate the already problematic and sometimes abusive warning practice.
- Infringements of consumer rules are already sanctioned in all EU Member States. The EU Consumer Scoreboard shows that the level of fines is not decisive for the frequency of violations.
- UEAPME explicitly rejects all allegations that companies do not behave lawfully unless they are threatened by high fines. Strong penalties do not guarantee better compliance as the Commission itself demonstrates in the Impact Assessment.[2]
- Drastic sanctions at EU-level do not contribute to better functioning of the internal market. Harmonizing sanctions can certainly not create a level playing field if the national material laws are different.
- As the complexity of the rules is the main reason for the unintentional non-compliance, the only solution is to invest in prevention and to better inform the traders, as for example through the Consumer Law Ready project. (https://www.consumerlawready.eu/)
- In a real "New Deal" measures to make consumers more responsible are equally important.

2 See IA Part 1/3, S 50, FN 138, "…, Luxembourg, UK and Austria are the Member States with the highest scores on the compliance and enforcement composite indicator, but have relatively low or no financial penalties available to their enforcement authorities. Source: 2017 Consumer Conditions Scoreboard, p. 118-147."

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Off-premises contracts

UEAPME also opposes the proposed possibility for Member States to restrict door-to-door sales. They should not be cate-gorised as "unfair" or "misleading" all together. After having achieved a fully harmonised legal framework in the field of so-called unfair practices, the Commission now wants to turn the clock backwards and this clearly goes against the principle of the Internal Market and the principle of proportionality.
Also in the crafts sector, numerous contracts are concluded at the consumer's home while examining damages or preparing a renovation/construction work. It needs to be clear that such situations are not generally prohibited as consumers and craftsmen would otherwise be forced to formally conclude the contract in a complicated and costly manner.
Therefor UEAPME proposes to delete recital 44 and article 1(1)a and b (amendments to Article 3 Directive 2005/29/EC.)

Right of withdrawal

UEAPME welcomes the fact that the Commission has taken into account UEAPME's request to remove two specific obligations on traders regarding the 14-days right of withdrawal, which have proven to constitute disproportion-ate burden. We welcome the simplifications for businesses in this case. Traders would no longer be obliged to accept the right of withdrawal when the consumer has made actual use of an ordered good instead of only trying it out. **This is only common sense.** Additionally, traders will also not be obliged to reimburse consumers before receiving the returned goods. However, much more could have been done to simplify the acquis.

Online market places

- No major issues with the proposed rules on online marketplaces.
- In particular, we agree that it should be clear for buyers if the seller acts as a commercial or private seller and whether consumer protection rules apply.

Beyond the proposed simplifications, we see the need for further adjustments:

- For example reducing the definition of "contracts negotiated away from business premises" to contracts concluded in private homes or at work.
- In addition, distance contracts should be restricted to business models clearly targeted to distance selling (e.g. online shops, teleshopping, contracting via call centres, etc.).
- The information requirements need to be reduced and simplified. For example, it is not necessary that entrepreneurs inform the consumer on the non-existence of a statutory right of withdrawal. Furthermore, the information obligation to refuse participation in a consumer dispute resolution procedure does not create an informative added value for consumers and has the sole purpose of discrediting entrepreneurs who decide not to participate in such proceedings.
- The rules on the right of withdrawal and the model withdrawal form need to be simplified and allow for more flexibility of the entrepreneur. The goal must be to inform consumers comprehensibly and in a flexible manner about their rights. The extension of the withdrawal period in case of formally incorrect instructions is disproportionate if the consumer is actually sufficiently informed in terms of content of the instructions and leads to a lot of legal uncertainty about the contract.

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- Overall, the information requirements should be streamlined. In particular, a single catalogue of information requirements should apply both to doorstep and distance contracts and the formal requirements should be the same as well.

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