

The Consumer Voice in Europe

FITNESS CHECK OF EU CONSUMER LAW

ADDITIONAL BEUC POLICY DEMANDS



Contact: Christoph Schmon – consumer-rights@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • consumers@beuc.eu • www.beuc.eu
EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2017-040 - 25/04/2017

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 other party. This is even more the case in the digital world, where consumers increasingly rely on online platforms for the decision-making process and where many traders provide their products or carry out their services in exchange for consumer data. It is therefore important that EU consumer law gives consumers essential rights, such as the rights to receive true information in a readable format, to not be misled or aggrieved, to be protected against unfair terms and unfair practices, or to have remedies available in case of faulty goods or poor services. These rights must be safeguarded by enforcement and redress mechanisms: there are no consumer rights without redress.

Summary

EU consumer law is there to protect and empower consumers and to provide for effective enforcement of their rights. These criteria should therefore form the benchmark for the form of EU consumer law.

Some important BEUC policy demands are outlined in detail below, concerning

- **The Absence of remedies under the Unfair Commercial Practice Directive;**
- **The exchange of data as a counter-performance;**
- **Liability and information duties of online platforms;**
- **A better presentation of information and terms and conditions.**

We are hopeful that the European Commission will work to ensure that consumer rights across the EU are improved and modernised.

Our general position on the Fitness check of EU consumer law can be found under the following link:

http://www.beuc.eu/publications/beuc-x-2016-081_csc_fitness_check_of_eu_consumer_law_2016_beuc_position.pdf

1. Absence of contract law remedies under the Unfair Commercial Practice Directive

BEUC policy demands:

- Consumers should always be entitled to claim compensation after suffering damage from an unfair commercial practice;
- Consumers should be able to rely on civil law remedies, particularly the right to terminate the contract or ask for a price reduction, without having to prove any damage, if its conclusion was the result of an unfair commercial practice;
- Traders should face truly dissuasive sanctions amounting to a significant percentage of their annual turnover.

It is a significant flaw, much to the detriment of consumers, that the Unfair Commercial Practices Directive does not provide an adequate redress and enforcement chapter which ensures that consumers are not left empty-handed when problems of law infringement or enforcement arise.

Generally, consumers should be given the right to claim compensation after suffering damages from an unfair commercial practice. Consumers should also have access to contract law remedies, such as rights to withhold performance or terminate a contract where the contract has been concluded as a consequence of an unfair commercial practices.

A good example of the **lack of effectiveness** of the Directive is the Volkswagen emissions scandal, where consumers from many countries are unable to bring a civil claim based on a breach of unfair practice legislation. Consumers don't benefit from consumer protection law even though the practice is black-listed, hence, in all circumstances, unfair.

While consumers **are well protected in some Member States, in others, consumers have no rights at all in case of an infringement of the EU rules**. Particularly in the case of EU-wide infringements, this leads to different classes of consumer protection, and this under a fully harmonising Directive whose aim is to create a high common level of consumer protection.

We urge the Commission to remedy this shortcoming and propose an **EU wide standard for individual rights and remedies of consumers**, without lowering the level of protection that already exists in the Member States. On top of that, non-compliant traders should face **truly dissuasive sanctions** amounting to a significant percentage of their yearly turnover.

2. Data as a counter-performance

BEUC Policy demands:

- Consumers should always be protected when they buy goods, services, or digital content products, regardless of whether they pay with money or provide for in-kind payments, including data as counter-performance;
- Where consumers provide data as a counter-performance, they should benefit from information duties and a right to withdraw from the contract under the Consumer Rights Directive;
- Consumers should be protected against unfair clauses. The provision of data should be taken into account in assessing the fairness of terms;
- The Unfair Commercial Practice Directive should clarify that whether data must be provided constitutes material information, as well as the processing the data for commercial purposes or related to the commercial practice, including the monetisation of data. Its annex should be updated to ensure that the monetisation of data is considered a business practice and that misleading or false claims are considered unfair.

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. Therefore, BEUC supports the Commission's proposal on contract rules for the supply of digital content, which makes clear that consumers should enjoy legal guarantee rights where they have provided data as remuneration. While such rights are related to the post-contractual stage, it is crucial **that consumers are well protected at every stage of the transaction process.**

It is key that consumers are well informed about the contract they enter into and that they are properly informed about the true characteristic of the product or service. Only then informed choices will be possible. It goes without saying that rules on data disclosure and consent of use of data under data protection law must be respected.

2.1. Unfair Contract Terms Directive

The Unfair Contract Terms Directive has proven to be useful in protecting consumer rights. The abundance of case law demonstrates, on the one hand, that unfair contract terms are wide-spread and consumers and consumer organisations stand up against contract terms which create a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Under the Directive, there are a number of references to the price of a product or the price/quality ratio. However, it is not reflected that contract terms on the processing of data or the performance of data may cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer. **It should therefore be made clear that the processing and provision of data should be taken into account in assessing the fairness of terms.**

2.2. Consumer Rights Directive

The Consumer Rights Directive is one of the most important consumer law instruments, particularly for online sales. It contains essential rights for consumers, such as the right to receive information and to withdraw from certain contracts. If the Directive did not cover payments other than money, some consumers would be less protected.

2.2.1. Sales and service contracts: scope should be extended

Article 2

- (5) 'sales contract' means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services;
- (6) 'service contract' means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof;

2.2.2. Sales and service contracts

Since the definitions refer to a contract under which the consumer pays a price, the Consumer Rights Directive is not applicable where consumers provide their personal data in exchange for **goods or services**. Information requirements do not apply, nor does the consumer's right to withdraw from the sales or service contract. We call on the Commission to protect consumers in such contractual situations.

2.2.3. Digital services

Currently, **digital services**, such as cloud services or e-learning, are excluded from the scope of application even where data are given as a counter-performance. Given the growing importance of such services and the amount and value of data that consumers are bound to provide to use such services, the exclusion disregards the reality of today's digital market. The scope should therefore be extended.

2.2.4. Digital content

It is unclear whether digital content provided against data, as a means of counter-performance, falls under the scope of the Consumer Rights Directive. While the guidance document of the European Commission states that contracts for online digital content are subject to the Directive even if they do not involve the payment of a price by the consumer, the legal status quo in the Member States is unclear. **We call on the Commission to make it clear** by the letter of the law that **digital content falls under the scope of the Consumer Rights Directive, even where the contract does not involve a monetary payment.**

2.2.5. Information duties and right of withdrawal

An updated is needed when it comes to information duties and the right to withdraw from the contract:

- **If consumers give their data, there should be equivalent information duties**

Consumers should be informed about which data they would be obliged to provide as a counter-performance and about the purpose of commercialising the data.

Acknowledging that data are a form of counter-performance should also mean that information about the quantity and quality of data processed, and about the forms and purposes of commercial use of these data, should be provided in a simplified form. This should ideally be comparable to the information about the price paid by the consumer.¹

- **Consumers should always have a right to withdraw from the contract.**
- It is essential for consumers to be able to test the product, digital content, or service and withdraw from the contract within 14 days without giving a specific reason. Where consumers have provided non-personal data as a counter-performance, they are currently protected neither by the directive nor by the General Data Protection Regulation. The Commission's proposal for a directive on digital content products does not provide for an equivalent right of withdrawal either. Within these 14 days, the consumer should be able to use the product, digital content or service without the supplier being allowed to process or commercialise the consumers' data.

2.3. Unfair Commercial Practices Directive

2.3.1. Characteristics of a product: price

Consumers should be able to make an informed transactional decision. Therefore, for the assessment of whether a practice is unfair, the accuracy of information and the omission of material information are crucial. One of the most important element in the unfairness test is the information about the product's main characteristics and its price. These essential information pieces – *essentialia negotii* – relate to the minimum content of a contract and are therefore material information for the consumer.

The economic value of data is undisputed and data may indeed serve as the essential object of the contract. However, if data is required as a payment, the concept of price seems not to fit. The Directive should thus **clarify (in particular in Art 7(2)) that whether data must be provided constitutes material information, as well as the purpose of monetisation of the data.** An update should also be envisaged as regards **No 22 of Annex I** to the Directive, which prohibits the false claim or impression that the trader is not acting for his business purposes.

2.3.2. Falsely describing products as 'free'

The directive sets out provisions on promotional practices. It that an unfair commercial practice is to:

describe a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item (No 20 Annex I).

However, the criterion of payment may be understood as only covering practices where the consumer has to provide money as remuneration. This understanding would lead to the negative consequence that companies, such as Facebook, may misleadingly² state that their services are 'free' although, in fact, consumers provide their personal data to use the service, which is then monetarised by the companies. **The Annex should therefore be updated to include data as remuneration.**

¹ Following this rationale, data privacy statements need to be brought into a format that allows the categorisation and quantification of the privacy impact of a certain product or service. The Commission should therefore analyse the merits of a standardisation of privacy statements.

² Our German member vzbv has brought an action against Facebook based on the argument that such a promotional claim is misleading and therefore unfair.

3. Online platforms – liability of intermediaries and transparency obligations

BEUC Policy demands:

Online platform operators should provide correct and valid information towards consumers and be liable

- for the failure 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;
- for the failure to remove misleading information given by the supplier and notified to the platform;
- for guarantees and statements made by the platform operator;
- if they have a predominant influence over the supplier and the consumer relies on it;
- for the performance of a contract, such as payment and delivery carried out by the platform for third party suppliers in line with Art. 2 (2) of the Consumer Rights Directive (joint liability).

Over the last few years, various types of platforms sprung up across all sectors. The qualitative and quantitative dimension of consumer contracts that are concluded via intermediaries has drastically increased. Consumers increasingly rely on online platforms in their decision-making process. However, particularly when the online platform facilitates communication and contractual transactions between other market players, the application of EU consumer law is unclear. This is particularly the case when considering whether platforms should be measured according to the standards of the Unfair Commercial Practice Directive.

Even more pressing are the standard of correctness and validity of information provided to the consumer and whether and under which circumstances platform operators, particularly those who have a certain control over the transactions, should be held liable for (non-)performance under supplier-consumer contracts. Here, we see a strong need to update EU consumer law.

The Commission has rightly identified this problem and asked the REFIT of consumer law 2016 consultative group whether there is a need for “explicit rules on the level of liability of the intermediaries for the performance of the transactions that they facilitate?”

3.1. Accuracy and validity of information provided to the consumer

Currently, the information requirements of platforms are unclear, for example regarding the standard of due diligence or information requirements about the business model of the platform operator. There is therefore a clear need to clarify the standard of information requirements for online platforms and to introduce specific information duties.

Where online platforms acts as intermediaries, for example in market places, it is often unclear whether the platform is a party to the contract (which will be up to national law to

decide) or who is a trader/who acts on behalf of a trader. Although the Commission's Guidance on the Unfair Commercial Practice Directive makes clear that online intermediaries, which are considered a 'trader' must respect due diligence and information standards under the Directive, it seems that courts in some Member States follow a rigid approach when interpreting the standards of commercial practices. This is particularly true as far as comparison websites are concerned³. Often, online intermediaries invoke the privileges of host providers under the E-Commerce Directive, which limits the possibilities of consumers to hold the platform responsible for incorrect information. Thus, at present, **the legal standard for ensuring the correctness and validity of information provided by online platforms is rather low.**

While we welcome the update of the Unfair Commercial Practice Directive Guidance and the publication of Principles for Comparison Tools, we believe that the adoption of non-binding documents is not enough. **What is needed is clear rules for the correctness and validity of information provided to the consumer.** In the context of transparency obligations, it is crucial that online platform operators always provide transparent listings and clearly indicate whether the supplier has paid for a better placement, or whether there is a corporate link between supplier and platform operator. Also, platform operators should follow rules of professional diligence when using reputation feedback systems.⁴

Besides the standard of information provided to the consumer, we have identified the following **grounds for liability, which should be clarified and introduced in EU consumer law.**

3.2. Liability for the failure to inform about supplier of the goods or service

Where the platform operator has failed to inform the consumer that a third party is the actual supplier of the goods or service, the operator should be liable for the performance of the contact.

This approach was recently taken by the Court of Justice when interpreting the concept of 'seller' for the purposes of Article 1(2)c of the 1999/44 Sales Directive. The Court made clear that an intermediary can be regarded a seller and that in such cases it would not matter whether the intermediary is remunerated for acting as intermediary or whether he acts on behalf of a private individual. The Court stated that it is essential that consumers are aware of the identity of the seller and that the:

'consumer can easily be misled in the light of the conditions in which the sale is carried out, it is necessary to afford the latter enhanced protection. Therefore, the seller's liability [...] must be capable of being imposed on an intermediary who, by addressing the consumer, creates a likelihood of confusion in the mind of the latter, leading him to believe in its capacity as owner of the goods sold.'⁵

3.3. Liability for misleading information, guarantees, or statements

We support the liability approach taken by the *Research group on the Law of Digital Services* who use the approach of the E-commerce Directive of removal and observance duties to justify a liability of the platform operator.⁶ **If the consumer can rely that the platform takes responsibility for certain quality or safety criteria, the operator**

³ For example, German courts hold that the Directive does not apply to comparison platforms where the platform does not actively promote the sale of certain goods or services.

⁴ See the suggestions by the *Research group on the Law of Digital Services*, Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 4/2016, 164.

⁵ Case C-149/15, *Wathelet v Biethères*, ECLI:EU:C:2016:840 [41].

⁶ Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 4/2016, 164.

should be liable for damage that occurs if these quality or safety criteria are not met.

This should comprise in particular misleading information given by the supplier and notified to the platform operator if the operator has not taken appropriate measures to remove the misleading information. It should comprise also misleading statements or guarantees made by the platform operator regarding the supplier or the good and services offered by the supplier.

3.4. Liability where the platform has a predominant influence over suppliers

In many cases, the market reality is such that it is the platform operator who has decision-making power regarding payment means, prices, or conduct. In such cases, the position of the platform operator is close to that of the actual supplier of the goods or service. Inasmuch the platform operates or intermediates within a consumer-to-consumer transaction in the 'sharing economy', the platform is the only professional (!) in the transactional process and the asymmetry of information and bargaining power will be in his favour alone. The market reality is also that it is the platform that creates high profit margins and which may insure itself against financial risks.

It is therefore also a **point of fairness to create clear rules for responsibility for contract performance duties, particularly where the platform has a predominant influence over other the supplier and the consumer could rely on the dominant position of the platform operator.** A liability for dominance & reliance, as suggested by the Research group on the Law of Digital Services, is therefore a good starting point, and also a matter of protecting consumer trust. Yet, other liability options that go beyond the dominance-approach should be considered.

As to the criteria for when consumers could reasonably rely on the predominant influence of the platform operator, it will be necessary to **keep the burden of proof for the consumer to a minimum.** Besides objective criteria, such as control over payments and supplier-consumer contracts, the expectation of the consumer when using the platform should be protected, such as the presentation of the platform, marketing activities, and information provided by the operator, including terms and conditions.

By the same token, the presentation or statements of the platform alone cannot be decisive where the platform operator **actually acts on behalf of the supplier**⁷. In this case, the platform operator should be liable as a trader. Already the Unfair Commercial Practice Directive states that a trader is 'anyone acting in the name of or on behalf of a trader' (Article 2(b)).

END

⁷ The problem of '*protestatio facto contraria*' situations was not recognised in the Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 4/2016, 164.

4. Presentation of information and T&C

BEUC Policy demands:

- Quality of information can be best achieved by introducing remedies and rights for consumers in the Consumer Rights Directive and Unfair Commercial Practice Directive and a reinforced control under the Unfair Contract Terms Directive;
- There should be stricter mandatory criteria for the presentation of essential pre-contractual information or contract terms;
- It should be clarified what falls under essential information for the consumer purchase decision in addition to Art. 8 (2) of the Consumer Rights Directive, such as specific delivery and payment arrangements, withdrawal right and legal/commercial guarantees;
- For the quality of information, the main focus should be on: framing, contextualisation, prioritisation, and design of information;
- Traders should be obliged to provide for a summary of key terms and conditions;
- Contract terms which are technically not fit for easy reading (e.g. length, jargon) should not be binding on consumers in line with the transparency requirements under settled case-law of the Court of Justice;
- Terms and conditions on data protection and the processing of data should be presented separately in line with the GDPR and be subject to the same summary obligation and transparency requirements than sales terms.

4.1. Better presentation of pre-contractual information

4.1.1. Problem of lack of remedies and sanctions under the UCPD and CRD

The question of how to better present information is strongly connected to the problem that information is not often provided or not in an intelligible, clear way because there are no redress or sanction mechanisms that would pressure the trader to do so.

The Consumer Rights Directive, generally, does not provide consumer remedies or sanctions for situations where the trader fails to provide the necessary information. This often leaves consumers empty-handed. The consequences of non-compliance are illustrated by so-called subscription traps, where consumers are not aware that they are engaging in a contract of indeterminate duration because traders omit information about the true costs and nature of the contract. Such behaviour will most likely also constitute a breach of the Unfair Commercial Practices Directive, which does not provide contract law remedies for consumers either.

In order to ensure the effectiveness of the directive, we propose a **standard remedy for non-compliance with the duties laid down in the Consumer Rights Directive**, for example, the contract is non-binding on the consumer; this without prejudice to remedies provided under national laws. Affected consumers should also be entitled to ask for compensation while traders should face dissuasive and effective sanctions for non-

compliance. **Civil law remedies and the right to compensation should also be provided under the Unfair Commercial Practices Directive.**

4.1.2. Presentation of pre-contractual information

We consider it crucial to assess

how, in which form, in what language, by whom, and when essential information

is communicated to consumers.

There will be many situations in which the 'information paradigm' fails and where more effective information is needed in order to place the consumer on an equal footing with the trader. It is clear that the onus should be on businesses to ensure that consumers know the key characteristics of the particular products.

- The '**button-solution**' under the Consumer Rights Directive demonstrates that format matters. Such a button could easily be used to inform consumers about other essential rights, for example the option to withdraw from the contract within 14 days.
- By contrast, we are sceptical about whether **pictograms** are appropriate to inform consumers. It should be about how to display information and not about how to substitute information.
- In particular, with a view to the Consumer Rights Directive questions of **framing, contextualisation, prioritisation, and design of information** will matter.
- Much can be done by simply **providing for buttons or summary boxes**.
- Whatever solutions are proposed, they should ideally be **tested on real consumers** in advance to ensure they have the desired impact on improving consumer decision making.

4.1.3. Stricter mandatory standards or indicative criteria

We are sceptical about whether voluntary information models alone will lead to better information for consumers. The standard model for digital products developed by the Commission for the Consumer Rights Directive did not find support among traders. The latter generally disagree that information should be simplified by using standard forms.⁸ When it comes to trust-marks or quality cues, evidence shows that only partnerships with consumer organisations and quality cues by consumer organisation increase consumer trust. A 'promise-to-be-fair' by the seller can even decrease trust and lower purchase intentions.⁹

Under EU consumer law, the requirements of presentation and formulation are formulated in an abstract way ('intelligible', 'clear', etc.), wherefore the information standard is up for interpretation. We suggest the introduction of **descriptive indicative criteria**, including general rules about how 'a trader shall present the information' [button, summary boxes, etc.]' and, where this is appropriate, supplemented by specific form requirements [describing the design] which may for example help to mark separate transaction steps.

⁸ Fitness Check online public consultation, a majority of business associations tended to disagree or strongly disagreed.

⁹ Study on consumers' attitudes towards Terms and Conditions (2016): http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf at 11-13 (last accessed 04 April 2017.)

If an **information standard form** is created, one may consider the option to create an assumption of compliance with information requirements if traders make use of such a standard form and an assumption of non-compliance, if traders disregard it.

4.2. Better presentation of standard terms and conditions

4.2.1. Update of the Unfair Contract Terms Directive – black list of unfair contract terms

Besides our ideas how terms and conditions can be presented in a better way, we would like to emphasise that consumer protection policy and law should not start from the idea that consumer must always read all terms and conditions. Mandatory law exists to give consumers a protection by default, taking into account the weak position of the consumer vis-à-vis the seller. Often, consumers will simply lack time or expertise to become familiar with contract details. A better presentation of standard terms and conditions may therefore help increasing awareness, but can never be an exchange for default protection.

First and foremost, consumer protection against unfair contract terms must be strengthened by updating the Unfair Contract Terms Directive, in particular by:

- **exploring the idea of strengthening consumer protection by introducing a non-exhaustive black list¹⁰ of unfair terms that are always prohibited and which should be updated regularly.**¹¹ This particularly relates to sector specific areas, such as transport contracts where a blacklist of terms based on existing court cases would put an end to systematic consumer detriment in this sector. As regards contracts for the supply of digital content, there are specific problems of unfair terms. Consumers are very often confronted with a flood of disclaimers and unfair copyright and liability clauses¹²;
- **incorporating case law of the Court of Justice, particularly on ex officio duties of judges to assess the presence of unfair terms in the Directive.** It is evident from cases of the Court of Justice that the invalidity of an unfair term must be determined by national courts on their own motion. National legislation must not prevent courts from doing so. For the sake of legal certainty, this duty should be introduced in the text of the Directive. Other ruling by the Court of Justice should be included where this is appropriate; at least, there should be a guidance document on the interpretation of the Unfair Contract Terms Directive which is based on case law;
- **banning exclusive or misleading jurisdiction clauses.** Clauses under which consumers are deprived of or misled about their rights under the Brussels I Recast Regulation to sue the trader before their home courts should be expressly banned. If traders include a jurisdiction clause, they should be obliged to inform consumers about such rights.

¹⁰ If a grey list (assumptions) is considered, such a list such not lead to consumer detriment in Member States which have the relevant clauses already black-listed.

¹¹ However, our approach that maximum harmonisation is not justified for this Directive also applies for the Annex. The level of harmonisation of the Directive has not created a barrier to the Single market. Furthermore, full harmonisation is not appropriate because the unfairness of a term can only be assessed by comparing it with a national law. The minimum harmonisation directives were agreed by EU legislators precisely because they did not preclude better protection levels in national laws.

¹² In our Position Paper on the EC Proposal on digital content contracts, we have produced an Annex with a list of suggestions for unfair contract terms <http://www.beuc.eu/publications/beuc-x-2016-036> are proposal for a directive on contracts for the supply of digital content.pdf.

4.2.2. Consumer attitude towards terms and conditions and how to better design them

Many consumers, particularly when they shop online, accept terms and conditions without reading them. This happens because such terms are often lengthy and complex, thus consumers have no fair chance to get to know their content and impact on the contractual relationship. When it comes to online transactions, terms and conditions are often presented or placed in a way that consumers cannot easily access them.

- **Consumers should be able to acquaint themselves with terms and conditions before the conclusion of the contract, with due regard to the means of communication used.** Terms and conditions should be transparent and easy access to them should be provided. For example, consumers should be able to access terms and conditions throughout the ordering process (for example via a clearly identified link).
- **It is not realistic to expect an average consumer to read and understand all terms and conditions if they are very lengthy.** The Norwegian Consumer Council demonstrated what reading the terms and conditions actually entails when they publicly read the terms of conditions of the most common smartphone apps. It took them 37 hours in total. This shows that the current state of terms and conditions for digital services is bordering on the absurd. **Traders should be obliged to keep the length of terms and conditions to a minimum.** The positive effect of shortening terms and conditions was recently confirmed by the Commission Study on 'consumers' attitudes towards Terms and Conditions (2016)', according to which 26.5% reported to have read the whole terms and conditions compared to only 10.5% where they were long. Consumers also understood the T&Cs better when they were short and simple.¹³
- **Short summary of terms and conditions.** Traders should be obliged to provide for a summary of Terms and conditions, which includes the most important rights and obligations, as well as to inform the consumer about the relevant data protection requirements. As an inspiration may serve the EU Regulation on key information documents for investment products (PRIIPs)¹⁴.
- **Highlight essential terms and conditions.** Essential terms and conditions, particularly those which relate to obligations or refer to deadlines, should be particularly highlighted, using user-friendly colours, font-size, or background of the text.
- **Make Terms and Conditions permanently available.** Particularly where consumers use technical devices to access terms and conditions, for example their smart-phones, they should be enabled to download and save terms and conditions permanently.
- **Information about change of terms and conditions.** Any change of terms and conditions must be communicated in a clear and transparent way and consumers should be informed about the consequences of the changes. Any updated version must be made available to the consumer.

¹³ Study on consumers' attitudes towards Terms and Conditions (2016) http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf at 14 (last accessed 04 April 2017.)

¹⁴ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352/1.

4.2.3. Practice document with guiding principles developed by REFIT 2016 consultative group

Notwithstanding of our preference for hard-law rules, we support the creation of an expert group to the Commission, which is supposed to work on a good-practice document with guiding principles on how to better present:

- Pre-contractual information in consumer sales and
- Presentation of standard terms and conditions in consumer sales.

We expect that the outcome of such an initiative may also result in binding legislation, if the evidence so supports. While we acknowledge the idea of the Commission that the trader association should provide for practical examples, which may then be endorsed by the expert group, we suggest that the Commission appoints a professional for legal design whose work could serve as a basis for discussion and who could give guidance for a consumer-centred and practical approach.

END



This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

The content of this publication represents the views of the author only and it is his/her sole responsibility; it cannot be considered to reflect the views of the European Commission and/or the Consumers, Health, Agriculture and Food Executive Agency or any other body of the European Union. The European Commission and the Agency do not accept any responsibility for use that may be made of the information it contains.