



PLUGGING THE GAP IN CONSUMER RIGHTS

WHAT A NEW DEAL FOR CONSUMERS SHOULD
LOOK LIKE IN 2018

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Introduction

Under EU law, consumers across Europe enjoy a number of important rights when they purchase something from a shop or look for offers in an online store. These include the right to not be misled, to have the price of a product clearly displayed, to withdraw from a contract within 14 days, or to obtain redress when something goes wrong. These rights are crucial in strengthening the consumer's hand in the business-to-consumer transaction, given that the consumer is always the weaker party.

As borders inside the EU have become less and less relevant for purchasing goods and services, consumers need to know they can rely on a high standard of protection everywhere.



In 2016-17 the European Commission undertook a review of EU consumer law (REFIT) to make sure it was still fit for purpose and to see what might need changing. The review included rounds of consultations, meetings with stakeholders and commissioning reports which national authorities, businesses, consumer organisations and academics could all feed into.

The results of the review, which are contained in the following section, provided inspiration for the Commission to take action.

Overall, the review showed EU law was fit for purpose but needs to be improved in several respects.

As a result, the Commission announced a set of proposals which would be a 'New Deal for Consumers' taking into account current gaps in consumer protection and the current lack of law enforcement. These proposals for reform are expected to be released in spring 2018.

Alongside the Commission's results, we have put forward recommendations, based on our knowledge of the situation for consumers across Europe, to truly plug the gap in consumer rights.



REFIT results and BEUC recommendations



EU consumer law overall

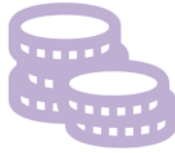
REFIT conclusion(s)

EU consumer law is fit for purpose and capable of handling problems in today's markets. However, adjustments need to be made in a number of areas to better protect consumers. The main problem is a lack of enforcement & redress.

BEUC recommendations

Throughout the business-to-consumer commercial transaction it is the consumer who is in a weaker position. This is even more the case in the digital world.

An update of consumer law is needed to give better rights to consumers, safeguarded by enforcement and redress mechanisms.



Costs of EU consumer law are reasonable

REFIT conclusion(s)

- The Commission concluded that the compliance costs of EU consumer law overall were reasonable and proportionate given the benefits acquired.
- Concerning the Consumer Rights Directive, the Commission said it's impossible to draw a conclusion on the cost/benefits of the directive because there is too little quantitative info out there and it's too soon after the transposition to tell.

Supporting evidence

The **estimated costs of complying** with the directives are **proportionate** when compared to annual turnover and with the significant benefits they bring for the functioning of consumer markets.

European Commission: [Executive summary of the REFIT Fitness Check](#) (2017), page 3.

The estimated **overall costs** of regular **compliance checks** amount to approximately **0.024 % of the annual turnover for business**, including SMEs.

European Commission: [Report on the Fitness Check of EU Consumer Law](#) (2017), p. 54.

In a 2012 analysis, **EU rules** in the area of **consumer protection** were considered the second **least burdensome** area by SME respondents among the 32 surveyed areas.

European Commission: [Report on Fitness check of consumer and marketing law](#) (2017), p. 79.

BEUC recommendations

REFIT confirmed that it is not a burden of businesses to respect EU consumer law.

The problem, instead, is the low level of compliance with consumer rules. We advocate for remedies for consumers and better enforcement and redress options.



Compliance with EU consumer law too low

REFIT conclusion(s)

There is:

- A lack of compliance by traders with consumer law
- A lack of awareness by traders of EU consumer law
- A lack of awareness among consumers of their rights

Supporting evidence

Consumer rights-related problems reported by consumers stood at 20 % in 2016, which is the **same rate as in 2008**. **No improvement** has been made in **almost a decade**.

European Commission: [Executive summary of the Fitness Check](#) (2017), p. 2.

Only 41% of people knew they have the **right to a free repair or replacement** if their goods are **defective**. Only one third (33%) knew that they did not need to pay for, or return, products they did not ask.

European Commission: [Press release](#), 29 May 2017.

Traders showed a low **level of awareness** regarding the implementation of the Consumer Rights Directive in their national law (for example only 11% of traders knew the clauses concerning language policy, 13% the rules on digital content and 57% the clauses on the right of withdrawal).

European Commission: [Study on the application of the Consumer Rights Directive](#) (2017), p. 74.



BEUC recommendations

There should be better enforcement and redress measures, along with greater awareness-raising efforts.

Consumers must enjoy individual and collective rights if traders do not comply with EU law.

Non-compliant traders should face truly dissuasive sanctions amounting to a significant percentage of their yearly turnover.

BEUC is currently running a project – Consumer Law Ready - together with business federations, which helps and teaches SMEs to understand and comply with EU consumer law.



Collective redress is long overdue

Note: the review of EU consumer law (REFIT) did not cover collective redress. This section uses a mix of BEUC evidence and a separate analysis into the 2013 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States.

Conclusion(s)

- A European Commission recommendation to Member States to adopt a collective redress system with minimum standards in 2013 has had little impact.
- In many of the Member States which do have a collective redress system, people cannot use the procedure either because it is too rigid, too lengthy or because there the costs will likely outweigh the benefits.
- In only 4 countries was it possible for consumer organisations to launch a collective redress procedure after the VW car emissions fraud.
- Today, only few EU consumers feel they have a realistic chance to get redress in a mass harm situation. In most countries and for most European consumers, access to justice in such situations is impossible.

Supporting evidence

Seven Member States have enacted reforms of their laws on collective redress after its adoption, but these reforms have **not always followed** the principles of the Recommendation.

European Commission: EU Commission, [Report into implementation of Recommendation on collective redress](#) (2018), p. 2.

There are still **9 Member States** which do not provide any possibility to collectively claim compensation in mass harm situations.

European Commission: EU Commission, [Report into implementation of Recommendation on collective redress](#) (2018), p. 3.

In many instances people who are unable to join forces to seek redress collectively **abandon their claims** altogether, due to the **excessive burden** of individual proceedings.

European Commission: EU Commission, [Report into implementation of Recommendation on collective redress](#) (2018), p. 19.

Only five EU countries have a well-functioning system of collective redress (Belgium, Italy, Portugal, Spain and Sweden)

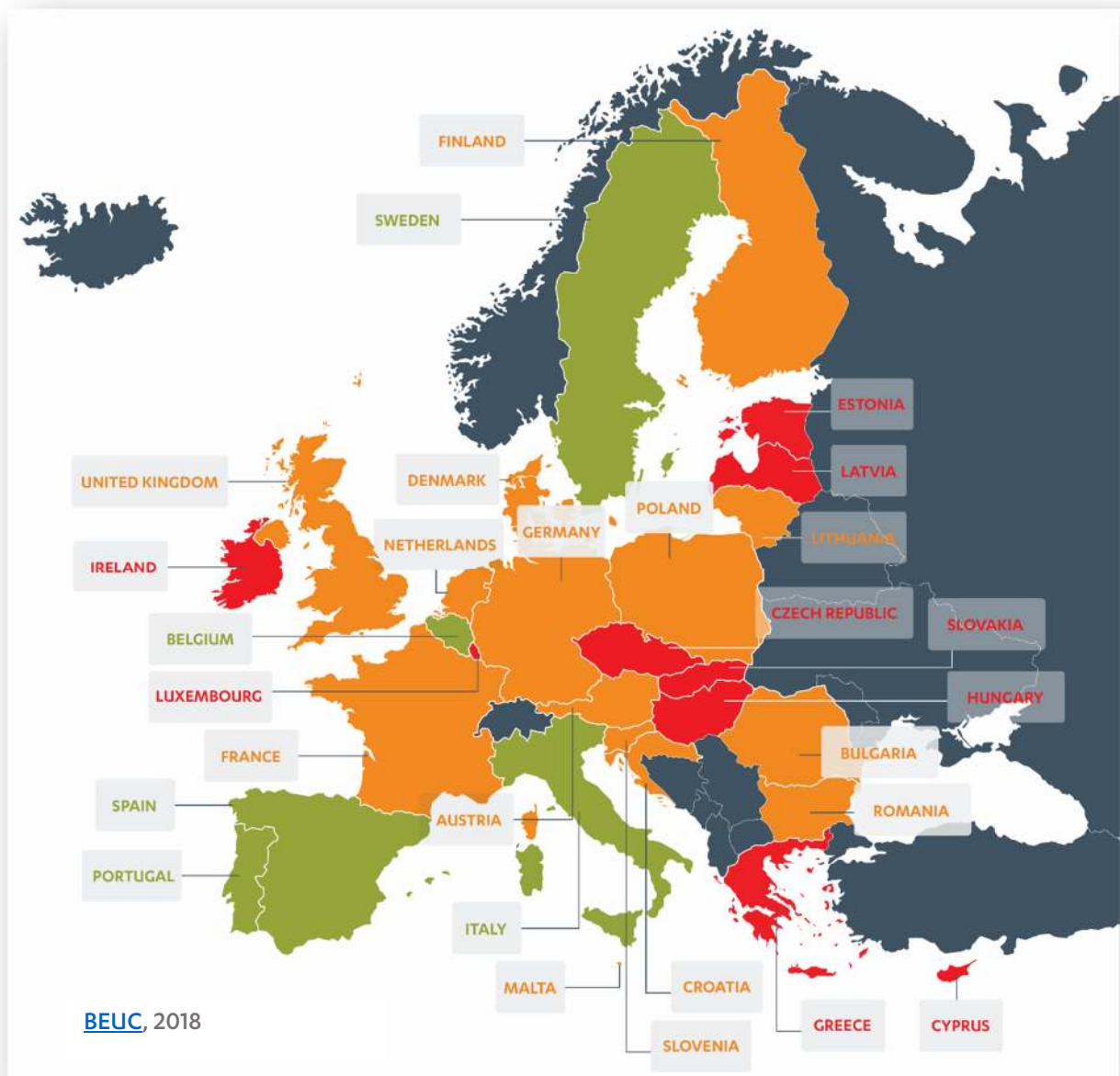
Source: BEUC, [Collective redress for all Europeans](#) (2018)

Where can consumers access collective redress in Europe?

GREEN: only in Belgium, Italy, Portugal, Spain and Sweden are the systems working well. We have coloured these countries green.

ORANGE: in Austria, Bulgaria, Croatia, Denmark, Finland, France, Germany, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia and the UK, a procedure exists but it has either serious flaws or the system is too recent to assess.

RED: in Cyprus, the Czech Republic, Estonia, Greece, Hungary, Ireland, Latvia, Luxembourg and Slovakia there is either no procedure or a procedure which cannot be used efficiently by consumers.



BEUC recommendations

BEUC is calling for a collective redress system that allows all EU consumers to access such a scheme.

- There should be a binding instrument at EU level which obliges all Member States to introduce effective collective redress schemes.
- The collective redress scheme should cover all areas of law that affect consumers' interests, including competition law.
- It should be possible to seek compensation for both material and moral damages.
- Consumer organisations should be given legal standing to bring collective cases.
- The scheme should allow both opt-in (consumers have to notify that they are joining a case to be considered for compensation) and opt-out systems (all consumers affected are automatically added to the case unless they signal they don't want to be).
- Court fees and lawyers' fees for consumer organisations should be limited, as is already the case in several countries.
- There should be many possibilities for the funding of actions. This includes government funding, membership fees, donations, project funding, sales or consulting activities, as well as third party funding. The availability of third party funding has recently been used by some stakeholders as an illustration of the dangers and potential abuses of the collective redress procedures. However, BEUC members dispute these allegations.
- Ensure judges have an active role in admitting the case, overseeing litigation costs, deciding on how victims should be informed, or whether the system should be opt-in or opt-out.



Injunctions need an upgrade

REFIT conclusion(s)

Injunctions are a useful tool and are fit for purpose but are not sufficiently used at Member State level because of several shortcomings:

- the high costs linked to the proceedings,
- the length of the proceedings,
- the complexity of the procedures,
- the relatively limited effects of the rulings on injunctions and the difficulty of enforcing them;

Injunctions should be more harmonised and the scope of application extended.

Regarding harmonisation, the changes could be to:

- facilitate access to justice and reduce costs for the 'qualified entities' that protect collective consumers' interests
- increase the deterrent effect of injunctions
- produce an even more useful impact on the affected consumers.

Consumers should be allowed to rely on injunction orders in their follow-up actions for compensation, both when they bring individual compensation actions and in group procedures.

One suggestion is to extend the effects of injunction to traders which were not parties to the injunction proceedings but engage in the same infringements.

Supporting evidence

Since June 2011, **4579 injunctions** were brought **in Germany** - only **1 in Croatia**. 14 out of the 29 qualified entities indicated that they did not initiate any injunction actions primarily due to costs/financial risks and the complexity of procedure.

European Commission: [Study for the Fitness Check of EU Consumer Law](#), p. 104

90% of injunctions concerned **national** infringements, **8%** infringements in **another EU country** and only 2% infringements in non-EU countries.

European Commission: [Study for the Fitness Check of EU Consumer Law](#), p. 107.

BEUC recommendations

We call for the strengthening of injunction procedures and adding a possibility for consumers to get redress in a collective manner:

- The scope should cover all areas of interests of consumers.
- The injunction should also oblige the trader to publicise the injunction order on its website or by other means.
- Consumer associations need to be among the entities able to initiate injunctions and redress procedures, both nationally and cross-border.
- There should be an alleviation of costs to enable consumer associations to take actions.
- It should be possible to ask for remedies for the affected consumers in the same procedure.



Redress is insufficient

REFIT conclusion(s)

Few countries offer consumers an efficient civil law remedy in case they were victims of unfair commercial practices. In some countries, businesses and consumer organisations cannot bring forward injunctions. Member States continue to have diverse approaches on collective redress.

Supporting evidence

Only Belgium, Poland and the UK **provide special remedies** specifically for breaches of the Unfair Commercial Practices Directive (UCPD). Bulgaria, France, Luxembourg, the Netherlands, Portugal and Slovakia, provide a positive cross-reference to the relevant remedies in the provisions implementing the UCPD, but the **national laws differ** in scope and **level of detail**.

European Commission: [Report on the fitness check of EU consumer law](#) (2017), p.93.

BEUC recommendations

As regards the Unfair Commercial Practices Directive, we propose an EU-wide standard of individual rights and remedies for consumers, without lowering the level of protection which already exists in some Member States.

There should 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 not negatively impact on remedies provided under national laws.



Enforcement and penalties are lacking

REFIT conclusion(s)

There are too few national enforcement actions and sometimes large differences in the way the rules are enforced.

The different and low level penalties put in place by Member States for breaches of the Consumer Rights Directive are also problematic, since the maximum penalties in several Member States do not appear sufficiently 'effective, proportionate and dissuasive'.

Supporting evidence

The national authority in **Bulgaria** can issue **penalties** ranging from BGN 100 to BGN 3000 (approx. €51 to €1535) and in **Lithuania** from €144 to €1448. The **Italian** competition authority meanwhile imposed a **€5 million fine on VW** for the emissions fraud, the maximum level it could fine. This is in stark contrast with a penalty of **\$4.3 billion** VW had to pay in the **US** so far.

European Commission: [Evaluation of the Consumer Rights Directive](#) (2017), p. 33-34.

BEUC recommendations

There should be truly dissuasive penalties that amount to a percentage of the annual turnover of the infringing company. The intra-EU dimension should be taken into account.



Online platforms need to be transparent

REFIT conclusion(s)

Online platforms systematically use terms and conditions that are opaque, too broad and unfair.

The transparency standard and responsibility of online platforms needs to be improved, particularly when it comes to:

- the identity of the supplier
- application of consumer law
- the default ranking criteria when presenting offers
- the consequences for failing to comply with transparency requirements.

Supporting evidence

In a Commission survey, **55%** of consumers reported that they had **experienced at least one of a range of problems** using online platforms. These included problems with the product/service not being described accurately or of **poor quality**, with the **price not being as agreed** or additional costs, or **non-delivery** of the product or **cancellation**.

European Commission: [Exploratory study of consumer issues in online peer-to-peer platform markets](#) (2017), p. 68.

85% of consumers find it important or very important that **peer-to-peer** platforms are **clear and transparent** about who is responsible when something goes wrong, data protection and the consumer's rights in case of a problem with the price or quality of a product or service.

European Commission: [Exploratory study of consumer issues in online peer-to-peer platform markets](#) (2017), p. 117.

60% of consumers do **not seem to know**, or are not sure, who is responsible when something goes wrong, what the **responsibility of the platform** is or if they have a **right to compensation or reimbursement**. It is alarming that **40% of the providers** themselves are **not aware** of their rights and responsibilities either.

European Commission: [Exploratory study of consumer issues in online peer-to-peer platform markets](#) (2017), p. 117.

46% of consumers experiencing a problem on an online platform **do not take any action**.

European Commission: [Exploratory study of consumer issues in online peer-to-peer platform markets](#) (2017), p. 117.

Review mechanisms are **neither transparent nor reliable**, with three quarters of consumers expressing reservations.

European Commission: [Exploratory study of consumer issues in online peer-to-peer platform markets](#) (2017), p. 120.

BEUC recommendations

There should be specific transparency requirements for online platforms, which should provide transparent listings and clearly indicate whether the supplier has paid for a better place in the ranking. The legislator should establish explicit consequences for failing to comply with these transparency requirements.

The platform operator should be liable:

- for misleading information, guarantees, or statements
- for the performance of the contract where he has failed to inform the consumer about who the actual supplier of the goods or service is and whether consumer rights are available
- and be regarded as the supplier of the goods or service where the platform has a predominant influence over suppliers.



Payment with data needs protection

REFIT conclusion(s)

The Consumer Rights Directive does not give consumers withdrawal and information rights when data is provided as the counter-performance in a digital service.

The Commission recognises that the directive should be extended to cover these services so that pre-contractual information requirements and the right of withdrawal apply to any digital services.

Supporting evidence

Nearly half of consumers have experienced problems with digital services.

27% of consumers have had **problems terminating their contracts** after a free-trial period while **48%** had **difficulties unsubscribing from 'free' online services**.

78% of consumers consider having a **right of withdrawal** from a “free” service as **beneficial** and 79% of consumers consider receiving the same information on “free” online service contracts as they would for a paid service contract as beneficial.

European Commission: [Study on the application of the Consumer Rights Directive](#) (2017) (pages 83, 85, 164).

BEUC recommendations

The Consumer Rights Directive scope should be extended so as to cover the provision of services where the consumer’s data is used as a form of payment.

The Unfair Commercial Practices Directive should be updated so that the monetisation of data is considered a business practice and that misleading or false claims are considered unfair.



Presentation of contract terms and information

REFIT conclusion(s)

Terms and conditions and pre-contractual information to consumers should be better presented.

The Commission has set up a subgroup within the REFIT taskforce, which provided input to the Commission's review of consumer law, to develop guiding principles to better present terms and conditions and pre-contractual information duties.

Information requirements are generally considered relevant today, except the requirement to provide a fax number and email address where other more modern forms of communication might be more suitable.

Supporting evidence

Consumers have **problems in understanding terms and conditions**. The **length** and **complicated language** used make it hard for consumers to understand them. Simplifying and shortening them could result in higher trust from consumers. There should also be a better presentation of pre-contractual information.

European Commission: [Report on the Fitness check of consumer and marketing law](#) (2017), p. 78, 86.

BEUC recommendations

There should be stricter mandatory criteria for the presentation of essential pre-contractual information or contract terms.

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 General Data Protection Regulation and be subject to the same summary obligation and transparency requirements than sales terms.



Right of withdrawal is important

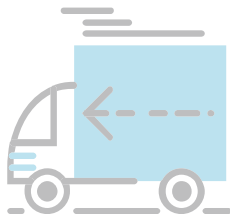
REFIT conclusion(s)

- The right of withdrawal is the best-known consumer right and consumers consider it as very important.
- Traders are not sufficiently complying with the right of withdrawal.
- Compliance with the right of withdrawal is particularly low for digital content products and digital services.
- There is no sufficient evidence for the claim that there are losses for companies associated to the exercise of the right to test the product.

Supporting evidence

95% of consumers **value the right of withdrawal** as important when making online purchases.

European Commission: [Study on the application of the Consumer Rights Directive](#) (2017), p. 160.



53% of consumers have **experienced problems** when exercising their **right of withdrawal** at least once.

European Commission: [Study on the application of the Consumer Rights Directive](#) (2017), p. 86.

59% of consumers were **not given access to a form of withdrawal** when making an online purchase.

European Commission: [Study on the application of the Consumer Rights Directive](#) (2017), p. 82.

42% of consumers were **not informed** that they can only withdraw from the contract **before** they start **downloading or streaming** digital content.

European Commission: [Study on the application of the Consumer Rights Directive](#) (2017), p. 82.

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BEUC recommendations

The actual problem is the lack of compliance by traders. We urge the EU to investigate how to strengthen this important consumer right.



Unfair Commercial Practices need improvement

REFIT conclusion(s)

The Unfair Commercial Practices Directive should be improved by providing consumers with clear EU-wide rights to remedies.

At present, there is no clear candidate that could be added to the Unfair Commercial Practices Directive/Unfair Contract Terms Directive blacklist.

Supporting evidence



48% of traders totally **ignored** the consumers reaching out to them for **redress** due to an unfair practice, while only **2%** of the traders **recognised the unfair practice** from their side.

16% of the traders **offered a remedy**, as opposed to **32%** who did not offer **any remedy** whatsoever, while there were instances where the trader ceased communication.

European Commission: [Consumer Market Study to support the Fitness Check of EU consumer and marketing law](#), p. 246-252.

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BEUC recommendations

Consumers should always be entitled to a set of rights and remedies when they are confronted with unfair commercial practices by traders.

In particular, consumers should be able to claim compensation after suffering damages or be able to terminate the contract if it was concluded as a result of an unfair practice.

No Member State should see its level of protection of consumers lowered through a harmonisation of remedies at EU level.

The 'black list' of unfair practices must be extended to tackle the following issues:

- The organised second-hand resale of tickets at more than face value.
- The marketing of unhealthy food to children.
- The false claim or impression that the trader is not acting in his business' interests although he monetises consumers' data.
- Unfair green claims



Unfair Contract Terms need clarification

REFIT conclusion(s)

The Unfair Contract Terms Directive could be improved through a guidance document which would help clarify its interpretation.

BEUC recommendations

The Unfair Contract Terms Directive should be improved by:

- introducing a non-exhaustive black list of unfair terms that are always prohibited, and which should be updated regularly.
- 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.
- banning exclusive or misleading jurisdiction clauses.



Automated processes and algorithms

Note: the REFIT fitness check did not cover this area but BEUC believes this is an important area which the New Deal must tackle.

BEUC recommendations

There should be a general information obligation for companies providing services to consumers that are based on automatised processes (such as algorithms). The obligation should explain how the logic of the algorithm functions, including how the information is organised and presented to consumers. For example, the criteria used to rank or display the information should be listed.

There is an urgent need to clarify the liability of companies which use algorithms or artificial intelligence technology in EU consumer law.

The practice of using a disclaimer to remove a company's liability in an automatised decision-making process should be considered unfair/illegal.

Consumers should know about the existence of personalised and automatised pricing.

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