

The Consumer Voice in Europe

PROPOSAL FOR A BETTER ENFORCEMENT AND MODERNISATION OF EU CONSUMER PROTECTION RULES – “OMNIBUS DIRECTIVE”

The BEUC view



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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 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 if it doesn't meet expectations. Consumers value the possibility to test a product in the same way they would do in a brick and mortar shop. 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

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.

1. We strongly oppose the watering down of the right of withdrawal.
2. We support the inclusion of penalties for infringing companies based on their annual turnover. However, the legislator should also introduce penalties expressed as a lump sum, as is the case with the General Data Protection Regulation (GDPR).
3. It is positive to open the scope of consumer protection law also to contracts where the consumer doesn't pay with money. Thus, we support granting consumers a right of withdrawal and right to information where they provide personal data as a counter performance. However, they should also be protected if they pay with non-personal data.
4. Whilst BEUC supports greater transparency of online marketplaces, the important questions of liability of on-line intermediaries or reputation feedback systems should also be addressed.
5. We strongly support the proposal that consumers can seek redress in case of an unfair commercial practice, but an additional remedy of price reduction should be also envisaged.
6. Regarding the issue of "dual quality" of goods, BEUC welcomes the clarification that the seemingly identical marketing of products which have a different composition may constitute an unfair commercial practice but suggests some improvements.
7. We welcome the clarification related to Member States' freedom to adapt rules on certain forms of doorstep selling and sales excursions but suggests some improvements.
8. While we welcome some suggested improvements regarding unfair commercial practices, the quickly spreading EU wide consumer problems with websites reselling event tickets should be addressed by updating the black list of unfair practices.
9. BEUC suggests also that the EU must finally act against online advertising of unhealthy food to children by banning such practices.

Note on terminology: we use the term ‘Omnibus Directive’ and ‘Directive on Better Enforcement and Modernisation of EU Consumer Protection Rules’ interchangeably. Both terms refer to the same proposal.

1. Introduction

As a part of the New Deal for Consumers, the European Commission published a proposal on the modernisation and better enforcement of EU consumer law, known also as the ‘Omnibus proposal’, which amends four important directives from the field of consumer law: Unfair Commercial Practices Directive¹, Unfair Contract Terms Directive², Consumer Rights Directive³ and Price Indication Directive⁴.

BEUC welcomes this proposal, because today EU consumer law has no teeth and its enforcement and redress urgently need to be improved. Moreover, it is not fit for practice when it comes to the digital world. Consumers increasingly rely on online platforms in their decision to buy something and many traders provide their products or services in exchange for consumer data rather than money. This reality should be reflected in the law, which, at the same time, should give consumers better rights, and also provide dissuasive sanctions against traders who do not respect the rules.

On the other hand, BEUC strongly disagrees with the proposal to water down consumers’ right to return products bought online. This important consumer right should be reinforced not weakened.

In this position paper, we set out our main concerns with the proposal and provide suggestions for improvement.

2. Redress – Article 1

Inserting individual remedies in the Unfair Commercial Practice Directive

It is a significant flaw, which is to the consumer’s detriment, that the Unfair Commercial Practices Directive does not provide for adequate redress and enforcement. It should instead ensure that consumers are not left empty-handed when problems of law infringement or enforcement arise. A good example of the lack of effectiveness of the directive is the Volkswagen emissions scandal, where consumers in most EU 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.

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁴ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

We therefore strongly support the proposal that consumers can seek redress in case of an unfair commercial practice (proposed change to Article 11a of the Unfair Commercial Practice Directive). As a minimum, besides the right to compensation and the right to contract termination, we suggest introducing further remedies, particularly the right to a price reduction and a right to compensation for damages as a contractual remedy, which is currently proposed only as a non-contractual remedy. These inclusions should be accompanied by definitions of what those remedies entail.

There should also be standard remedies for non-compliance in the Consumer Rights Directive. Member States should ensure that, in accordance with their national law, consumers have a right to damages and that they are not bound by the contract where traders breach their duties.

BEUC Policy demands

In case of unfair commercial practices, consumers should always have the right to be compensated for the harm resulting of this practice, the right to contract termination, and the right to a price reduction. This kind of remedies already exists in some member states and proved to be very beneficial for consumers.

There should also be standard remedies in case of traders' non-compliance with the duties set out in the Consumer Rights Directive. While in some countries such remedies already exist, the situation is still too fragmented. All consumers should at least have a right to damages and the right not to be bound by the contract where traders do not meet their obligations.

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

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. We also agree 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 reference for those penalties is the turnover of the company in the *Member States* concerned by the infringement, which might be not sufficiently dissuasive for the big global market players. A turnover-approach also seems insufficient in cases where the turnover is insignificant or cannot be established. We suggest aligning the scope of the relevant consumer law directives with the General Data Protection Regulation (GDPR). The GDPR sets out a maximum fine of 10 million euros or refers to a penalty of 4% of the trader's worldwide annual turnover, whichever is higher.

EU legislator should also explore whether harmonised *minimum* penalties or daily fines for non-compliance with consumer law should be introduced. This could ensure that penalties have a truly dissuasive effect.

BEUC Policy demand

We support the new rules on maximum penalties. Penalties should amount to a significant percentage of the trader's worldwide annual turnover or a fine expressed as a lump sum, whichever is higher (GDPR approach).

4. Transparency of online platforms – Articles 1 and 2

Amending the Directives on Unfair Commercial Practices and Consumer Rights

Over the last few years, various types of platforms have sprung up across all sectors.⁵ The qualitative and quantitative dimension of consumer contracts that are concluded via intermediaries has drastically increased. However, standards of due diligence or information requirements of platforms, particularly those for online marketplaces, are unclear. From the consumer perspective, it is often unclear whether the platform is a party to the contract or is a trader or acts on behalf of a trader. When it comes to comparison tools, evidence shows that criteria linked to third party payments are used, even though consumers believe that the ranking was based on impartial criteria.

We therefore welcome the proposed clarification in the Unfair Commercial Practice Directive to clarify 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 professional/consumer, whether EU Consumer Law applies, and who is the responsible contracting party (Article 6a).

However, the legislator should make sure that the maximum harmonisation of the proposed transparency requirements does not lead to a lowering of the level of protection for consumers that currently exists in some Member States or that could be introduced in the future. France, for example, recently adopted new rules dealing with the transparency of platforms.⁶ These rules contain obligations which are beneficial to consumers, for example linked to the presentation of information or disclosure of guarantees and dispute resolution mechanisms. Most importantly, the transparency standard relates also to platforms that are not online marketplaces, such as comparison tools or search engines. We call on the legislator to adopt transparency requirements at EU level which live up to the level of protection afforded by such national rules.

Regarding information about whether the third party offering the goods, services or digital content is a trader or not, the Omnibus Directive suggests that this should be done on the basis of a self-declaration of the third party. However, the proposal does not specify how the self-declaration principle should be implemented and does not address the consequences for providing false statements or the cases when an online marketplace needs to verify the correctness of information. Online market places shall be liable for the

⁵ For more information about different issues related to online platforms see also the BEUC position paper "Ensuring consumer protection in the platform economy" (BEUC-X-2018/080).

⁶ Decree n°2017-1434 of 29 September 2017 on digital platform operators' information obligation, Decree n°2017-1436 of 29 September 2017 on information obligations regarding online consumer reviews, Decree n°2017-1435 of 29 September 2017 setting up a threshold of connections from which online platform operators develop and disseminate best practices to enhance the loyalty, clarity and transparency of information transmitted to consumers.

comprehensiveness and completeness of the trader self-declaration. The online market places should also develop a set of measures with a deterrent effect on traders and inform them about their consequences in cases of a wrong self-declaration. These measures should be applied by the online market places whenever there is an apparent evidence available that the self-declaration is incorrect. BEUC welcomes the requirement to provide information on whether the consumer legislation applies to the contract concluded but it is not clear whether this constitutes a general reference or whether this duty relates to specific consumer rights. In France, for example the online platform is obliged to inform the consumer specifically whether his legal guarantee right or the right of withdrawal would apply to him.

As for rankings, it is not enough to simply provide information about the main parameters of a ranking. The consumer has no idea about what this means as long as he/she is not informed about the weighting of those parameters for presenting offers. Consumers should be informed about the relative importance of those criteria and receive sufficient information enabling them to understand how the ranking mechanism takes account of the characteristics of the actual goods or services and their relevance to the consumers of the online intermediation service. This is particularly important as the Explanatory Memorandum makes clear that these provisions are complementary to the Commission's platform-to-business initiative. Under this draft regulation⁷, professionals benefit from a higher information standard. Besides the main parameters which determine ranking results, professionals have a right to be informed about the "reasons for the relative importance of those main parameters as opposed to other parameters". The lawmaker should therefore make sure that consumers do not have a lower level of protection than professionals and on top of this, some member states' laws already provide a high level of consumer protection when it comes to ranking of offers.⁸

Regarding paid placements, the obligation to disclose promoting products in the search results in exchange for a payment should comprise not only monetary payments but all forms of remuneration or commercial links.

A number of **important legal gaps or issues of consumer concern are not addressed under the proposal**. These should be addressed to ensure adequate and modern consumer law rules:

- **Algorithms:** In modern online markets, offers are based on the use of algorithms which provide consumers with a personalised shopping experience. Thanks to big data management, many tasks and decisions are entrusted to systems based on algorithmic decision-making or even self-learning machines which execute orders autonomously. This changes the information paradigm, which currently dominates EU consumer law. For example, how can consumers make informed decisions when product information or offers are individually targeted at them depending on their profile established by algorithms? Consumers will often be unaware that the price of a product is determined based on their user profile (personalised pricing). In such cases, the comparison of offers will be difficult, and the ranking of offers may be opaque. Consumers must be empowered to understand how information and offers are organised and presented as follows:
 - Most importantly, consumers should be informed (i) about the use of algorithms to present offers or to determine prices, its main criteria and the logic behind it, (ii) which data are used for this purpose and (iii) whether personal pricing techniques are involved. Besides the transparency of transactional processes,

⁷ Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (COM(2018)238).

⁸ For example, under the French law, platforms are obliged to reveal the criteria for classification of content by default: Article D111-7 I as modified by the Decree n°2017-1434.

there is a need to update pre-contractual information requirements about the product or service. Under the Consumer Rights Directive, consumers have the right to receive essential information about the product or service, for example its characteristics or its price. It should make clear that (iv) traders – when explaining the main characteristics of the product or service – need to provide information about how algorithms relate to the functioning of those products. Moreover, many other important consumer issues related to algorithmic decision making also need to be addressed, such as the right to object to automated decision making or to correct the data collected by the trader.⁹ If future developments in this area cause problems to consumers that require regulatory intervention, the European Commission should propose this type of measures. A revision clause should be added to the proposal for this purpose.

- **Reputation feedback systems:** The fitness check of EU consumer law revealed that reputation feedback systems, otherwise known as consumer reviews, are neither transparent nor reliable. Hence, consumers are easily prone to manipulation and end up being misled. Platforms that host user reviews should have appropriate systems to take down fake reviews and to ensure that advertising content is identified. In terms of transparency, platforms using reputation systems should inform consumers (i) which mechanisms are applied to ensure the authenticity of the reviews, (ii) explain how reputation systems work, (iii) reveal under what ranking criteria they are being displayed, (iv) give information to users about the representativeness and reliability of user reviews or ratings, and about how positive or negative reviews or ratings influence the search results or access to the platform. Moreover, if the platform is exercising the control of consumer reviews it should inform consumers about it. It should also inform them about what the control entails.¹⁰

Moreover, in order to effectively tackle the problem of unreliable consumer reviews, the relevant national authorities need to develop greater experience in this field and have sufficient resources allocated to them for this purpose.

- **Remedies:** Information duties can only be effective if consumers have remedies in place in case of non-compliance. In order to ensure the effectiveness of the directive, we propose a standard remedy for non-compliance with the duties laid down in the directive. For example, the contract should be non-binding on the consumer; this without prejudice to remedies provided under national laws. Affected consumers should also be entitled to ask for compensation.
- **Liability of online platforms:** In general, rules on the liability of online marketplaces are missing in the proposal. The following grounds for liability should be introduced in EU consumer law:
 - Liability for the failure to inform about supplier of the goods or service: In line with the EU Court of Justice *Wathelet v Biethères*¹¹ judgment, if the platform fails to inform the consumer that a third party is the actual supplier of the goods or service.

⁹ For more information see BEUC position paper “Automated decision making and Artificial Intelligence – A consumer perspective” ([BEUC-X-2018-058](#)).

¹⁰ For example, under the French law such a requirement already exists: Article D111-17 and D111-18 of the French “Code de Consommation” as created by Decree n°2017-1436 of 29 September 2017.

¹¹ C-149/15, ECLI:EU:C:2016:840.

- Liability for misleading information, guarantees, or statements: Currently, even if the fault with the poor contract performance lies on the platform's side, there are no clear rules that would allow for its liability. We support the approach of the E-commerce Directive of removal and observance duties to justify a liability of the platform operator.¹² If the platform takes responsibility for certain quality or safety criteria, the platform operator should be liable for damages that occur if these quality or safety criteria are not met. This should include 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.
- Joint liability for contract performance where the platform has control 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. When 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 which 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 towards consumers where the platform has a predominant influence over the supplier.

BEUC Policy demands

We support the proposed provisions for greater transparency of online marketplaces and online search queries. However, the standard of transparency must be improved and apply also to other types of platforms. Consumers should be informed about the relative importance of ranking parameters and the logic of the underlying algorithms. Consumers should also be informed about personalised pricing techniques, and whether offers are presented at an online marketplace or directly from the seller.

When it comes to reputation feedback systems, consumers should receive better information about which mechanisms are applied to ensure the authenticity of the reviews and how reputation systems work. Where online marketplaces do not comply with information requirements, consumers should enjoy remedies, such as not to be bound by the contract.

Where platform operators control important aspects of the supply of goods or services, the platform should be jointly responsible for contract performance duties. The platform operator should also be liable for its own promises or statements provided on the platform.

¹² Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 4/2016, 164.

5. Right of withdrawal – Article 2

Amending the Consumer Rights Directive

The consumer's right to test and inspect products bought at a distance, and to withdraw from the contract within 14 days, is the best-known consumer right in the European Union¹³ and 95% of shoppers find this right important.¹⁴ Regarding the claims of certain companies of losses associated with returned goods, the evaluation of the Consumer Rights Directive revealed that solid data could not be provided which would confirm such a claim.¹⁵

It is therefore very troubling that the European Commission suggests weakening 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, there is no conclusive evidence demonstrating a large-scale misuse or a necessity to change the Consumer Rights Directive. It is inexplicable and against the European Commission's own better regulation principles to base such an important 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."¹⁶ On the contrary, all the Commission's or consumer organisations' data suggests a severe lack of compliance by traders, signalling the need to protect, rather than weaken, consumers' right of withdrawal¹⁷.

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 be as high as the product price. In such a case, the consumer would only be partially reimbursed or receive no money back at all. Similarly, there is no need for a rule which allows traders to withhold performance until he/she has received the product back (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 reject the proposed change of this important consumer right and to instead investigate how to strengthen it and ensure better enforcement.¹⁸

We also reject another negative change for consumers. Under current rules, consumers lose the right of withdrawal from service contracts that have been fully performed if (i) the performance has begun with the consumer's prior express consent and (ii) with the acknowledgment that he or she will lose the right of withdrawal once the contract has been fully performed by the trader (Art 16a). The proposal now suggested removing the reference to this acknowledgment. We reject this change. Information about the negative consequences for consumers should be provided prior to agreeing to the immediate performance of the service and is very important for consumers; this especially in door-

¹³ https://ec.europa.eu/info/sites/info/files/consumer-conditions-scoreboard-2017-edition_en.pdf.

¹⁴ Study on the application of the Consumer Rights Directive (2017), 160.

¹⁵ COM/2017/0259 final 4.2.

¹⁶ Impact Assessment, SWD/2018/096 final, 2.4.5.

¹⁷ Commission's Staff Working Document to CRD Report {SWD (2017) 169 final; at 30; 86-87; etc.

¹⁸ For example, the Directive only requires the consumer to be informed of his right of withdrawal but does not explicitly require informing consumers about the financial consequences in case the value of the goods decreases as a result of the consumer's handling, other than what is necessary to test them. However, in some cases, consumers may face costs they could not possibly be aware of. This problem is even larger because the test-and-inspect principle is narrower than what would be required to make sure that products are fault-free in every respect. From this follows that consumers who are particularly diligent face a high risk of being charged unfairly by traders. See Austrian Supreme Court (OGH) Case 1 Ob 110/05s where the consumer was charged 330 EUR for using a flat screen for 43.5 hours.

step selling situations, which are characterised by a potential surprise element and/or psychological pressure. The acknowledgment can be also used as important evidence that the consumer was properly informed about his rights. Instead of deleting this requirement, the Commission should make sure that consumers always receive information about the circumstances under which they lose the right of withdrawal. This should also apply to contracts for the supply of digital content products.

BEUC Policy demand

The consumer's right to test and inspect products bought at a distance and to withdraw from the contract within 14 days is one of the most important consumer rights in the European Union.

We reject the proposed change that consumers should lose the right of withdrawal where the goods have been used more than necessary to test them. We also reject the proposed change that traders should be entitled to withhold performance until the product has been returned. There is no evidence that would justify those, or any other, changes proposed.

Instead of watering down consumer protection, the legislator should try to ensure that consumers can better enforce existing rights.

6. Changes of information requirements – Articles 1-2

Amending the Directives on Unfair Commercial Practices and Consumer Rights Directive

Complaint handling policy: The information requirements under Article 7(4) of the UCPD obliges traders to inform the consumer about the trader's complaint handling policy. We do not agree with deleting this information requirement. Recital 30 explains that this information is already governed by the Consumer Rights Directive. However, information about complaint handling options is also relevant at the advertising phase whilst the Consumer Rights Directive only relates to the pre-contractual stage. The information duty under the Consumer Rights Directive also only refers to contracts concluded between consumers and traders and does not necessarily relate to the relationship of online platforms and the consumer.

Other means of communication: Whilst we agree to remove the pre-contractual information requirement about the trader's fax number, we do not support the suggestion to allow traders to use "other means of online communication", such as webforms and chats, instead of an email. E-mail communication is very important for consumers and is not an obsolete means of communication. It serves as evidence for correspondence and allows consumers to store the information as long as the consumer needs to protect his/her interests stemming from the relationship with the trader. It is not clear whether chats can fully live up to this standard.

Webforms on the other hand might create technical obstacles for consumers to reach the trader successfully, for example by requiring consumers to fill in all the mandatory fields before they can send their message. In addition, webforms often have word and space

limits which might prevent consumers from submitting all the relevant information they wish to. Such means of communication should be considered 'additional' means of communication and not a substitute.

BEUC Policy demands

We reject the proposal that traders should no longer be obliged to inform consumers about the complaint handling policy at the advertising phase, as this is currently the case under the Unfair Commercial Practice Directive. The protection afforded by the Consumer Rights Directive is insufficient to protect the consumer interest. This is particularly the case when it comes to online platforms.

Whilst we agree that consumers do no longer need information about the trader's fax number, we do not support the suggestion to allow traders to use "other means of online communication", such as webforms and chats, instead of an email. Email communication is not outdated and consumers value this communication channel for reasons such as to keep track of their communication with the seller.

7. Digital services in exchange of consumer's data – Article 2

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 and should have a right to receive information before they conclude a transaction.

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 are becoming increasingly blurred and non-personal data can very easily become personal data or the other way around, through the crossing of data and using of algorithms. A broad scope of the proposal 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. Also, the current information requirements should be adapted. Traders should always inform consumers about the fact that consumer's data are used and how. 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'. For example, the Unfair Commercial Practices Directive should clarify if the provision of data constitutes material information. 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.

BEUC Policy demands

We welcome 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, the scope of the Consumer Rights Directive should be extended to cover all kinds of counter-performance – including personal and non-personal data – in exchange of goods, services, or digital content products. Other directives need to be updated as well to reflect the development of the data economy.

8. Dual quality of goods – Article 1

Amending the Unfair Commercial Practice Directive

Consumers across Europe want to have access to good quality goods and to not be discriminated against in any way. Unfortunately, differences between products under the same brands and logos still exist, which was demonstrated also by the tests undertaken by some of BEUC members.¹⁹

BEUC welcomes the clarification in the Unfair Commercial Practices Directive which addresses the practice of marketing products as identical in different Member States even though they have significantly different compositions or characteristics (point (c), Art 6(2)). In such cases, the practice is considered unfair if consumers are likely to be misled in their decision-making. This clarification has the potential to improve enforcement in this area. However, in order to make a real difference, the provision needs to be redrafted.

First of all, to determine if there is indeed dual quality in goods marketed in the same way, comparing the product marketing from two countries should be enough and there is no need to take into account the marketing from several countries. There is also no reason to limit the unfairness test to “significantly different” compositions.

As a principle, where products have different compositions, traders should not create the impression that they are identical.

The requirement that consumers must be influenced in their decision making already presupposes a ‘significance’ criterion. We propose to focus on “identical or seemingly identical marketing” rather than on “marketing *as being* identical”. The latter does not address the situation that traders use the same or similar marketing – including slogans, pictures and other commercial statements – for products with different compositions. This creates the impression for consumers that they would receive the same quality, or that the product would come with the expected same features, regardless of the Member States in or from which they shop. Moreover, the addition of ‘seemingly’ identical is crucial in order to reflect reality. Consumers recognise products due to their general features and marketing. They hardly ever have the possibility to make a comparison of similarly marketed products.

Recital 43 explains that the assessment should be carried out on a case-by-case basis and that authorities should take into account whether a differentiation is justified, for example due to legitimate factors such as consumer preferences or geographical specificities. Whilst we recognise the trader’s right to adapt products of the same brand for different geographical markets, this should not justify misleading marketing as prescribed in Art 6(2). When making their commercial decision and choosing which product to buy, consumers are often being influenced by the product brand itself, its reputation and the fact that it is very popular in other countries. They do not expect to be sold products with the same marketing but different compositions without being informed about it. We therefore propose to delete the notion of “legitimate factors” from the Recital.

¹⁹ For more information, see BEUC position paper: « Dual Product Quality Across Europe : state-of-play and the way forward » ([BEUC-X-2018-031](#));

BEUC Policy demands

BEUC welcomes the proposed clarification that the identical marketing of products which have a different composition may constitute an unfair commercial practice. However, improvement is necessary, most importantly by:

- Focusing on “identical or seemingly identical” marketing,
- Deleting the criteria of “significantly” different composition and “several” other member states,
- Deleting the reference to legitimate factors as a justification to the misleading practice

9. Doorstep selling and sales excursions – Article 1

Amending the Unfair Commercial Practice Directive

Consumers regularly face persistent and unwanted solicitations made by phone, email, SMS, letters, or on their own doorstep. Information provided by traders can often be incomplete or even mendacious. Often, doorstep selling practices are directed at vulnerable consumers, particularly the elderly. It is not a problem that Member States have set out specific provisions preventing certain unfair commercial practices, prohibited under the Unfair Commercial Practice Directive. What is a problem is that although the Unfair Commercial Practice Directive tries to ban certain aggressive doorstep-practices, these selling practices continue to exist within the internal market?

We therefore welcome the clarification in the Omnibus Directive that acknowledges the right of Member States to adopt certain additional restrictions on doorstep selling and/or sales excursions (amendment of Article 3 of the UCPD) that go beyond or regulate other elements than the ones covered by the directive. However, the provision is too limited as it only refers to “aggressive or misleading marketing of selling practices” whilst certain Member States’ rules are not limited to such practices but are more protective and can address bad selling practices related to certain products. This is in line with Recital 44 of the proposal, which explains that the directive is without prejudice to Member States’ freedom to make arrangements without the need for a case-by-case assessment of the specific practice to protect the legitimate interest of consumers. The directive should therefore clarify that Member States have general discretion in this area to ban or restrict certain doorstep sales and sales excursions practices, including selling practices carried out without prior consent of the consumers or related to specific types of products.²⁰

²⁰ For example, Austrian law (§§ 57 und 59 GewO) refers to product groups such as pharmaceuticals or food supplements. Provisions related to other product types, such as noble metals, were already repealed in light of infringement procedures.

BEUC Policy demand

We welcome the clarification that Member States have the right to adopt certain restrictions on doorstep selling and/or sales excursions. However, the suggested requirements related to those types of selling practices that can be regulated nationally, are too restrictive and would prevent Member States to decide for themselves whether and how to regulate certain doorstep selling practices. We therefore suggest deleting those requirements.

10. What is missing

10.1. New information requirements under the Consumer Rights Directive

Internet of things and “smart” goods

The Consumer Rights Directive is in need of an update regarding the sale of “smart” goods, which are goods with embedded digital content or which are connected to a digital service. Consumers have a specific interest to be informed about the functioning of those products and what is needed to ensure both functionality and security.

Under the directive, consumers have a right to receive information about the main characteristics of the goods or services, ‘to the extent appropriate to the medium and to the goods or services’ (Arts 5,6(1a)). Yet, what is the ‘extent appropriate’ for the ‘internet of things’?

Then, the directive sets out specific information requirements regarding digital content products, such as functionality or interoperability. However, it is unclear whether consumers have a right to receive specific information when the digital content is embedded in a tangible product (smart goods).²¹

Consumers need this information in order to make informed decisions about such products and thus a clarification is needed. The recital to the directive explains that the notion of interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features. This leaves out the question of interoperability of the goods to function with a specific hardware and software different from the one for which they are supplied by the seller. In line with the current discussion on legal guarantee rights for digital content products and tangible goods, there should be a differentiation between compatibility (with standard hardware and software) and interoperability (with specific hardware and software different from those supplied by the seller). Importantly, the directive should also ensure that consumers receive information about software updates related to the functionality and in particular about updates related to cybersecurity features and the envisaged security lifecycle. Consumers should also be informed about the use of technical protection measures of digital content.

²¹ The purchase of smart goods is covered by the rules on ‘sales contracts’. For those contracts, the Directive does not set out specific information requirements on functionality or interoperability. Whilst one could argue that the information requirements regarding digital content may be relevant too, Recital 19 explains that digital content products are neither sales nor service contracts.

Information about delivery restrictions: too late?

It is not enough that traders inform consumers about geographical restrictions for delivery and payment means “at the beginning of the ordering process” (Art 8(3)). Trading websites should indicate such information, including delivery time, prominently on their front webpage.

Information about applicable law in cross-border cases

As is prominently demonstrated by the case taken by our Austrian member Verein für Konsumenteninformation, VKI v Amazon EU²² in case of a choice of law clause included in terms and conditions, traders should be obliged to clearly and visibly inform targeted consumers that if it is the law of the country where the trader resides that applies to the contract, the consumer still enjoys the protection afforded to him under his/her country’s rules.

BEUC Policy demand

It is unclear how the information requirements for digital content products under the Consumer Rights Directive apply to smart goods. Consumers must receive all the necessary information about the main characteristics of those products, including the necessary hard- and software for its function and how it interoperates with hard- and software different from those supplied by the seller. Consumers should also receive information about updates related to the functioning of those products and most importantly as regards to the cybersecurity features and updates.

10.2. Changes of UCPD Annex I needed to address certain unfair practices

In order to ensure the proper conduct of businesses, to protect consumers, and to ensure legal certainty, certain practices are deemed to be unfair under the UCPD without a case-by-case assessment. Hence, they are in all circumstances illegal. We suggest including the following practices in the relevant Annex I of the UCPD:

10.2.1. Certain practices related to the resale of tickets

Consumers all over Europe report numerous problems when buying event tickets on the secondary market. This is particularly the case when consumers buy them on large online resale platforms. The ongoing reform of EU consumer laws is an excellent opportunity to tackle those issues and ensure that consumers are better protected in the future.

Today, consumers often find impossible to buy tickets with the primary seller at face value as tickets disappear within minutes or even seconds after sales channels are opened. Instead, almost immediately the tickets are being offered for sale on reselling websites which sell them for as high as 900% of their face value.²³ In addition to that, consumers risk not being granted entry to the event due to restrictions imposed by primary sellers or event organisers that they are not informed about on the reselling website.

While consumer organisations and national authorities across Europe work to enforce rules already in place, there is a clear legislative gap which makes their efforts less efficient.

²² Case C-191/15 [2016] ECLI:EU: C:2016:612.

²³ Report by Choice, Australian consumer organisation, from August 2017: “Sold Out: Consumers & the ticket resale industry”.

BEUC calls for a ban of certain practices of reselling websites by amending Annex I to the Unfair Commercial Practice Directive, namely by considering as unfair in all circumstances:

- Using techniques that allow buying tickets on a large scale and for commercial purpose, including through automated software²⁴, to resell event tickets for more than their face value;
- The organised resale of tickets for more than their face value where restrictions imposed by event organisers or primary ticket sellers –for example as set out in terms of conditions – do not allow the resale of tickets or restrict the resale of tickets in a way that could prevent the consumer from being able to use the ticket and access the event in question.

In addition to prohibit the worst practices, we think that the directive also needs to be clarified in how it can apply to other unfair practices that need to be assessed on a case by case basis. BEUC calls on the European Commission to update the Guidelines on the Application of the Unfair Commercial Practices Directive²⁵ in order to include a section on event ticket-reselling websites. Most importantly, it must clarify that omitting important material information, including the main characteristics of the event ticket, such as its face value, indication of the seat/row/section or existing restrictions imposed by third parties to use the ticket, is unfair. It should also specify that providing false information about these characteristics could be considered unfair under the UCPD.

BEUC Policy demand

Consumers all over Europe encounter numerous problems when buying event tickets on the secondary market, for example through online resale platforms. To tackle this issue, the Annex I of the Unfair Commercial Practice Directive should be updated to ban the automated purchasing of tickets to resell them for a higher price and the organised resale of tickets despite restrictions imposed by event organisers or primary ticket sellers.

10.2.2. Online marketing of unhealthy food to children

A European Commission study on online marketing to children²⁶ found that children have clear difficulties in recognising online advertising and in consciously defending themselves against commercial persuasion, with their choices and behaviour affected by such practices. They are particularly vulnerable to pressure selling. The study concludes that more should be done to protect children against online marketing. It also states that the authorities should consider whether particularly harmful practices should be further regulated and/or banned through legislation.

A particularly harmful practice is online marketing of unhealthy food to children. The World Health Organisation has stated that there is unequivocal evidence that childhood obesity is influenced by marketing of foods and non-alcoholic beverages high in saturated fat, salt and/or free sugars (HFSS).²⁷ The rise in the use of HFSS foods being marketed online has been described as a 'paradigm shift' for the way children are targeted by these adverts.

²⁴ Such software, called also ticket bots, is being used to bulk-buy tickets to events in an automated way.

²⁵ Commission staff working document Guidelines on the implementation/application of Directive 2005/29/EC on unfair commercial practices (COM(2016)320 final).

²⁶ http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/impact_media_marketing_study/index_en.htm#foot1

²⁷ Tackling food marketing to children in a digital world: trans-disciplinary perspectives, World Health Organisation, 2016.

This new media landscape poses serious issues regarding the methods used by food advertisers to target children and raises questions as to how children can be adequately protected from these new methods.

Although children benefit from specific protection by the Unfair Commercial Practice Directive, only the practice of directly encouraging children to buy advertised products or to persuade their parents or other adults to buy advertised products for them are banned (Annex I No 28). Given the techniques used by food advertisers to target children online and young people's inability to identify commercial content on the internet, we are calling for online advertising of unhealthy food to children (as defined by the widely-recognised WHO nutrient profile²⁸) to be added to the list of practices which are deemed to be always unfair. At the same time, we call for an assessment into whether the specific protection of vulnerable consumers under Article 5(3) of the Directive and Annex I No 28 effectively protects children from abusive online marketing strategies.

BEUC Policy demands

Children have clear difficulties in recognising online advertising and consciously defending themselves against commercial persuasion. They are affected in their choices and behaviour by such practices.

Children should be better protected against unfair marketing practices by adding the practice of online advertising of unhealthy food to children to Annex I of the Unfair Commercial Practice Directive.

10.2.3. Promotional sales

Consumers are often eager to buy goods or services if the price is subject to a price reduction. Marketing techniques used by traders who advertise such special offers can often lead consumers to taking rushed commercial decisions that they might not have taken otherwise. This is why it is so important that they are not being misled about these offers. Traders should always indicate a reference price from which the reduction was made and be able to prove the correctness of this reference price during at least the last 30 days.

BEUC Policy demands

Informing the consumer about a price reduction without indicating the reference price from which the reduction was made, and without being able to prove the correctness of this reference price in the 30 days preceding the promotion, should always be considered an unfair practice and therefore should be added to the Annex I of the Unfair Commercial Practices Directive.

Also, the Guidelines of the Unfair Commercial Practice Directive should be updated to include a specific section on the event ticket reselling websites.

²⁸ http://www.euro.who.int/_data/assets/pdf_file/0005/270716/Europe-nutrient-profile-model-2015-en.pdf?ua=1

11. Phone communication with traders

Consumers around Europe face excessively high fees for phone communication with passenger transport operators, in particular airlines. They are often surprised by very high phone bills at the end of the month if they needed to contact the airline about their booking.

A cost-limitation for communication by telephone has already been introduced into the Consumer Rights Directive, which foresees that such costs cannot exceed the basic rate (Article 21). Unfortunately, passenger transport services are excluded from the application of this directive (Article 3(3)(k))²⁹.

In BEUC views scope of this directive should be extended to cover also the application of its provisions related to the communication by telephone (art. 21) to the passenger transport.

BEUC Policy demands

The rule specifying that consumers should not pay more than the basic rate to contact a trader via phone should be extended to passenger transport so that consumers are no longer confronted with excessively high fees when calling an airline helpline.

²⁹ However, certain provisions of the Consumer Rights Directive protecting consumers against excessive fees for the use of means of payment or against hidden costs (Article 8(2) and Articles 19 and 22) apply already now to passenger transport.



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