The Consumer Voice in Europe

ROADMAP FOR THE REFIT OF THE CONSUMER LAW ACQUIS 2016

Comments to the European Commission

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General statement

Initiatives in context of the European Commission's fitness-check of EU legislative acts ('REFIT') affecting consumer interest should aim at achieving a solid and modern framework for business-to-consumer transactions in the internal market based on a high level of protection. It is important that a good balance is struck between what should be further harmonised and to what degree and what is better left to national consumer rights. This assessment should be based on robust evidence, focusing on areas where consumer detriment exists. . Most importantly, it must be ensured that any evaluation of consumer law puts consumers' interests upfront and does not lead to a reduction of consumers' protection but ensures a solid and enforceable legal framework for all consumers.

No right without redress

It is positive that the detailed roadmap of the envisaged fitness check of the consumer law acquis focuses on the entire B2C transaction process: Consumer law starts at an early pre-contractual stage and ends at the stage of enforcement. In this respect, it is dissatisfying that the evaluation description nearly entirely omits the aspect of effective redress, which should be addressed in each and every EU directive.

Key questions to be introduced within each topic are:

- **How can consumers get redress?**
- **What elements should be introduced into the consumer law acquis for this purpose?**
- **What are the respective merits of national public and private redress?**
- **Whether sanctions should be harmonised?**

These important questions need to be addressed when carrying out a fitness check. There is no useful right without redress. The aims of the European Commission's Better Regulation agenda, such as effectiveness and relevance, cannot be achieved if consumers have no effective remedies available. In particular, we urge the Commission to develop a more ambitious strategy on the enforcement dimension, taking into account that injunctions are but one aspect of consumer law enforcement. In this respect, the review of the CPC Regulation has a high potential for supporting better enforcement and cooperation of national authorities. In addition, we underline that in relation to substantive consumer legislation, respective remedies should be introduced on a systematic way.
This could be done via uniform rules on the availability of remedies, leaving member states to implement those remedies in a way that is consistent with existing national procedural laws.

Truly high level of consumer protection and its enforceability should be the benchmark for REFIT

The Commission explains quite a few times that the main issues of the fitness agenda relate to market integration, removal of regulatory burdens, need for further harmonisation, or the consolidation of the consumer law acquis. In contrast, the objective to achieve a high level of consumer protection is hardly mentioned in the REFIT roadmap and although formulated as a demand, no further explanation or substantiation is provided on how to achieve this key goal of consumer law.

We do hope that the Commission does not disregard the need for consumer protection and use it as a mere template term. It is important to recognise that the guiding principle of the consumer law acquis must be to achieve consumer welfare first and foremost by way of:

- **a solid legal framework that provides for**
- **a truly high level of protection for consumers, and**
- **a better enforcement of their rights.**

These criteria should build the benchmark for REFIT and any legislative activity which affects consumer interests.

Re-evaluation of the 1999/44 Sales Directive in light of circular economy

We advocate for a review of the 1999/44 Sales Directive in in the light of new market realities, better enforceability and the circular economy, focusing on whether the length of the legal guarantee period, the information duties, and the available remedies are appropriate. BEUC is convinced that the Sales Directive should be improved to ensure that the guarantee rights meet consumers' needs and expectations in a changed and more complex market environment. A few key points for us are the expansion of the legal guarantee period and, in line with the European Commission's Circular Economy agenda and taking into account the practices of planned obsolescence, the addition of the criterion of 'durability' to the current definition of conformity in order to *concretise the reasonable expectation* of consumers.[1]

It is also clear that a *further* harmonisation of the Sales Directive must relate to *more* protection for consumers. This is recognised by the Preamble of the Directive, which states that a future improvement is necessary:

[1] We refer, for example, to the standards for vacuum cleaners, which - according to new measures implementing the eco-design legal framework - will soon require a durability of 500 hours of use or about eight years average durability. Currently, under the Directive, there is a legal presumption that the goods are in conformity with the contract if they, inter alia, show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods.

[…] to envisage more far-reaching harmonisation, notably by providing for the producer's direct liability for defects for which he is responsible (23).

The recent proposal on on-line purchases for tangible goods is unfortunately not addressing these key points but mainly aiming at establishing a full harmonisation framework. In its current state, the proposed Directive would significantly weaken consumer rights in many Member States: French consumers will no longer be able to rely on remedies for vice caché, British consumers no longer reject a faulty good from the start, Portuguese consumers no longer freely choose the remedies, or Dutch consumers no longer benefit from a longer guarantee period due to a long expected lifespan of the product. This cannot be the vision of European consumer sales law. Our position on this proposal will be issued in short time.

We are worried that in order to act quickly and to avoid the proposed fragmentation of the market into on and off-line sales, the European Commission may simply expand the scope of the on-line purchases proposal to cover all sales (including thus off-line sales). This may also lead to new unfair commercial practices, such as situations where sellers inform consumers that a certain product must be purchased online in order to deprive them from legal guarantee rights.

This approach would fully disregard the urgent need for a broad and in-depth modernisation of this area of consumer law. It would limit the review to the very few elements addressed in the recently presented on-line proposal. Such a fast track legislative approach would lead to the consolidation of an outdated market concept to the detriment of all European consumers but also businesses. This is not acceptable, nor compatible with the European Commission's better regulation objectives and with the European Commission's obligation to ensure a high level of protection of consumers in all its tasks.

Advertising and Price indication

At the outset of every transaction process, questions of representation and information about the product and the indication of its price arise. Only if consumers are not misled and have the correct information about the characteristic of the product, informed choices are possible and price comparisons facilitated. For the sake of clarity, we welcome the Commission's intention to assess the link between the interplay between the information requirements provided in the Unfair Commercial Practices Directive, the Consumer Rights Directive, and the Price Indication Directive, taking into account that the latter was based on Art 129a EC[2] (Consumer Protection).

We would like to stress that the right of consumers to receive pre-contractual information as granted under the 2011 Consumer Rights Directive are an important aspect of consumer protection because it helps to balance the information asymmetries that exist between traders and consumers. It is an undisputed fact that without sufficient information, an informed choice is impossible. In order to ensure the functioning of the freedom of contract and to protect the weaker party in a contractual relationship, rights

[2] Maastricht consolidated Version.

of consumer to receive information before and after conclusion of a contract should be strengthened, in no way weakened.

In some Member States, however, traders do not comply with the information requirements set out by the 2011 Consumer Rights Directive. Such shortcomings should therefore be taken into account when exercising the Fitness Check.

Another focus should be placed on the interplay between the Misleading and Comparative Advertising Directive and the Unfair Commercial Practice Directive due to their obvious interrelation. We would also like to draw the Commission's attention to new forms of advertising which are emerging and how comparison of prices can be facilitated in the digital environment but on the other hand is at risk due to dynamic and individualised pricing techniques. We have also concerns about forms of hidden advertising, for example advertising which occurs in social networks or at sharing economy platforms where it is particularly difficult for consumers to identify commercial purposes or the identity of the traders.

Unfair Commercial Practice Directive:

We do not agree with the assessment that the Unfair Commercial Practice Directive (UCPD) has established an appropriate standard for consumer protection and that there is no need for amendment. Quite to the contrary, there is an obvious general problem of enforcement of the standard set out in the UCPD and an urgent need to strengthen the respective role of national competent authorities, consumer associations, and the European Commission, using an "integrated" approach that takes into account public and private enforcement tools. The full harmonisation concept has turned out to have negative effects in a number of countries on (pre-) existing national legislation on unfair practices. Since the Directive has established an exhaustive list of unfair commercial practices, Member States are prevented from prohibiting and punishing certain unfair practices which are closely connected to the specific cultural, social or economic environment of the Member States but are not included in this list. In particular when it comes to transparency in pricing and promotions, the current list is not comprehensive and precise enough.

Additionally, it is a significant flaw and leads to clear consumer detriment that the Directive does not provide for an adequate framework for contract law remedies for consumers to obtain redress where a contract has been concluded as a consequence of an unfair commercial practice. We are therefore worried that consumers are left empty-handed when problems of law infringement or enforcement arise. The Directive shows its ineffectiveness not only in specific sectors, such as misleading environmental claims but also its apparent unfitness to tackle problems brought by the digital dimension of commercial and non-commercial transactions. For example, problems related to on-line booking, comparison tools, or the collaborative economy can often not be solved by the current standard of protection laid down by the Directive; this also due to the full harmonisation effect of the Directive, which may prevent Member States to combat certain unfair practices.

We therefore hope that the update of the Commission's guidance document on the Directive, which hopefully will include issues that have emerged since the publication of the last version particular in relation to the digital economy, will be published soon. However, even though such guidelines may serve as a valuable source of information, we would like to emphasise that a renewal of the guidance alone is not enough. They cannot provide a formal interpretation of community law in relation to specific situations and have no legal authority. In relation to several sectors, we know from experience that the guidance document in its current form, which included already certain principles on fair practices in specific sectors like for example on comparison tools, does not have any relevant impact.

Unfair Contract Terms: no maximum harmonisation

As to the fitness check of the Unfair Contract Terms Directive, we wish to point out that we welcome the assessment of whether the provisions should be reinforced by additional rules on standard terms that are always prohibited, in particular sector-specific areas such as financial services and (air) transport contracts, also taking into account the digital sphere and the growing emergence of online platforms. A maximum harmonisation, however, is not indicated because 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 comparison to a given national law. The highly developed ECJ case-law on unfair contract terms should be consolidated in a Communication from the European Commission.

Injunctions Directive

As the Commission rightly points out in the Study on the application of the Directive 2009/22/EC, injunctions are indispensable to rectify detriment to consumer, whether they are used for prohibiting unfair practices *pro futuro* or for imposing sanctions *ex post*. A fair number of consumer organisations in the Member States have successfully sought injunctions in order to stop illegal practices, for example relating to unfair contract terms.

However, as mentioned in the REFIT roadmap, when it comes to cross-border infringements, the Injunctions Directive has not proven to be a useful tool for consumer protection for many reasons, among others due to high costs involved in cross-border actions or the risks that consumer organisations will not get reimbursed for proceeding costs, even where the action brought is successful. Other reasons relate to procedural obstacles, such as problems to obtain evidence or slow-paced proceedings. Again, we would like to point out that it is of utmost importance to exploit the potential for enforcement cooperation. BEUC would support an evaluation that focuses on these aspects.

Furthermore, we believe that there is a need to analyse the need to extent the scope of the Directive to legal instruments not yet mentioned in its Annex. For instance, it should be assessed whether other areas, such as product liability or data protection should be

included in the scope of the Directive. We also suggest the creation of a platform which collects information on all injunctions brought in cross-border cases.

Injunctions alone are not an effective deterrent against law infringements by traders. Besides the protection of collective interests of consumers, individual consumers need to be enabled to successfully obtain redress where traders act contrary to their obligations. For example, consumers should be able to claim compensation or withdraw from the contract if it was based on unfair practices. Consumer redress should therefore be a key priority of REFIT. In this respect, another focus should be on the relevance of successful injunctions on individual proceedings by consumers, in particular the question on third-party effects and binding effects on other traders infringing the law by the same illegal practice.

Although not covered by the REFIT roadmap, we wish to point out that many consumer will not go to court individually as it is expensive, complicated, time-consuming and intimidating for many, and even more so in cross-border cases. What is needed, are collective redress mechanism to enable consumers to obtain compensation for the harm suffered as a result of unlawful practices by traders.[3] REFIT of the consumer acquis should therefore include revisiting the Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. REFIT provides the perfect opportunity to assess Member States' progress against the objectives of the Recommendation and consider introducing a mandatory instrument or incorporating the objectives of the Recommendation into existing mandatory instrument(s), as appropriate.

REFIT list of questions - addendum

In light of the description of the Roadmap and general purpose of the REFIT evaluation, we understand that the list of questions provided under C.2. is indicative and open for improvement.

We therefore suggest to

- Assess whether the questions sufficiently reflect the need for a high level of consumer protection and the need for an enforceable legal framework;
- Address whether the use of the notion of "regulatory burden", as provided in the questions to "efficiency", is adequate. We believe it is unacceptable to describe law or "regulation" as a burden *per se*. Rules have a purpose and in the case of consumer law, this purpose is the provision of protection and enforceable rights. The idea to reform *consumer law* by way of abolishment of consumer rights standards is a logical fallacy;
- Add to the questions on effectiveness: "What is the level of enforcement of national authorities and the level of compliance of businesses?";

[3] For more detailed BEUC position on collective redress, we refer to our position paper 'Towards a Coherent Approach to European Collective Redress', X/2011/049, available at www.beuc.eu.

- Add to the questions on effectiveness whether the lack of compliance of businesses may be remedied by introducing more effective enforcement tools, including collective actions, and by enabling consumers to easier obtain individual redress;
- Add to the questions on effectiveness whether the lack of compliance of businesses could be remedied by giving more weight to the role of consumer organisation and the cooperation among various enforcement bodies and organisations;
- Take into account that contract law differences are principally not a key barrier trade for business. Compliance costs which relate to different tax regimes or local language requirements will often be more significant. We are also concerned about the approach to assess the efficiency of a legal instrument on the basis of a cost-benefit analysis since it is impossible to value the need for consumer protection in figures;
- Take into account that SMEs face different problems when doing business or going cross-border than consumers and can therefore not be treated as such. Likewise other traders, SMEs have usually an advantage of information, experience, and bargaining power and consumers need to be protected from exploitation. It is a long-standing principle in consumer law that the yardstick is a category of persons who act professionally while the subjective situation of the person concerned is not relevant;
- Take into account that the wish for coherence and simplification cannot come at the price of giving up on necessary modernisation or reducing consumer protection standards.
- "Specific inconsistencies and unjustified overlaps" can only be tackled by way of a broad and in-depth analysis of the respective consumer law requirements and by granting detailed consideration to sector-specific consumer needs which are often necessary. For an explanation how a reform of the respective legal instrument will bring added value and better protection for consumers.

END

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