The Consumer Voice in Europe

# FITNESS CHECK OF EU CONSUMER LAW 2016

## BEUC Position

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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 other party.** EU consumer law gives therefore essential rights to consumers, such as the rights to receive true information, to not be misled or aggressed, to be protected against unfair terms and unfair practices, or to have remedies available in case of faulty goods. These rights must be **safeguarded by enforcement and redress mechanisms:** there are no consumer rights without redress. A fitness check of consumer law should ensure that consumer rights across the EU are not weakened but improved and modernised.

# Summary

EU consumer law is there to protect and empower consumers and to provide for effective enforcement of their rights. Robust consumer protection is the cornerstone of building confidence in well-functioning markets, driving competition and supporting responsible businesses to flourish across the EU. These criteria should therefore form the benchmark for the Commission's fitness check of consumer law 2016. We call on the European Commission to take into account **BEUC's demands**, which are based on the expertise and vast practical experience of our membership**.**

## BEUC's expectations

- **The Fitness check should place consumers' interests in the foreground** and focus on the various challenges in protecting consumer rights throughout the commercial transaction.

- **Full harmonisation** does not necessarily boost consumer confidence in the internal market. It may help tackling legal fragmentation but it does not favour consumers if it does not bring a truly high level of consumer protection. During the fitness check of consumer law 2016, it should be carefully considered whether it is justified - not only from an internal market perspective but also from a consumer trust perspective - to end national autonomy in the areas concerned. It is crucial that national consumer standards are not omitted or watered-down.

- **The Fitness check of the 1999 Sales Directive** should address the fragmentation between offline and online purchases which is effected by the Commission's Proposal on the online sales of tangible goods. It should be ensured that guarantee rights meet consumers' needs and expectations in a changed and more complex market environment. Consumers expect to benefit from a high level of protection, no matter whether rules for tangible goods or those for digital content products apply. This includes: a free choice of remedies in case the product is defective, a legal guarantee period that is based on the expected lifespan of the product, and a joint liability between traders and producers.

- **The Fitness check of the Price Indication Directive** should acknowledge that consumers can only make informed choices if they have the correct information about the product or service and the price. A focus should be put on the need for better enforcement, in particular when it comes to effective, proportionate, and dissuasive sanctions.

- BEUC supports the Commission's intention to look at the interplay between the **Misleading Advertising Directive** and the **Unfair Commercial Practice Directive**. Attention should be paid to new forms of advertising and the problems that come with dynamic and individualised pricing techniques.

- The **Unfair Commercial Practices Directive** has shown great potential to protect consumers against unfair commercial practices at all stages of a commercial transaction. At the same time, there are shortcomings in the Directive. Some clarifications are necessary and improvements needed. Enforcement of the law and the possibility of redress are key for its effectiveness.

- The **Unfair Contract Terms Directive** is an important piece of EU consumer legislation. We expect the fitness check to analyse problems of consumer protection in sector-specific areas. Particular attention should be paid to problems that arise in the digital sector, taking into account that consumers should be given a real possibility of becoming acquainted with the terms and conditions. A maximum harmonisation approach is not desirable.

- The **Injunction Directive** has shown its importance to stop illegal practices of traders which are exercised domestically, but there are practical barriers to using the Directive in some Member States. In addition, when it comes to cross-border activities, the Directive has not turned out to be an effective tool for consumer organisations due to procedural obstacles and related costs. The fitness check should also consider how to make a successful injunction decision more impactful and to address the link to redress.

- During the fitness check of EU consumer law, we recommend to look into the **form by which information is presented to consumers and its simplification** and to explore the respective consumer reality. It is important to look at how information is given and whether there are best practice examples based on real-world experience and behavioural economics. Mandatory protective rules should be strengthened where appropriate.

- Clarification is needed as to **how, and to what extent, EU consumer law applies to online platforms** which facilitate the communication and contractual transactions between market players. There is a strong need to discuss whether a reform of EU consumer law is necessary or whether the main problems relate to enforcement. The fitness check should address (with an evidence-based focus) whether a clarification of the UCPD is needed, discuss whether specific information requirements related to online-intermediaries should be laid down, and explore the potential of rules for platform liability.

- **There are no consumer rights without redress**. How can consumers get redress? What elements should be introduced in the consumer law acquis for this purpose? What are the respective merits of national public and private redress? Should sanctions be harmonised? These important questions need to be addressed. Consumer law cannot be effective and be useful if consumers have no effective remedies available. We urge the Commission to develop an **ambitious strategy on the enforcement and redress dimension.**

## 1. Need for consumer protection throughout the commercial transaction

**Throughout the business-to-consumer commercial transaction it is the consumer who is in a weaker position vis-à-vis the other party.** EU consumer law is therefore the legislative response to an asymmetry of information and bargaining power to the disadvantage of the consumer, who needs to be protected from exploitative or unfair behaviour of the professional. It is undisputed that consumers need to have effective rights and remedies available, particularly in cases where traders do not comply with statutory or contractual obligations.

**Essential consumer rights**, such as the rights to receive true and adequate information, to not be misled or aggressed, to be protected against unfair terms and unfair practices, or to have remedies available in case of faulty goods, are at the core of EU consumer and marketing law. Such rights and the right of consumer organisations to take actions should not be weakened. In the case of distance sales, the consumer's right of withdrawal is crucial: if consumers are unable to see the goods before concluding a contract, they should be allowed to test and inspect the goods bought. These rights must be **safeguarded by enforcement and redress mechanisms**: there are no consumer rights without redress. Consumer law is not effective if consumers do not have remedies available and if there is not an effective forum for handling complaints and dealing with a lack of compliance. Enforcement and sanctions must therefore be at the heart of any review of EU consumer law.

These rights are **also important for businesses**: the EU internal market enables more and more consumers to carry out cross-border transactions across 28 Member States. It also allows traders to reach over 500 million consumers. Within this market, non-compliance with the law can easily affect a high number of European consumers who may suffer damage or harm. From the company's point of view, complying with EU consumer rules is likely to increase consumer trust and to give them a competitive advantage over other companies which do not respect consumer rights.

## 2. Challenges of consumer protection

There are **many challenges in upholding consumer rights**. In quite a number of cases, consumers are ill-informed, or even misled, about their rights if traders do not comply with consumer protection rules. In the digital area, it is particularly difficult for consumers to find that a trader's practice is deemed unfair, illegal, or constitutes a breach of contract. Consumers are frequently discouraged from lodging a complaint because of unclear information given by the trader. Equally important is the problem of a lack of enforcement and redress mechanisms. In many Member States, consumers do not have **civil law remedies** to obtain redress in case of a law infringement by the trader.

Even where remedies are available, monetary and other access barriers hinder consumers from starting costly proceedings. Many consumers do not go to court individually as it is expensive, complicated, time-consuming and intimidating; even more so in cross-border cases. The availability of alternative dispute resolution mechanisms only helps if traders are committed to such proceedings, which regularly is not the case. **Collective redress mechanisms** are necessary to obtain compensation for the harm suffered.

**Consumer organisations** have a pivotal role in this regard. They can detect market failure at an early stage, collect and inform consumers, initiate proceedings or co-ordinate enforcement actions against companies acting in different Member States. They must be considered as important partners in consumer law enforcement, e.g. in the Consumer Protection Cooperation Network. However, when it comes to cross-border infringements, injunctions are not often useful for consumer protection because of high costs or the risk

of not being reimbursed, even where the action brought is successful. Other reasons relate to procedural obstacles.

**BEUC's expectations for REFIT consumer law 2016:**

The fitness check should put the consumer interest first and assess the challenges in protecting consumer rights. Consumer law starts at an early pre-contractual stage and ends at the stage of enforcement. The fitness check should focus on the various challenges in protecting consumer rights throughout the commercial transaction.

## 3. Directives under REFIT: BEUC comments

### 3.1. 1999/44 Sales Directive

Building upon the high level of protection under the EU consumer law acquis, there are **opportunities for reform in the area of EU sales law and legal guarantees.** However, we believe it is important to recognise the context – this Directive set a minimum standard, allowing member states to build upon the provisions over time. Due to their full harmonisation character, the recent Commission's proposals on the distance sales of tangible goods and the supply of digital content products will impact on national consumer rights and it is important that these rights are strengthened, not weakened.

We are disappointed that the Commission took an approach which reversed the normal order for the preparation of legislative initiatives (assessment - discussion - proposal). However, we welcome the Commission's statement in its Evaluation and Fitness Check Roadmap[1] of consumer law 2016 that it is necessary to analyse as a priority the application of the Sales and Guarantees Directive to the goods sold by means other than distance. There is a need for clear rules on the conformity of goods. It is crucial that consumers have remedies available in case a product is faulty.

**Modern and effective rules for on-line and offline transactions are essential for consumers when they make purchases across the EU Single Market. BEUC has published two comprehensive position papers on the Commission's Proposals on sales of tangible goods and digital content products, in which we lay down our concerns and BEUC's view in more detail.[2]**

Since the Proposal on sales of tangible goods would apply only to distance sales contracts, the 1999/44 Sales Directive would continue to apply to non-distance sales. This would lead to different sets of rights for consumers buying directly from a shop and those buying through the internet or other distance channels. If the proposal were implemented in its current form, it would be better for consumers not to shop online in some Member States where their current national law offers a higher level of protection than the EU proposal. In other Member States, the new proposals would offer advantages to consumer, so that purchases in brick and mortar shops would be less attractive to consumers. Thus, the

[1] http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf
[2] http://www.beuc.eu/publications/beuc-x-2016-053_csc_beuc_position_paper_on_tangible_goods_proposal.pdf; http://www.beuc.eu/publications/beuc-x-2016-036_are_proposal_for_a_directive_on_contracts_for_the_supply_of_digital_content.pdf

proposed Directive may inadvertently curb online sales in some countries while promoting them in other countries. Consequently, it would lead to unequal conditions, unfair competition and more fragmentation, not less, of the market.

We understand that the Commission will focus the fitness check of the 1999/44 Sales Directive on a possible alignment of the rights for face-to-face sales and distance sales of goods[3]. However, 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 channels. This approach would ignore 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 proposal for on-line goods and would turn what was always intended to be a *minimum* standard into a maximum "cap" on rights, significantly curtailing existing rights for millions of consumers across the EU. 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 compatible with the European Commission's objectives of better regulation or with its obligation to ensure a high level of protection of consumers.

**The Sales Directive should be improved to ensure that the guarantee rights match consumers' needs and expectations in a changed and more complex market environment.** From the consumer perspective, available remedies in case of faulty products against the seller and the producer, the length of the legal guarantee period, and the reversal of the burden of proof period are the crucial issues when engaging in purchases across the EU internal market.

**BEUC demands:**

- **It must be up to the consumer to decide which remedy he prefers** because it is the trader who is in breach of contract. A free choice of remedy, established and well-received in a number of Member States, is the fair legislative response to misconduct from the trader.

- **A legal guarantee period must live up to the longer lifespan of many products** and not frustrate legitimate consumer expectations. A blanket two-year legal guarantee period is not sufficient. There should be a longer period for durable products according to their expected life-span; this is consistent with the objectives of the circular economy agenda.

- What is needed is **more ambitious legislation**: as stated in the Preamble of the Directive, future attempts to further harmonise EU sales law should relate to more protection for consumers, for example by providing for the **producer's direct liability**. BEUC advocates for a **joint liability of sellers and producers** which should be based on the concepts which already exist in many Member States.

In light of the Commission's Proposals on sales of tangible goods and digital content product, we stress that:

- **a fragmentation between the offline and online marketplaces should be avoided** because it would come at the expense of consumer protection, would undermine clarity and consistency for both consumers and traders, and would place a stranglehold on free competition between online and offline sales;

[3] At p. 15.

- **differentiation between digital content products and tangible goods** should be avoided because consumers expect products to work and to have remedies available if problems arise.

It is therefore important to **align, where appropriate, both Proposals** so that consumers always reach an equivalent result, regardless of whether rules for tangible goods apply or those for digital content products. That said, we stress that the **basis of an alignment must be of a truly high level of consumer protection**. There is much room for improvement in both Proposals. It is very unfortunate that the Proposal on distance sales of tangible goods would – in its current shape – significantly weakens consumer rights in many Members States. French consumers will no longer be able to rely on remedies for *vice caché*, just as the British consumers will not be able to reject a faulty good from the start, or as Portuguese consumers will no longer freely be able to 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 detailed vision can be found in our Position Papers.

**BEUC's expectations for REFIT consumer law 2016:**

The fitness check of the 1999 Sales Directive should end the fragmentation of the market into offline and online purchases, caused by the Commission's proposal on the online sales of tangible goods. It is important to ensure that legal guarantee rights meet consumer needs and expectations in an evolving market. Consumers need a truly high level of protection to give them confidence in markets and to drive growth, regardless of whether rules for tangible goods or those for digital content products apply. This includes: a free choice of remedies in case the product is defective, a legal guarantee period that is based on the expected lifespan of the product, and a joint liability between traders and producers.

### 3.2. Price Indication Directive

At the outset of every commercial transaction, there are questions about the product and its price. Hence, the obligation under the Price Indication Directive to indicate the selling price and the price per unit is the most crucial piece of information for consumers. This is considered the 'easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons'.[4] Consumers can only make informed choices and compare prices effectively if they **are not misled and have the correct information about the characteristics of the product and its price.**

We urge the Commission to look into compliance issues and lack of information with respect to **unit selling prices**, which must be:

- **unambiguous,**
- **easily identifiable, and**
- **clearly legible.**

[4] Recital 6 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.

The Commission should assess how Member States have made use of the regulatory options and derogations provided under the Directive and whether this was justified. For example, in some Member States, a range of units can be used which can cause difficulty with comparability. Another problem is small type sizes, which makes it difficult or even impossible for consumers to read the selling price. Greater clarity could also be helpfully provided around unit pricing of short-term promotions to ensure that these are not exempted, causing confusion. Another focus should be placed on the **potential for improvement**, for example by extending the scope to services. In areas where it is particularly difficult for consumers to compare different offers, such as mobile telecommunication or energy, compulsory unit pricing for certain services should be considered.

We welcome the Commission's intention to assess the information requirements 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[5] (Consumer Protection). The right of consumers to receive pre-contractual information under the directives mentioned above is an important aspect of consumer protection. It helps to balance the information asymmetries that exist between traders and consumers. Making an informed choice is impossible without sufficient information. In order to protect the weaker party in a contractual relationship, the right to receive information before and after the conclusion of a contract should be strengthened, not weakened. Shortcomings in implementation or the non-compliance of rules should be taken into account during the Fitness check.

**BEUC's expectations for REFIT consumer law 2016:**

The fitness check of the Price Indication Directive should acknowledge that consumers can only make informed choices if they have correct information about the product and its price. A focus should be put on the need for reducing inconsistencies and better enforcement, in particular when it comes to effective, proportionate, and dissuasive sanctions.

### 3.3. Misleading Advertising Directive

BEUC agrees with the Commission's intention to put a focus on the interplay between the Misleading and Comparative Advertising Directive and the Unfair Commercial Practices Directive due to their obvious interrelation, in particular when it comes to business-to-business relationships. However, we would **not advise the Commission to attempt to establish one set of rules for the protection of both consumers and businesses** in this area; different considerations arise and inappropriate consolidation is likely to lead to an over-complication of consumer law.

We would also like to draw the Commission's attention to new forms of advertising which are emerging and how a price comparison can be made in the digital environment while being affected by dynamic and individualised pricing techniques. We also have concerns about forms of hidden advertising, for example advertising which occurs on social networks

[5] Maastricht consolidated Version.

or on sharing economy platforms where it is particularly difficult for consumers to identify commercial purposes or the identity of the traders.

**BEUC's expectations for REFIT consumer law 2016:**

BEUC supports the Commission's intention to look at the interplay between the Misleading and Comparative Advertising Directive and the Unfair Commercial Practice Directive during REFIT. Attention should be paid to new forms of advertising and the problems that come with dynamic and individualised advertising and pricing techniques.

### 3.4. Unfair Commercial Practice Directive

The Unfair Commercial Practice Directive (UCPD) is a very important piece of EU consumer legislation, which has the potential to protect consumers against unfair commercial practices before, during, and after the transaction. In many respects, the Directive protects consumers from the consequences of unfair commercial practices where they are material. However, certain aspects require improvement and we expect the fitness check to assess whether the Directive has established a sufficient standard for consumer protection or whether there is need for its amendment.

**Our most significant concerns relate to:**

- **General problem of enforcement**

As with other directives under the REFIT examination, there is an obvious **problem of enforcement** of the UCPD, but here to a particular high degree, there is an urgent need to strengthen the role of national 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 often closely connected to the specific cultural, social or economic environment of the Member States and are not included in its annex. When it comes to transparency in pricing and promotions, the current list is not comprehensive and precise enough.

- **Absence of contract law remedies**

It is a significant flaw, and to the detriment of the consumer, that the Directive does not oblige Member States to implement an adequate framework for **contract law remedies** for consumers, such as rights to withhold performance, obtain redress, or terminate a contract where the contract has been concluded as a consequence of an unfair commercial practice[6]. We are therefore worried that consumers are left empty-handed when problems of law infringement or enforcement arise. The Directive shows ineffectiveness in specific sectors, such as misleading environmental claims and unsuitability in tackling problems brought by the digital dimension of commercial and non-commercial transactions. For

[6] In some Member States, for example in Italy, consumer may receive compensation in case they suffered harm from unfair commercial practices. This should be an EU-wide standard. See also footnote 16.

example, problems related to on-line booking, comparison tools, or the collaborative economy can often not be addressed by the current standard of protection laid down by the Directive; this also due to its full harmonisation effect, which prevents Member States from combatting certain unfair practices.

- **Digital environment**

Consumers increasingly rely on online platforms in their decision-making process. However, the scope of application of the **UCPD is often not clear**[7], which is why we welcome the update of the **Commission's guidance document** on the Directive. However, even though such guidelines may serve as a valuable source of information, a renewal of the guidance alone is not enough. They cannot provide a formal interpretation of EU law in relation to specific situations and have no legal authority. This can be seen in the example of the previous version of the guidance document, which, in relation to several sectors, did not have any relevant impact.

- **Online marketing to children**

In a European Commission study on online marketing to children[8], it was found that **children have clear difficulties in recognising online advertising** and consciously defending themselves against commercial persuasion and are affected in their choices and behaviour by such practices. They are considered particularly vulnerable to pressure selling. The study concludes that more should be done to protect children against online marketing. It also states that it should be considered 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)[9]. 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. 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 direct exhortation to children to buy advertised products or 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 diminished ability to identify commercial content on the internet, we are calling for **online advertising to children of unhealthy foods** (as defined by the widely-recognised WHO nutrient profile[10]) **to be added to the list of practices** which are deemed to be always unfair. At the same time, we call for an **assessment** 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.

[7] See in detail under 4.2.

[8] http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/impact_media_marketing_study/index_en.htm#foot1.

[9] Tackling food marketing to children in a digital world: trans-disciplinary perspectives, World Health Organisation, 2016

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

**BEUC's expectations for REFIT consumer law 2016:**

The Unfair Commercial Practices Directive has great potential to protect consumers against unfair commercial practices throughout the entire commercial transaction. At the same time, shortcomings of the Directive have a strong impact on the level of protection of consumers. Clarification and improvements are needed in many respects. Enforcement and redress are key for its effectiveness.

### 3.5. Unfair Contract Terms Directive

The Directive has proven to be useful in protecting consumer rights. The abundance of case law demonstrates, on the one hand, that unfair contract terms are wide-spread and consumers and consumer organisations stand up against contract terms which create a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

As to the fitness check of the Unfair Contract Terms Directive (UCTD) we would like to stress the following **priorities:**

- **Rules on standard terms that are always prohibited**

We support the idea to explore strengthening consumer protection against unfair contract terms by introducing a black list of unfair terms that are always prohibited and which should be updated regularly. This may be needed with respect to sector-specific areas, such as air transport contracts where a blacklist of terms based on existing court cases would put an end to systematic consumer detriment in this sector. In our comments on the recently adopted Interpretative Guidelines on the EU regulation on air passenger rights, we called on the Commission to include a section in this document dedicated to potentially unfair contract clauses in air passengers' contracts. The fitness check provides an opportunity to do this in the UCTD itself.

As regards contracts for the supply of digital content, there are specific problems of unfair terms. Consumers are very often confronted with a flood of disclaimers and unfair copyright and liability clauses. Terms are often lengthy, complex, and difficult to access. The Commission should address these concerns during the REFIT exercise, taking into account BEUC's suggestion[11] of a specific non-exhaustive list of unfair terms to be annexed to the proposal on digital content products or to the Directive.

- **Ex officio duties of judges**

It is evident from cases of the Court of Justice that the invalidity of an unfair term is determined *ex officio* by national courts. National legislation must not prevent courts from doing so. Since the Directive sets out that consumers are not bound by unfair terms, we very much support the incorporation of case law on *ex officio* duties of judges to assess the presence of unfair terms in the Directive. This would contribute to legal certainty and facilitate law enforcement. Some member states have already done this on a case by case basis.[12]

[11] http://www.beuc.eu/publications/beuc-x-2016-034_pki_air_passenger_rights.pdf
[12] For example, UK law includes an express provision about ex officio duties of judges.

- **Maximum harmonisation not justified**

A maximum harmonisation is not justified for this Directive 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 comparing it with a national law. The minimum harmonisation directives were agreed by EU legislators precisely because they did not preclude better protection levels in national laws. This also applies to the annex of the UCTD, which contains a non-exhaustive list of the terms which may be regarded as unfair.

- **Extension of protection to individually negotiated unfair terms and terms which describe the main subject matter**

BEUC considers that fairness rules should apply to all contract terms irrespective of whether they have been individually negotiated or not. In practice the consumer will often lack the bargaining power and the knowledge required to be in a position to influence the content of a contract term during an individual negotiation process. For example, the UK has recognised this need by extending consumer protection from unfair standard contract terms to unfair negotiated contract terms, as well as consumer notices.[13]

In addition, an assessment of an unfair character should also be possible of terms which describe the main subject matter of the contract or relate to the adequacy of the price. The exclusion of unfairness control of these aspects of the contract leaves consumers without the necessary and expected protection.

- **Consumer attitude to terms and conditions**

Many consumers, particularly when they shop online, accept terms and conditions without reading them. This happens because such terms are often lengthy and complex, so consumers have no fair chance to get to know their content and impact on the contractual relationship. During the fitness check of consumer law, it should be assessed *in which way* terms and conditions are expressed, for example whether they are drafted in plain, intelligible language. It is also important to take into account whether terms and conditions can be easily accessed at a place where the consumers reasonably expect them to find. This must be another factor in assessing the unfairness of a contract term.

Consumers should be able to acquaint themselves with terms and conditions before the conclusion of the contract, with due regard to the means of communication used.

It is not realistic to expect an average consumer to read and understand all terms and conditions if they are so lengthy. The Norwegian Consumer Council demonstrated what reading the terms and conditions actually entail when they publicly read the terms of conditions of the most common smartphone apps. It took them 37 hours in total.[14] This shows that the current state of terms and conditions for digital services is bordering on the absurd. In its study, the Consumer Council found that the terms and conditions for these apps were not only drafted in an unclear or complicated manner but also contained quite a few unfair contract terms which consumers blindly accept. The fitness check should therefore take into account consumer reality and seek to find ways – tested on real consumers - of shortening and simplifying terms and conditions while increasing their quality standard.

[13] Consumer Rights Act 2015, section 61.
[14] http://www.forbrukerradet.no/side/the-consumer-council-and-friends-read-app-terms-for-32-hours

**BEUC's expectations for REFIT consumer law 2016:**

The Unfair Contract Terms Directive is an important piece of EU consumer legislation. We expect the fitness check to analyse problems of consumer protection in sector-specific areas. Particular attention should be paid to problems that arise in the digital sector. A maximum harmonisation is not appropriate.

### 3.6. Injunctions Directive

Since the adoption of the Injunctions Directive, a fair number of consumer organisations have successfully sought injunctions to stop illegal practices, like unfair contract terms, door-step selling, distance selling or timeshare scams. As far as domestic illegal practices are concerned, we consider that the Directive has the potential to be an important tool that consumer organisations have at their disposal. However, significant barriers to its use – such as cost implications[15] - mean that this is often not the case in practice. In particular, cost protection should be explored.

In addition, with injunctive actions brought under the Directive, consumers cannot be compensated for any harm they suffer. The situation is aggravated further by the fact that, in most countries, the injunction decision has effect only *inter partes* and cannot be relied upon in follow-up actions for compensation. Therefore, consumers often remain empty-handed.

In case consumer organisations wish to seek **cross-border injunctions**, a number of additional **obstacles** exist:

- The high costs involved in cross-border actions are a major hindrance; so 'pleading abroad' is often unaffordable for consumer organisations. In addition, even where the injunction is successful, there is a risk of non-reimbursement of all costs, which is why consumer organisations would need additional resources to cover their financial investments.

- Cross-border procedures are rather slow, so ideally the Directive should allow for more speedy procedures. Even nationally, it is not always possible to use fast-track procedures because of procedural risks or burdens[16]. On top of that, nothing prevents the trader from targeting consumers in another country.[17]

[15] For example, in the UK, even where a consumer organisation brings an important injunction action in the public interest, if the case is lost for any reason (including on a technicality) the consumer organisation will have to pay the trader's costs, which could run into millions of euros. This is untenable.
[16] For instance, in Austria if an injunction granted under summary procedure is overruled in the appeals procedure, the defendant is granted a no-fault claim to damages against the plaintiff.
[17] After an injunction was successfully obtained by the UK's Office of Fair Trading against a Belgian company (*Office of Fair Trading v Duchesne SA*, Cour d'Appel de Bruxelles, 8 December 2005), the same prize notifications were sent by other companies, linked to the defendant, from other Member States. The Directive should therefore at least be improved by an extension of legal force to linked companies and successors of the defendant.

- There are other procedural obstacles, which relate to obtaining evidence and accessing the data of the trader from abroad. The fact that "foreign" consumer organisations are often not well aware of local structures complicates things even more.

The **question of the limited scope** of the Directive deserves attention too. There is no valid reason to restrict the Directive to consumer protection measures which are currently listed in the annex. For instance, areas such as product liability, data protection, transport or financial services, should also be covered. In addition, the authority of a court to issue injunctions can be effective only if there are **penalties** in place for failure to respect them. This is provided as a possibility in the Directive, but should be elevated to an obligation.

The greatest shortcoming of the injunctions procedure is the **absence of redress** possibilities. Besides protecting the collective interests of consumers, individual consumers need to be able to obtain redress where traders behave differently from their obligations. During the Fitness check of the Injunction Directive, the link between successful injunctions and individual redress for consumers should be considered, as well as the suspension of limitation periods.

**BEUC's expectations for REFIT consumer law 2016:**

The Injunctions Directive has shown that it has the potential to be effective in stopping the illegal domestic practices of traders. However, reform is needed to ensure this potential is improved in practice. In addition, when it comes to cross-border activities, the directive has not turned out to be an effective tool for consumer organisations due to procedural obstacles and related costs. The fitness check should also consider how to strengthen the link between a successful injunction decision and redress.

## 4. BEUC comments on some important horizontal issues

### 4.1. Information requirements

Throughout the commercial transaction, consumers can only make informed choices and price comparisons if they are properly informed about the true characteristic of the product or service. Information requirements have an impact on key rights, such as the right of withdrawal under the Consumer Rights Directive or the right to ask for repair of a faulty product under the 1999 Sales Directive. Generally, they help balance the information asymmetries that traders and consumers have. It is an undisputed fact that without sufficient information, decisions are basically guesswork and wrong information affects the economic behaviour of consumers. Hence, **much is at stake.**

**BEUC is open to discuss the potential of regrouping and streamlining marketing/pre-contractual information requirements currently included in the Directives under REFIT and the Consumer Rights Directive, as long as the consumer protective standard is not lowered.**

In order to effectively protect consumers against unfair practices and misleading information and marketing, the existing level of consumer protection must be reinforced by additional rules which take into account 1) the technical and digital dimension of modern commercial transactions and 2) the enforcement dimension.

We consider it crucial to assess *how, in which form, in what language, by whom, and when* essential information is communicated to consumers; one may think of online platforms or comparison tools where multiple parties are involved about whom the consumer knows little and whose identification is difficult. Traders should be obliged to inform consumers about existing mandatory protective rules, particularly at the point where the consumer experiences a problem. It should be assessed whether there should be a stronger emphasis on rules which put the burden of proof on the trader.

The fitness check of consumer law 2016 should also assess **whether the 'average consumer-model' is adequate** to serve as a standard of consumer protection: in order to balance the information asymmetries that exist between traders and consumers, businesses are principally obliged to submit information to consumers about the main characteristics of the product and the essentials of the contract. However, although information about the trader or the product is necessary for consumers to make the right choice, there are many situations, in which the 'information paradigm' fails. In many situations and sectors, information alone cannot place the consumer on equal footing. Therefore, alternative approaches, in particular the strengthening of mandatory protective rules, are needed and should be discussed.

**BEUC's expectations for REFIT consumer law 2016:**

During the fitness check of EU consumer law, we recommend to look into the form of the information, its simplification and to explore the reality of consumer understanding and behaviour. It is important to look at how information is distributed and whether there are best practice examples. Mandatory protective rules, which go beyond information duties, should be strengthened where appropriate.

### 4.2. Online Platforms and the Role of Intermediaries

Over the last few years, various types of platforms have been established across all sectors. The qualitative and quantitative dimension of consumer contracts that are concluded via intermediaries has drastically increased. Consumers increasingly rely on online platforms in their decision-making process. However, particularly when the online platform facilitates communication and contractual transactions between other market players, the application of EU consumer law is unclear.

For the REFIT of consumer law exercise, we see the need to look into the role of intermediaries and to address questions of:

- **information requirements, both horizontally and sector-specifically,**
- **due diligence of market players, and**
- **liability issues in case of law infringement**

From the consumer perspective, it is often unclear whether the platform is a party to the contract (which will be up to national law to decide) or who is a trader/who acts on behalf of a trader. We therefore see the need to discuss whether specific information requirements related to on-line intermediaries should be laid down, also considering that some Member States, such as France, are adopting already specific legal obligations in the absence of EU harmonisation.

When it comes to comparison tools, evidence shows that for example criteria linked to third party payments are used, even though consumers believe that the ranking was based on impartial criteria. Although transparency requirements are anchored in the Unfair Commercial Practice Directive, this has not been sufficient to prevent confusion arising around consumers' rights, the traders' commitments, or the true motives for the commercial practice, including sponsorship.

Often, platforms carry out their services against remuneration. In this respect, we urge the Commission to analyse how the Directives under REFIT, as well as the Consumer Rights Directive, apply to services based on data provided by the consumer as remuneration. The scope of this instrument should include digital content and services, as well as contracts that are concluded on the basis of the exchange of consumers' personal data or any other data provided by the consumer as remuneration.

While we welcome the update of the UCPD Guidance and the publication of principles for comparison tools, the adoption of non-binding documents has not proven to be enough.

**BEUC's expectation for REFIT consumer law 2016:**

Clarification is needed as to how and to what extent the consumer law acquis, including the Consumer Rights Directive, applies to online platforms which facilitate communication and contractual transactions between other market players. There is a need to discuss whether a reform of EU consumer law is necessary or whether the main problems relate to law enforcement. The fitness check should address whether a clarification of the UCPD is needed, discuss whether specific information requirements related to online-intermediaries should be laid down, and explore the potential of rules for platform lability (with any proposed action being proportionate and evidence-based).

### 4.3. No consumer rights without enforcement and redress

We welcome that the proposed fitness check of consumer law 2016 focuses on the entire business-to-consumer commercial transaction: consumer law starts at an early pre-contractual stage and ends at the stage of enforcement and redress. In this respect, it is dissatisfactory that the evaluation description[18] does not sufficiently address aspects of effective enforcement and redress, which should be recognised as the **key issue in each and every EU directive**.

- **Injunctions**

We would like to emphasise the importance of Injunctions and the need to make injunction proceedings less cumbersome and costly and to discuss the link to binding effects and redress aspects. In this respect, the review of the Regulation on consumer protection cooperation (CPC Regulation) could support better enforcement and cooperation of national

[18] http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf

authorities. The Proposal on a review of the CPC Regulation suggests that the responsible authorities shall have the power to provide consumers with access to redress for harm caused by such infringements. Consumer organisations need to be able to secure these measures for consumers also. The implications of the CPC Regulation review on the enforcement and enforceability of the consumer law acquis should be discussed during the Fitness check of consumer law.

- **Individual redress**

Injunctions alone are not an effective deterrent to law infringements by traders. Consumers should be able to successfully obtain redress where traders act contrary to their obligations. For example, consumers should be able to rely on civil law remedies, in particular to claim compensation or to withdraw from the contract if it was based on unfair practices. The Benelux States' jurisdictions, Italy, or the UK, may serve as role-models in this respect.[19]

- **Sanctions**

The Unfair Commercial Practices Directive and Consumer Rights Directive are good examples of the lack of harmonised sanctions. Both do not harmonise sanctions but only contain a vague and weak obligation for Member States to lay down penalties for infringement. We strongly support the strengthening of consumer protection by making sure that non-compliant businesses face truly dissuasive sanctions. Such sanctions may be based on a significant percentage of their annual turnover.

- **Collective redress**

Many consumers will not go to court individually as it is often expensive, complicated, time-consuming and intimidating for many, and even more so in cross-border cases. As the current Volkswagen 'Dieselgate' scandal illustrates, collective redress mechanisms would help enabling consumers to obtain compensation for the harm suffered as a result of unlawful practices by traders.

**BEUC's expectation for REFIT consumer law 2016:**

There are no rights without redress.

- 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?
- Should sanctions be harmonised?

These important questions need to be addressed when carrying out a fitness check of consumer law. Consumer law cannot be effective and bring added value if consumers have no effective remedies available. We urge the Commission to develop an ambitious strategy on the enforcement and redress dimension.

END

[19] For example, the Luxembourg Code de la consummation lays down fines for breach of unfair commercial practices rules and, most importantly, allows for a civil law sanction to be invoked by consumers who have been the victim of such practices. In Italy, consumer may receive compensation in case they suffered harm from unfair commercial practices. In the UK, individual redress can be obtained for breaches of the Unfair Commercial Practices Directive, with the amount of compensation depending on how egregious the breach was.

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