

The Consumer Voice in Europe

## STRENGTHENING ENFORCEMENT

BEUC position paper on Consumer Protection Cooperation (CPC)  
Regulation review



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## Why it matters to consumers

Consumers need to know that their rights are protected by law and that public authorities are prepared to enforce them. When an infringement has a cross-border element, public authorities sometimes lack the powers and resources to take an investigation beyond their country's borders, which can leave consumers empty-handed. This is why the Commission is proposing to give national consumer protection bodies more powers and is providing ways for them to cooperate further, both among themselves and with other entities such as consumer organisations. Stronger cooperation procedures are also important in order to be able to stop traders applying the same unfair practices across Europe, as is more and more often the case.

## Summary

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- BEUC supports the proposed review of the Consumer Protection Cooperation regulation and the strengthening of public enforcement.
- The role of consumer organisations needs to be made more prominent, in line with their frontline role of being a point of call for consumers who have suffered detriment.
- National authorities have to be given more powers, especially the powers related to obtaining redress for consumers.
- We welcome the fact that Member States may designate bodies like consumer organisations to take the necessary enforcement measures available to them under national law.
- We agree that the cooperation procedures among authorities will be strengthened, especially in cases of infringements with a cross-border dimension.
- As a general point, more transparency is needed with regard to common enforcement positions – a new tool for enhanced cooperation – that will be the basis of the strengthened procedure. In particular, there should be clear rules on consulting with consumer associations and making information about the common positions available to consumers. We suggest that the provisions on seeking the views of the interested parties about the common positions are changed to explicitly mention consumer associations (including the ones on Union level) as one of the concerned parties to be consulted.
- Where one of the authorities is designated to take enforcement measures on behalf of all others, in case of a cross-border infringement, we strongly call for removing the location of the trader as a prominent criterion.
- As consumer associations have first - hand knowledge of the infringements as they emerge, they should be able to post alerts in the CPC system. However, to create a proper dialogue, a feedback mechanism would be needed on what happened with the information submitted.
- More consumer-related provisions from the EU retail financial services legislation have to be included under the scope of the application of the regulation to ensure that widespread infringements in those areas can also be efficiently addressed.

## 1. General observations

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One of the big challenges to a coherent enforcement of consumer rights in the EU is the different national enforcement approaches and systems. This includes the existence and strength of enforcement authorities, their statutory powers, their independence to set their priorities, human and financial resources, the level of fines or other sanctions they can impose etc. Also in some countries the enforcement is primarily court based, while in others enforcement by court case is very much a last resort and enforcers have other tools at their disposal. This results in different responses to similar, or the same, infringements (or no response at all). These different approaches often leaves consumers who are in 'weaker enforcement countries' on an unequal standing and discredits the Single Market in the eyes of consumers.

A more general challenge is that enforcement is limited by national borders or even by local jurisdictions within a Member State. This does not correspond to the reality of the Single Market, where services and goods move across the borders and traders target consumers in many Member States at the same time and with the same (sometimes unfair) marketing strategies.

To respond to those challenges, the EU has in 2004 adopted a regulation<sup>1</sup> creating a mechanism of mutual cooperation between national consumer protection authorities, where they would be obliged to act on each other's behalf in case of cross-border infringements.

However, the rise of EU-wide infringements (the trader applying the same unfair practices across multiple EU countries) and increasingly frequent and digitalised commercial malpractices showed the limits of the existing cooperation mechanism under the 2004 regulation. The European Commission responded by proposing this review, in order to fill in the gaps.

**We welcome the proposal in principal and we call on the EU legislators to use this opportunity to strengthen the enforcement of consumer law in the European Union not only through public authorities, but also by involving consumer organisations in the process<sup>2</sup>.**

Consumer organisations have been and will remain the frontline in relation to consumer complaints and addressing them, particularly in the digital marketplace.<sup>3</sup> They are the market watchdogs. It is important to maintain a framework for cooperation in particular regarding injunctions initiated by consumer organisations as 'designated bodies' as defined in article 6 (paragraph 4).

Public and private enforcement are not mutually exclusive: to the contrary, they strengthen each other provided an appropriate framework for co-operation exists. This is underlined by some of the national authorities themselves – for instance, the Italian Competition Authority (which also enforces certain consumer rights), in its 2015 annual report acknowledges that "even if the Authority has the power to intervene ex officio, the complaints by associations and individual consumers remain the principal instrument to detect the infringements. In particular, the central role in the fight against unfair

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<sup>1</sup> Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for enforcement of consumer protection laws.

<sup>2</sup> This was also one of the [final conclusions](#) of BEUC and dTest high level conference on Effective enforcement of consumer rights on 15 April 2016, at which Commissioner V. Jourová and multiple enforcement actors, including public authorities, participated.

<sup>3</sup> BEUC member organisations, especially in Germany and France, regularly take (and win!) injunction cases against unfair contract terms applied by giant online market players, such as Facebook, Twitter and Google.

commercial practices, misleading advertising and violations of consumer rights must be attributed to consumer associations which participate in directing the Authority by submitting information and important contributions on the very important topics for consumers”.

**The role of consumer organisations needs to be made more prominent in the proposal**

## 2. Powers of enforcement authorities (Article 8)

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BEUC supports giving additional powers to national authorities. However, for effective enforcement, this must be accompanied by a greater allocation of resources – on the national level - to the authorities to be able to use those powers.

It is important to ensure that all the authorities in the CPC network have the powers (e.g. investigative and sanctioning powers) that they need to properly tackle consumer detriment and ensure compliance with consumer legislation in their jurisdiction. It is clear that at the moment, the situation is very diverse in various Member States (or even within the same Member State). For example, the ability to impose fines can vary widely.



In the Apple case pursued by numerous consumer organisations and also some national authorities, the Italian authority investigated the practice, found the infringement and applied a €900,000 fine to the companies involved, while in Spain the regional authorities of Madrid imposed only a €47,000 fine (20 times less!).

Even though the existing CPC regulation already granted a number of powers to the CPC authorities, it seems that not all of them were implemented, and some authorities might have lacked the resources and means to apply them<sup>4</sup>.

In addition to that, many authorities lacked the powers and measures to deal with online consumer rights infringements. It is crucial that with the digitalisation of the economy, the enforcement also has the ability to follow potential infringers to online world. The investigative and interim powers such as requesting information from third persons (Article 8.2 sub-paragraph b)), and suspension of websites (Article 8.2 sub-paragraph g)), among others, seem absolutely necessary in this respect.

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<sup>4</sup> Commission Staff Working Document Impact Assessment accompanying the CPC review proposal SWD(2016) 164 final.

Even the most effective enforcement in terms of stopping illegal practices is still only half of the story. For consumers to directly benefit, not only the infringement must be stopped, but consumers need to be compensated for the harm they suffered. However, obtaining redress can be difficult for individual consumers, especially in legal systems where the legal advice and representation is very costly or court cases take a long time. Taking into account that the CPC regulation deals with cross-border infringements, individual consumer actions for redress seem even less likely.

Therefore the possibility that redress is achieved in conjunction with the enforcement action is even more important and the **powers of authorities related to redress** (Article 8.2 sub-paragraph (n)) have significant added value. It is important to note that this possibility is already available and being used in some European countries<sup>5</sup>.

**We strongly support giving the authorities powers to obtain redress for consumers**

With regard to the possibility to seize profits obtained as a result of infringements (Article 8.2 sub-paragraph (o)), we suggest that, where it is not possible to provide individual redress to harmed consumers, the profits obtained as a result of infringements should be **made available for projects that facilitate consumer redress or benefit consumer protection**, as is already the case in certain Member States.

For example, in [Italy](#), law 388/2000 provides that administrative sanctions imposed on undertakings by the Competition and Market Authority can be allocated to initiatives for the benefit of consumers. The initiatives are identified on a case by case basis, by ministerial decree and after consultation with appropriate parliamentary committees. The funds can be given to the regions (to promote consumer initiatives in collaboration with consumer organisations), chambers of commerce, consumer organisations or other bodies. To be eligible to apply, consumer organisations must be included in the national list of consumer organisations.

In [Portugal](#) a specific fund was established as a result of a government decision to ban an overcharge on certain consumer bills by public service providers. As most providers had already charged the consumers, they were obliged to reimburse them. However, most affected consumers did not have the evidence required and so did not request reimbursement. As a result, the government created a specific fund for the promotion of consumer rights to which the remainder of the amount was transferred. All NGOs can apply for money from this fund, provided the funding will be used for the promotion of consumer rights (including promotion of ADR, consumer education etc.).

In [Germany](#) a draft law on profit skimming is expected for this year. The skimmed profit shall be collected in a specific fund for consumer protection and redress measures.

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<sup>5</sup> For instance, the Polish Office for Competition and Consumer Protection has used such powers at least in a couple of cases in recent years (cf. T-Mobile Polska and Pure Health and Fitness cases of 2015). Compensation powers are also available in the UK.



It is also important to remember that alongside new powers to the competent authorities, enforcement and redress systems in Europe can be significantly strengthened by giving consumer organisations more legal instruments to obtain redress to consumers.

### Limitation periods (Article 4)

The limitation periods (5 years from the end of the infringement) to apply penalties should not only apply to the imposition of penalties *stricto sensu* (meaning financial fines as described in Article 8.2 (m)), but to also cover other measures, such as ordering redress or restitution of illegal profits (Art. 8.2 (n)-(o)).

## 3. Tackling widespread infringements (Sections I and II)

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### Effect on national enforcement

With the view to private enforcement (for example, actions launched by national consumer organisations) we believe it is crucial that the enhanced cooperation procedures among competent authorities do not have negative impact on the possibility of other bodies to act and put an end to the infringement.

Therefore we suggest **an amendment** to Article 2 to clarify that **the Regulation does not impede private enforcement actions taken by bodies other than competent authorities.**

It also has to be clarified what leeway national competent authorities have if they see they need to take urgent enforcement measures before the decision in the CPC-network is taken.

### Information on common positions (Articles 17, 23, 24, 31)

We support closer cooperation among competent authorities in the form of common positions. However, there has to be more transparency around them, especially once they have been adopted. Once the professional secrecy criteria, foreseen in Article 41 have been complied with, the competent authorities or the Commission **should publish** either the common position itself, or at least the information about it, so that consumers and the general public could learn about it.

In addition, the provisions on seeking the views of interested parties about the common positions (in Articles 17.4, 18.2, 23.3, 24.2 and 24.4) have to **explicitly mention consumer associations** (including the ones at EU level) as one of the concerned parties to be consulted, especially if at a later stage the competent authorities want to seek their help in monitoring whether the trader changed the practices according to the commitments (article 24.4).

**There must be more transparency regarding common enforcement positions**

### **Union-wide infringements (Article 21)**

For an infringement to be considered to have an 'EU dimension' – the infringement harming consumers in at least three quarters of Member States accounting together for at least three quarters of the Union population are **too strict**. This high threshold might mean that most infringements pass under the radar and the situation of diverse national answers will perpetuate itself. Secondly, it could lead to forum shopping from rogue traders selecting mostly smaller Member States as a target, hoping also that the enforcement in those countries is not as effective.

As an alternative, the general rule of qualified majority in the EU could be used, as defined in Article 16.4 and 16.5 of the Treaty on European Union (at least 15 MS representing 65% of the population of the Union).

### **Enforcement measures by one (designated) competent authority (Article 25)**

Where one of the authorities is designated to take enforcement measures on behalf of all others in the case of an EU-wide infringement, we call on the EU institutions to **remove the location of the trader as a prominent criterion** from Article 25. Leaving the current wording could result in authorities automatically designating the authority where the trader is located as the enforcer, which could again lead to forum shopping with traders setting up shop in countries where enforcement is weaker. Taken that enforcement measures will mostly need to be taken against the traders that do not cooperate or are rogue, other circumstances should also be taken into account, such as the resources of the authority in question, the array of enforcement measures it is likely to use, and the potential to stop the infringement and provide redress to consumers.

There is also a need to ensure, in practice that after the enforcement measures, the trader changes its practices in all the other EU countries concerned. This means rigorous monitoring is needed, and making clear that certain enforcement decisions have a cross-border effect, or, at the very least, can be used as *prima facie* evidence for the national authorities in other Member States.

## 4. Alert mechanism (Chapter V)

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BEUC welcomes the alert mechanism being opened to use by other entities (Article 35). We **strongly encourage Member States and the Commission to designate consumer associations to be able to post alerts on infringements** into the system. Consumer organisations are more acutely aware of the problems consumers face in the marketplace than other organisations or authorities/institutions, and so can spot important infringements sooner. **In addition, because of their coordinating role, European consumer organisations should be explicitly included** among those entities that the alert system is open to.

However, it is not enough that the alert enters the system. If no action is taken, it is very important to **receive feedback, on why the alert was not acted upon**. Apart from strengthening the cooperation among the authorities and consumer associations, the feedback might also allow consumer associations to streamline the information they gather from the markets and adapt it better for enforcement investigations. In addition, a consumer association needs to know whether the authority will address the infringement to be able to decide how to follow up the problem. According to our internal survey among BEUC members,<sup>6</sup> a vast majority of consumer organisations (almost 89%) receive feedback from the national competent authorities if they notify them about concrete infringements, so we do not see why this should not be done in the CPC Alert system as well.

**Consumer associations must be able to post alerts about infringements into the CPC system and to get feedback**

## 5. The scope of cooperation

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### Cooperation among various authorities and stakeholders

As many consumer products and services become increasingly complex (online applications and their updates, online storage services in exchange of consumer data, bundled energy offers...) there is a greater need for effective cooperation between various authorities, also outside the CPC network. On the practical level, besides formal cooperation obligations in article 6, competent authorities should be encouraged to develop informal cooperation agreements.

Similarly, **more cooperation with other stakeholders** (consumer and business associations, both on national and EU level), to discuss the trends in various markets and the enforcement priorities could be mutually beneficial. Such cooperation could be formalised into a **consumer enforcement forum** with regular meetings and exchanges.

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<sup>6</sup> Carried out in April-May 2016.



### Including retail financial services (Annex)

Consumers face substantial challenges in the financial services area. Excessively complex products that do not meet consumer needs, poor quality financial advice and mis-selling, unfair practices and contract terms, hidden and abusive fees charged by financial service providers are widespread across many EU Member States. Many of those problems result in large part from the lack of effective law enforcement by competent authorities. Over the past few years, several EU legislative texts have been adopted in the area of retail financial services. The current challenge is to ensure that this legislation is properly implemented and enforced at the national level. Unfortunately, in many Member States, supervision is poor. Including consumer-related provisions of financial services legislation in the CPC cooperation mechanism would ensure that national supervisory authorities have the necessary powers specified in the CPC regulation. They would also be able to better cooperate to address cross-border infringement cases with close involvement and coordination by the European Commission.

To this end, the following retail finance laws **should be included** in the CPC annex (in addition to what is already in the proposal) – these texts either do not provide for any EU-level cooperation mechanism, or the cooperation mechanism is insufficient:

- Regulation 924/2009 on cross-border payments (Art 3, 4 and 11);
- Regulation 260/2012 establishing technical and business requirements for credit transfers and direct debits in euro (Art 5, 7, 8 and 9);
- Directive (EU) 2015/2366 on payment services in the internal market (Titles 3 and 4);
- Directive 2016/97 on Insurance Distribution (Art 17 to 30).

END



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