

The Consumer Voice in Europe

REVIEW OF THE CONSUMER RIGHTS DIRECTIVE

BEUC Comments



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Why it matters to consumers

The Consumer Rights Directive sets out rules on contracts between consumers and businesses which apply across the EU and establishes certain basic consumer rights. These include a ban on pre-ticked boxes, rules on excessive payment fees, information requirements or the right to withdraw from a contract. The directive has a direct and tangible impact on the everyday life of consumers in the EU. Any review should ensure that consumer rights across the EU are improved and modernised, rather than weakened, particularly in light of the digital economy.

Summary

These comments are a first response to the upcoming review of the Consumer Rights Directive. In this paper, we set out our main concerns and provide suggestions for improvement. Because of the need to focus on consumer needs and expectations, the review should be guided by the following priorities:

BEUC's priorities

- **Problems of non-compliance of traders**
 - Particularly as regards the right of withdrawal
 - Lack of legal consequences for non-compliance
- **Improvement of information requirements: need to inform about**
 - delivery restrictions
 - mandatory law
 - diminished value of goods
- **Fees for the use of means of payment**
 - Are consumers protected in practice?
- **Problems of (unclear) scope & interlink with other EU consumer law rules for**
 - Online intermediaries and platforms
 - Internet of things
 - Data used as remuneration
 - Information regarding digital content products
- **Format of information and presentation of information**
 - Better information in best format
- **Regulatory options**
 - Distance contracts made by phone: adequate level of consumer protection?
 - Goods/services of lesser value: adequate level of consumer protection?

Introduction

A ban on pre-ticked boxes, rules on excessive payment fees, information requirements or the right to withdraw from a contract all show that **the Consumer Rights Directive has the potential to deliver tangible benefits to EU consumers**. We understand that the Commission intends to assess whether the Directive had actually delivered such results since its adoption and recent transposition into the national laws of the Member States. It will also evaluate the Directive in light of its overall impact on the internal market and the level of consumer protection¹.

We see the evaluation of the Directive as part of the general fitness check of consumer law 2016, to which we have already commented². In the upcoming consultative expert group meetings with the Commission, we will therefore deliver examples where the protection level intended has failed and suggest solutions to remedy the shortcomings identified.

The **comments outlined below summarise some of our main concerns** and should be considered as the first comments to the planned review of the Consumer Rights Directive. We have focused mainly on what the adequate high level of protection should be and the need for improvement, rather than on questions of implementation and awareness. We call on the European Commission to take BEUC's concerns into account, which are based on the expertise and vast practical experience of our membership.

Problems of non-compliance

Example of right of withdrawal

In a sale carried out at a distance, consumers are not able to see a good before they purchase it and lack possibility to assess the value of the good or services they would like to buy. Accordingly, they are allowed to test and inspect the goods and to withdraw from the contract within 14 days. In off-premises situations, consumers potentially face a surprise element, namely aggressive practices and/or psychological pressure, and should therefore benefit from a right to withdraw from the contract. The right to withdraw from the contract is a crucial element of consumer protection and, as such, it must be protected, all the more so in a cross-border scenario.

However, there are many cases where traders prevent consumers from effectively making use of this right by

- **not informing consumers about their right to withdraw from the contract.** Problems also result from the failure of providing the model withdrawal form;
- **miscalculating the start date of the 14-day withdrawal period.** With regard to tangible goods, some traders wrongly claim that the period starts the moment the consumer places an order;

¹ EVALUATION AND FITNESS CHECK (FC) ROADMAP 25/04/2016
ec.europa.eu/smart-regulation/roadmaps/docs/2017_just_001_crd_evaluation_en.pdf

²http://www.beuc.eu/publications/beuc-x-2016-033_csc_roadmap_for_the_refit_of_the_consumer_law_aquis_2016_beuc_comments.pdf

- **unduly claiming compensation following the exercise of the right of withdrawal.** There seems to be a tactic of certain traders to wrongly claim the value of the good has declined after a consumer chooses to withdraw from the contract;
- **refusing to take back the product** because the consumer has opened or damaged the package.

All this undermines the ‘*test and inspect*’ principle and is in contradiction with the rationale of the *Messner*³ judgment of the Court of Justice according to which a “consumer should not be dissuaded from exercising that right because he has to fear financial consequences or because the burden of proof would be upon the consumer”.

Any financial compensation must be justified and proportional. We are open to discuss a guidance for business on the calculation formula to assess any diminished value of the good.

Fees for the use of means of payment

Traders are prohibited from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means (Art 19). As regards payments by card, they must be read in connection with the Payment Services Directive⁴, which gives Member States the option to ban surcharging. That there are many examples of merchants surcharging consumers at levels much higher than the cost borne by the merchant for the use of a specific payment instrument is recognised in the Payment Service Directive II⁵, the implementation of which will lead to an outright ban on certain types of payment surcharges.

Although this rule applies to any means of payment and all kinds of fees directly linked to it, some payees try to circumvent this principle for direct debit transaction by calling the fees ‘administration, booking, or handling fees’; this is in clear contradiction with the rationale of the payment rule to protect consumers from excessive fees.

We urge the Commission to assess how the payment rule was implemented in national laws and whether it is respected in practice. We suggest to clarify the meaning of ‘cost borne by traders’. Because there are too few disclosure requirements, traders will quite naturally include all sorts of costs they have in the fees to consumers.⁶ It is a problem in practice that traders meet a consumers’ complaint with the statement that the surcharge is cost reflective. The consumer will not be able to prove them wrong since every trader’s cost base is different.⁷ This could be addressed by placing the burden of proof on the trader to show their surcharge is cost reflective.

Lack of consequences for non-compliance

Remedies for when a trader fails to provide the necessary information are missing in the Directive, which often leaves consumers empty-handed in such situations. There are no consumer rights without redress and sanction mechanisms. The consequences of non-compliance may be demonstrated on the example of so-called subscription traps, where consumers are not aware that they are engaging in a contract of indeterminate duration because traders omit information about the true costs and nature of the contract. Such

³ Case C-489/07

⁴ Art 52(3) Directive 2007/64/EC

⁵ Recital 66, Directive (EU) 2015/2366.

⁶ Implied also by Consumer Rights Directive DG Justice Guidance document (2014) 62.

⁷ In the UK, for example, this difficulty has meant there has been no enforcement of this provision by public authorities.

behaviour will most likely also constitute a breach of the Unfair Commercial Practices Directive, which does not provide for contract law remedies for consumers either.

In order to ensure the effectiveness of the Directive, we propose a standard remedy for non-compliance with the duties laid down in the Directive, for example, the contract is non-binding on the consumer; this without prejudice to remedies provided under national laws. Affected consumers should also be entitled to ask for compensation and traders should face dissuasive and effective sanctions for non-compliance.

BEUC's view:

The test and inspect principle is a crucial element of consumer protection and it must be protected. The Commission should focus on how this principle has been implemented in Member States' laws and whether it is respected in practice.

The review of the Directive should be used to improve remedies for consumers in case of non-compliance of the trader, who should face penalties too.

Problems of scope & interlink with EU consumer law rules

BEUC supports the Digital Single Market strategy to improve access to online goods and services for consumers and businesses, to create the right conditions for digital networks, and to maximise the growth potential of the EU's digital economy. However, when it comes to the digital world, we are convinced that the Consumer Rights Directive needs reform. Below we provide for examples of its unclear scope and where we see a missing interlink with other modern EU legislative acts.

We also stress the importance of looking at the matters which are excluded from the scope of application (Art 3(3)) and to analyse whether consumers benefit from an equally high level of protection under sector-specific rules in place, or whether there is a need to expand the scope of the Consumer Rights Directive. For example it should look at package travel or transport contracts where, if concluded online, consumers face a detriment similar to other distance contracts. These include the lack of physical contact and the risk of making hasty decisions because of marketing techniques, or the misleading display of prices and discounts available.

Online intermediaries and platforms: who is a trader?

Over the last few years, various types of online platforms have emerged across all sectors. The qualitative and quantitative dimension of consumer contracts that are concluded via online platforms, which facilitate the communication and contractual transactions between market players (intermediaries), has drastically increased. Consumers rely on online platforms in their decision-making process and it is often unclear as to whether the platform is a party to the contract – which will be up to national law to decide – or if it can be considered a trader, or acting on behalf of a trader, under the Directive.

For example, what are the information obligations of a platform, such as Amazon, concerning third party suppliers using the platform? What are the consequences in case of failure? If the intermediary is involved in the contract performance – one may think of receiving payments or providing delivery services to the trader – there is a question about the contract fulfilment obligations. Given that consumers often face problems to identify the trader, or in finding the relevant contact information in bilateral contractual relationships, multilateral contractual relations are even more problematic.

How is the internet of things covered by the Directive?

When it comes to smart devices with embedded digital content, it is unclear whether the information requirements for digital content products under the Directive apply to such products. Consumers need this information in order to make informed decisions about such products and thus a clarification is needed. Also, according to the Directive, the trader shall provide the consumer in a clear and comprehensible manner about the main characteristics of the goods or services *to the extent appropriate* to the medium and to the goods or services (Arts 5,6(1a)). What is the extent appropriate in the case of internet of things?

What about data as remuneration?

More and more traders provide their products or carry out their services against data as remuneration. However, it is unclear whether products, services, and digital content provided against data as a counter-performance fall under the scope of the Directive. This question is even more pressing since counter-performance in the form of data is now prominently anchored in the Commission proposal for a Digital Content Directive⁸.

While the guidance document of the European Commission states that contracts for online digital content are subject to the Directive even if they do not involve the payment of a price by the consumer, the legal *status quo* in the Member States appears to contradict this finding.⁹

It is therefore obvious that an extension of the scope is needed in order to cover all types of products and services and all kind of counter-performances. If the consumer pays with data, there should be equivalent¹⁰ information duties, as well as a right to withdraw from the contract. It goes without saying that data disclosure and consent of use of data should be analysed with a view to data protection legislation. There must be a smooth interplay between contract law rules and rights afforded to the consumer under data protection rules.

Information regarding digital content products

Art 30 makes clear that the evaluation of the Directive should be carried out with a focus on its provisions on digital content. Recital 19 explains that the need for further harmonisation should be discussed, in particular as regards the notions of functionality and interoperability of digital content products.

We support an in-depth discussion on whether the information requirements are sufficient and definitions are clear enough. For example, while it is clear that suppliers are required to inform consumers about technical restrictions, it is doubtful to what

⁸ COM(2015) 634 final

⁹ E.g. to the recitals attached to the legal text product by the German government in order to implement the Directive: “[...]in line with purpose of Directive, only consumer contract if there is a payment duty”.

¹⁰ Adjustments will be necessary, of course. For example, a reference to the purpose of monetarisation of the data instead of reference to a price will be necessary.

extent contractual or statutory restrictions arising from copyright law or agreements with third parties are covered by the Directive. Any change or clarification of the Directive should bear in mind the conformity concept under the 1999/44 Sales Directive, and the Proposals on Tangible Goods and Digital Content Products, should also cover legal defects, including those based on intellectual property. Such information and information about all potential fees and charges is crucial for the consumer.

BEUC's view:

When it comes to the digital world, the Consumer Rights Directive is in need of reform. This relates in particular to its unclear scope and the missing interlink with other, modern EU legislative acts. Additional information requirements should be discussed, as well as the extension of the scope where this is needed. The Commission should also analyse whether the exclusion of certain matters from the scope of application of the Directive is justified.

Information requirements

Properly informed consumers are confident consumers

Information requirements are among the most important consumer policy tools, aiming at removing information asymmetries between consumers and traders. Rules on information protect consumers from making bad choices and enhance their freedom of choice.¹¹ Typically, traders have greater economic clout and may impose contractual terms on the consumer.¹² Unsurprisingly, studies and consumer surveys¹³ indicate that among the most commonly experienced problems of consumers is the lack of information or the low quality of information provided. From this follows that the compliance with mandatory information requirements can drive up standards, enhance consumer trust, and help to exploit the potential of the internal market.

Suggestions for improvement

During the review, the Commission should focus on whether the information requirements set out under the Directive have been properly transposed into the laws of the Member States and whether the information duties are good enough to enable consumers to make the right choice. Due to the Directive's full harmonisation character, the priority should be in assessing whether consumers actually receive complete and transparent information about key contractual elements, rights and obligations as set out by the Directive. Full harmonisation can only deliver good results for consumers if the level of protection is truly high and the provisions take into account consumer reality in their daily transactions.

Apart from the question of additional information requirements for digital content products, we expect the Commission to take, among other things, the following suggestions for improvement into account:

¹¹ N. Reich, *Diverse Approaches to Consumer Protection Philosophy*, *Journal of Consumer policy* 14 (1992) 257 (258-259).

¹² Hill, *Cross border consumer contracts* (2008) 322.

¹³ References provided by Helberger, Guibault et al, *Digital Consumers and the Law* (2013) 14.

- **Information about delivery restrictions: too late?**

It is not enough that traders inform consumers about delivery restrictions and payment means “at the beginning of the ordering process” (Art 8(3)). We urge the Commission to assess the merits of trading websites to indicate such information prominently at their front webpage.

- **Information about applicable law in cross-border cases**

As is prominently demonstrated by the case *VKI v Amazon EU*¹⁴, traders should be obliged to clearly and visibly inform targeted consumers that if it is the law of the country where the trader resides that applies to the contract, the consumer still enjoys the protection afforded to him under his domestic mandatory rules.

- **Information about consequences of handling goods beyond what is necessary**

The Directive only requires the consumer to be informed of his right of withdrawal but does not explicitly require informing consumers about the financial consequences in case the value of the goods decreases as a result of the consumer’s handling, other than what is necessary to test them. However, in some cases, consumers may face costs they could not possibly be aware of¹⁵. This problem is even larger because the test-and-inspect principle is narrower than what would be required to make sure that products are fault-free in every respect. From this follows that consumers who are particularly diligent face a high risk of being charged unfairly by traders. We support the inclusion of an explicit information requirement to promote consumer confidence to shop at a distance.

- **Specific information for online-intermediaries**

As mentioned above, the information requirements for online-intermediaries are unclear. We already suggested in our position paper on the ‘Fitness check of EU consumer law 2016’¹⁶ to add additional information requirements related to online-intermediaries. For specific information requirements, the Consumer Rights Directive may be better suited than the Unfair Commercial Practices Directive. The Commission should also assess the necessity of rules on the liability of online-intermediaries and dissuasive sanctions for breach of information duties.

- **Fair payment in case of withdrawal from contracts on performance of services or the supply of water, gas or electricity**

There is a lack of information in a specific withdrawal situation: where the consumers gave consent to immediate performance of the service and withdraws from the contract, Art 14(3) requires the consumer to pay the trader an amount which is in proportion to what has been provided on the basis of the total price agreed. The compensation is based on the market value of what has been provided if the total price is excessive.

We urge the Commission to look whether there have been practical problems of implementation. For example, what should be considered “excessive” in the individual case? We also see in practice that traders do not use a proportionate method or the calculation is unclear.¹⁷ Also, the guidance document to the Directive explains that the

¹⁴ Case C-191/15 [2016] ECLI:EU: C:2016:612.

¹⁵ See Austrian Supreme Court (OGH) Case 1 Ob 110/05s where the consumer was charged 330 EUR for using a flat screen for 43.5 hours.

¹⁶ http://www.beuc.eu/publications/beuc-x-2016-081_csc_fitness_check_of_eu_consumer_law_2016_beuc_position.pdf

¹⁷ This is the case, for example, in Portugal.

trader may include one-off costs in the calculation of the compensation. The consumer will therefore often face unfair and unexpected charges. The Commission should therefore consider to set out a better calculation formula and corresponding information duties in order to avoid discrepancies and practical problems.

BEUC's view:

The Commission should focus on whether the information requirements set out under the Directive have been fully transposed into the laws of the Member States and whether the information duties are good enough to enable consumers to make the right choice. We suggest to assess the added value of additional information duties regarding delivery duties, mandatory law, online-intermediaries, and reduced value of goods-rule. Fair payment in withdrawal-situations must be ensured and a corresponding information duty established.

Form of information and presentation of information

Consumers are not overwhelmed by mandatory information required under the Consumer Rights Directive. The Directive requires providing information which is essential for a consumer to make an informed decision and such information are to a large extent codified best practice, such as the main characteristics of the goods or services, the identity of the trader, or the price of the goods or services. Instead, consumers face the problem that traders shift essential information to lengthy terms and conditions or obscure the real nature of the product, or intention of the traders, through complex, technical, unclear, and often unfair terms. This is particularly the case when it comes to digital content contract terms.

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.¹⁸ This not only shows that the current state of terms and conditions for digital services is bordering on the absurd, but also demonstrates that traders do not inform consumers in a “clear and comprehensible manner” (Arts 5(1), 6).

Better information in a better format

Consumers need better information rather than more information, particularly concerning the digital environment. We recommend discussing:

- 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. There will be many situations in which the ‘information paradigm’ fails and where more effective information is needed in order to place the consumer on an equal footing with the trader. The ‘button-solution’ demonstrates that format matters. Such a button could easily be used to inform consumers about other essential rights, for example the option

¹⁸ <http://www.forbrukerradet.no/side/the-consumer-council-and-friends-read-app-terms-for-32-hours>

to withdraw from the contract within 14 days. By contrast, we are sceptical about whether pictograms are appropriate to inform consumers. It should be about how to *display* information and not about how to *substitute* information.

For the review of the Consumer Rights Directive, we would therefore like to discuss:

- **How to frame, contextualise, prioritise, and design** information in a better way, for example by framing information in a better way, using buttons or summary boxes;
- **Whether to provide for a stricter mandatory protective standard**, for example by standardising consumer expectations, default settings, quality standards, or information models.

Whatever solutions are proposed, they should ideally be tested on real consumers in advance to ensure they have the desired impact on improving consumer decision making. We are also open to discuss the potential of regrouping and streamlining marketing/pre-contractual information requirements currently included in the Directives under the REFIT of Consumer Law 2016 and the Consumer Rights Directive, as long as the consumer protective standard is not lowered.

BEUC's view:

Consumers are not overwhelmed by mandatory information but in need of better information in a better format. The review should assess how to frame, contextualise, prioritise, and design information in a better way and whether a stricter mandatory protective standard is needed.

Exceptions from the right of withdrawal

We agree that there are cases where the right of withdrawal could be inappropriate, for example concerning the nature of particular goods or services. However, a key priority for the review should be to analyse whether the exceptions set out in the Directive (Art 16) are actually justified. This relates in particular to the supply of digital content which is not supplied in a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal (lit m). This means that consumers purchasing digital content can withdraw from the contract only before the downloading has started. Considering that this takes place almost simultaneously with the conclusion of the contract, the rule is of no value for consumers and the right of withdrawal denied in practice.

Similar to the rule for sealed tangible data carriers (lit i), we doubt whether the consumer should not have the right to test the digital content during the right of withdrawal period. The legitimate interest of traders to prevent consumers from any further use of the data by the consumer, after he made use of the right of withdrawal, could be protected by way of technical measures.

We urge the Commission to assess whether this exception is fit for practice and lives up to the digital single market vision.

BEUC's view:

There is a clear need to analyse the exceptions from the right of withdrawal, in particular in relation to digital content products.

Regulatory options: review needed

Distance contracts made by telephone

Where a distance contract is concluded by telephone, Art 8(6) allows Member States to provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his consent. The underlying idea is that consumers should fully read and understand the main elements of the contract before concluding it. We are concerned whether consumers enjoy the adequate level of protection in Member States which have not made use of this regulatory option. The Commission should analyse the impact of this provision in practice. In some Member States, such as Portugal, requiring written confirmation for contracts concluded by telephone became a key factor for consumer protection and solving conflicts.

Goods or services of a minor value sold in off-premises situations

Another regulatory option enables Member States to decide not to apply the Directive where the value of goods or services does not exceed EUR 50 (Art 3(4)). While we understand that this monetary threshold is supposed to protect traders from an excessive administrative burden, it should be assessed whether this has led to consumer detriment in practice. The same should be carried out for the exception of information duties set out in Art 7(4) regarding contracts on repairs or maintenance where the payment does not exceed EUR 200. Here, many consumer complaints signal a need for re-evaluation.

The Commission must assess whether the opt-in possibilities have undermined the goals of the Directive which are a harmonisation of rules across Europe and the establishment of a high level of consumer protection.

END

BEUC's view:

Have the regulatory choices undermined or strengthened consumer protection? This question and the impact of opt-ins by Member States should be analysed during the review of the Consumer Rights Directive.



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