EUROCHAMBRES

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Reaction to the Commission's Proposal for a directive on better enforcement and modernisation of EU consumer protection rules COM (2018) 185 final

The Commission's proposal on the review of four existing consumer protection directives follows the extensive REFIT exercise[1] which was concluded in the spring of 2017. As already amply underlined, the Commission arrived at the conclusion that the rules are indeed in the great majority still *"fit for purpose*". EUROCHAMBRES agrees that most legislation is still for purpose as well, with a few side-notes as we pointed out in our EU Burden tracker on The Consumer Rights Directive in 2016[2].

Back then we argued that it is necessary to strike a better balance between the need to protect consumers and the need to avoid excessive burdens on businesses, especially SMEs. Evidence from our membership showed that pre-contractual information requirements for off-premises and distance contracts are found to be particularly burdensome. Also, we argued that contracts negotiated away from business premises, when the consumer establishes contact with the trader for the purpose of concluding a contract, should be exempted from the scope of the provisions on off-premises contracts and be subject to the requirements set for on-premises contracts. Unfortunately, these simplifications were not included in the proposed text.

EUROCHAMBRES feels that the proposed amendments to the consumer protection directives are a mixed bag. Some changes might be legitimate but others are unlikely to bring any benefits. In particular we are alarmed about the provisions on:

- The new penalty regime imposing very high fines and obliging Member States with an effective private law based enforcement scheme to install a parallel public enforcement system;
- The new types of remedies;
- The restrictions on doorstep selling;
- The rules on dual quality for goods.

[1] http://ec.europa.eu/newsroom/document.cfm?doc_id=44639
[2] http://www.eurochambres.eu/Content/Default.asp?PageID=1&DocID=7495

Comments on selected parts of the proposal

1. A new penalties regime for infringements

The proposal puts into question the way how enforcement currently works at EU level, which is rooted in the well-established subsidiarity and proportionality principles. So far, enforcement has always been in the hands of the Member States themselves. This is the right approach that needs to be kept. There is no evidence from the REFIT report pointing at a need to change the way how enforcement is organised.

Especially with regards to the UCPD and the UCTD that are based on General Clauses the assessment whether a specific clause or practice is to be considered *"unfair"* is always difficult in advance and most of the cases are not clear-cut. It should be maintained that in such cases Member States – also against the background of the constitutional requirements (requirement of certainty of administrative criminal law; nulla poena sine lege, Art 7 CHR, Art 49 CFR) - do not provide penalties directly for the infringement of the very vague provisions itself but for the infringement of the judicial or administrative decision giving the General Clause concrete form for the specific case.

The proposal harmonises the minimum level of penalties by requiring Member States to introduce fines based on a trader's turnover only for widespread infringements and widespread infringements of a Union dimension *"where such harmonisation is clearly necessary to ensure the coordination of penalties required by the revised CPC Regulation."*

One of the issues at hand is that the Commission did not take into account its own Geoblocking Regulation, as the fines of up to 4% of a trader's turnover might also apply to the traders not intending to go across borders. The Geo-blocking Regulation de facto introduces an obligation to sell to all consumers, irrespective of their place of residence. As the CPC Regulation understands the term of *"widespread infringement"* as *"any act or omission contrary to Union laws that protect consumers' interested that has done, does or is likely to do harm to…"* (article 3 § 3 of the CPC Regulation), there is a risk that a mistake on for instance information requirements could potentially harm the interest of the consumer of different member states. Therefore sanctions could apply as well. This needs to be fixed and it cannot be that online traders who are not even targeting foreign markets would be affected.

It is clear that the 4% are coming from the GDPR. However, this is an enormous figure not taking into account that many companies operate in markets with low margins and that it has the potential to bankrupt a company. It is unacceptable that a company which made an honest mistake (think SMEs, who are also subject to the rules) would be imposed such fines which are shining in their lack of proportionality. In this respect, it should be added that it is not the necessarily the highest fines working as the best deterrents for unethical behaviour or compliance with consumer law. The Consumer scoreboards of the last years corroborate these findings[3]. Member States are therefore better placed to take care of enforcement.

In view of the tremendous complexity of EU-Consumer law the principle "advising instead of fining and suit-filing" needs to be anchored in each Directive.

[3] See : http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45983

2. Right to individual remedies for consumers.

The proposal, in its current wording, establishes that any unfair commercial practice would give rise to a right to contract termination and/or a right to damages. This is tremendously interfering with national civil law systems, could lead to many unjustified claims and is therefore to be rejected. The Fitness Check Report concedes that in all Member States it is possible to rely on general contract law provisions to seek redress in case of unfair commercial practices. Adding the proposed additional EU *"minimum remedies"* does not contribute to the better functioning of the internal market at all but leads to further legal uncertainty.

Against this backdrop, the risks lie e.g. with how *"damage"* is being interpreted by the courts. There is a genuine risk that even the slightest (subjective) lack of enjoyment about a product by a consumer could be considered as a "*damage"* and therefore give the right to terminate a contract. This cannot be the case.

EUROCHAMBRES has always pleaded in favour of a hierarchy of remedies such as in Directive 1999/44 and the Online Sales of Tangible Goods Directive, which this proposal would carve out. The 1999/44 Directive governs the rules in the case of non-conformity with the contract. How will the remedies under the UCPD and the new Contract Sales Law for Tangible Goods interact? Rightly so, the current law foresees that in case of non-conformity, the trader can first replace or repair the good. Price reduction or annulment of the contract only come into play later down the line. There is no reason why other remedy rules would need to be introduced under the renewed UCPD.

3. More transparency for consumers in online marketplaces.

EUROCHAMBRES agrees that it isn't in the online market places' remit to monitor the truthfulness of the information displayed by third party providers about their status. It is in everyone's interest though that they ensure that third-party providers making use of the website divulge their consumer or trader status so that consumers are fully aware of the rights they have when engaging in a commercial relationship with them.

The rationale to oblige platforms to making known to the public the main parameters defining the ranking of the offers is less clear. In the brick and mortar retail world similar agreements are made between retailers and their suppliers without the consumers being aware of them. This has never raised any questions. For the sake of having similar rules in the online and offline world, we advise against the introduction of the obligation to inform about ranking.

4. Removing burdens for businesses

We support the proposal of the Commission to extend the means of communication with customers. The use of chats and webforms would make the rules up to date with the current communication technologies.

Also welcome is the adaptation of the now well-established 14 day right of withdrawal. The right as such makes sense, but in its current form led to much abuse. Especially for SMEs which do not have the same systems in place as large companies, it incurred high costs because of an abusive use of the right. It needs to be reminded here to the legislators that the proposed changes do not remove the right but merely rebalance it. There is no reason to believe consumers would diminish

their online purchases due to the changes made as the right still, and rightly so, stands. A consumer who did not abuse the right will still be reimbursed and this is the whole point of the right.

5. Clarifying Member States' freedom to adopt rules on certain forms and aspects of off-premises sales.

There is insufficient evidence to give the right to Member States to abolish doorstep selling. It is an important part of the economy and it is surprising to see that honest enterprises would be penalised because of the bad behaviour of a few.

6. Clarifying the rules on misleading marketing of 'dual quality' products

The intentions of the Commission are unclear with regards to dual quality, especially in view of the lack of evidence which underpins the proposals in this regard. Especially this provision would lead to considerable legal uncertainty because the lack of clarity what could be deemed as a significant different composition. We call for a more evidence-based policy making in this area and ask to delete any reference to dual quality at this stage.

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