European Commission

WORKSHOP 2
INCREASING FAIRNESS OF COMMERCIAL PRACTICES AND OF CONTRACT TERMS

TIME: 10:45 - 13.30
MEETING ROOM: LORD JENKINS

17 October 2016

EUROPEAN CONSUMER SUMMIT

BRUSSELS

Programme

Chair: **Veronica Manfredi**, Head of Unit, DG Justice and Consumers, European Commission

Rapporteur: **Léon Mölenberg**, Senior Policy Advisor, Ecommerce Europe

10:45 - 11:00

WELCOME AND INTRODUCTORY REMARKS BY THE EUROPEAN COMMISSION

11:00 - 12:00

STAKEHOLDER VIEWS / PRESENTATION OF STUDIES

Objective: Participants will hear presentations about the assessment of the existing rules in the area of fairness and the need for their modernisation from three different perspectives: public enforcement authority, consumer association and business. They will then be introduced to the current, preliminary findings of the relevant Commission's external studies.

11:00 - 11:20

STAKEHOLDER VIEWS

- **Norwegian Consumer Association (Forbrukerrådet)** (by video)
- **Philippe Guillermin**, Chef du bureau, General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), France
- **European Banking Federation (EBF)** (by video)
- **Pauline Abou Jaoudé**, Legal Counsel, Airbnb

11:20 - 12:00

PRESENTATION OF STUDIES

- Study supporting the Fitness Check of EU consumer and marketing law – **Evelyne Terryn**, Professor, and **Bert Keirsbilck**, Assistant Professor, University of Leuven (Belgium)
- Study on procedural rules and the ex-officio assessment by national courts in the area of consumer law – **Burkhard Hess**, Professor, Max Planck Institute Luxembourg
- Study of consumer issues in the collaborative economy - **Sara Fiorentini**, Legal Adviser, Milieu Legal Consultancy
- Study on consumers' attitudes towards Terms and Conditions – **Dan Dionisie**, Head of Unit, DG Justice and Consumers, European Commission

12:00 - 13:00

DISCUSSION WITHIN GROUPS

Objective: To discuss, within groups of 10-12 persons, and to respond to two cross-cutting questions: "*What works well*" and "*What needs to be changed*" in the following areas:

Topic 1 - **Is there adequate protection against unfair commercial practices?**

Topic 2 - **Is there adequate protection against unfair contractual terms?**

Topic 3 - **Is there adequate consumer protection in the collaborative and peer-to-peer economy?**

13:00 - 13:15

VOTE

Objective: Participants' vote on questions presented below in the background information and arising from the discussion

13:15 - 13:30

CONCLUSIONS FROM THE WORKSHOP PRESENTED BY THE RAPPORTEUR, LÉON MÖLENBERG AND Q&A

Background information

The Unfair Commercial Practices Directive (UCPD) applies to all business-to-consumer (B2C) commercial practices before, during and after the transaction, including in the online environment, and to all products, including digital ones. It provides for full harmonisation[1] of Member States' laws protecting consumers' economic interests against unfair commercial practices.

The Unfair Contract Terms Directive (UCTD) protects consumers against the use by traders of standard (not individually negotiated) contract terms which, contrary to the requirement of good faith, create a significant imbalance in the parties' rights and obligations to the detriment of the consumer (see the general (un-)fairness clause in Article 3 UCTD). Such unfair terms are not binding on the consumer.

The Misleading and Comparative Advertising Directive (MCAD) provides a minimum legal standard of protection of businesses against misleading business-to-business (B2B) marketing.

The purpose of this workshop will be to discuss whether the substantive consumer protection rules under the UCPD and UCTD are still up to date. Moreover, the participants will be able to share their views as to whether the current rules on misleading advertising of the MCAD are sufficient to guarantee adequate protection for businesses, in particular of SMEs, in the B2B relations. Participants are invited to discuss what aspects of these rules work well and what needs to be modernised.

As a cross-cutting question, the participants are invited to express their views on whether EU consumer and marketing law rules should be simplified and streamlined by bringing them into a single horizontal EU instrument / an EU "code".

Discussion within groups – 3 topics

A) TOPIC 1. IS THERE ADEQUATE PROTECTION AGAINST UNFAIR COMMERCIAL PRACTICES?

The UCPD enables the public authorities and courts to impose fines and stop unlawful activities of traders. It has proven to be very instrumental in stopping several types of unfair commercial practices. However, the UCPD makes no provision for remedies for the benefit of those consumers who have suffered individual detriment, such as a right to nullity of the contract concluded as a result of unfair commercial practices or a right to compensation. In the case of misleading marketing of goods, the existing rules on the lack of conformity and legal guarantee already protect the consumers. However, this protection is limited by the legal guarantee period and would not cover the entire spectrum of the possible unfair practices, such as in particular aggressive marketing. Furthermore, these existing rules currently only apply to tangible goods and not to services, where the risk of misleading or aggressive behaviour is equally high, if not higher.

Sample specific questions for the discussion

1. Should there be rights to individual contractual remedies for consumers in case of unfair commercial practices affecting their transactional decision (e.g. right to claim nullity of the contract or compensation)?
2. Should the existing "black list" of unfair practices be extended to include new practices?
3. Should there be further rules to protect businesses in B2B relations, e.g. by introducing a "black list" of prohibited practices and/or regulating also aggressive commercial practices?

[1] *With the exception of the areas of financial services and immovable property where Member States can go above the UCPD requirements.*

B) TOPIC 2. IS THERE ADEQUATE PROTECTION AGAINST UNFAIR CONTRACTUAL TERMS?

The UCTD regulates the standard (not individually negotiated) contracts terms on the basis of a principle-based approach. The fairness of standard terms is to be assessed on a case-by-case basis against the principles of good faith and the balance of the parties' rights and obligations. To facilitate the enforcement, the Directive includes an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Several EU Member States in their implementation of the UCTD have gone beyond the minimum requirements, in particular by introducing "black lists" of unfair terms (contract terms considered unfair in all circumstances) and/or "grey" lists of contract terms (terms presumed to be unfair unless proven to the contrary).

Studies show that 90% of consumers do not read the standard Terms and Conditions, which are very often voluminous and difficult to read and understand. Would it help consumers to understand better their contract if there was an obligation on traders to present the key standard Terms and Conditions in a more accessible way, such as using graphical icons identifying the key information categories?

Sample specific questions for the discussion

1. Should a 'black list' of recurrent and harmful standard T&C be introduced across the EU?
2. Should there be a graphically enhanced model for the presentation of the main elements of the T&Cs?
3. If yes, should such model be binding?
4. Should there be further rules to protect businesses in B2B relations as regards standard contract terms?

C) TOPIC 3. IS THERE ADEQUATE CONSUMER PROTECTION IN THE COLLABORATIVE AND PEER-TO-PEER ECONOMY?

Transactions concluded through online collaborative (and (re)sale platforms) are growing in importance and present various regulatory challenges, also in relation to consumer protection.

From a consumer policy point of view, these transactions raise several issues.

A main question is when EU consumer and marketing law becomes applicable. This legislation applies to any supplier that qualifies as a "*trader*" which is defined as someone "*acting for purposes relating to his trade, business, craft or profession*". This definition was not developed with a collaborative economy and peer-to-peer platform economy context in mind.

In its recent Communication on the collaborative economy[2] the Commission pointed to the importance of the following factors that can help to qualify a provider as trader:

- Frequency of the services: The greater the frequency of the service provision, the more apparent it is that the provider may qualify as a trader;
- Profit-seeking motive: providers that obtain remuneration beyond cost compensation are likely to have a profit-seeking motive;
- Level of turnover of the service provision in the collaborative economy.

However, the current definition of trader does not include specific criteria (thresholds) to distinguish between traders and consumers on the basis of, for example, the frequency of the service provision or the level of turnover. Consequently, it is not always clear which suppliers of e.g. goods, accommodation and transport via collaborative economy and (re)sale platforms are "traders" and must therefore comply with EU consumer law obligations.

Furthermore, when both users of the online platform (i.e. the supplier and the recipient of the service or the goods) are consumers, EU and national consumer protection legislation does not apply. Is this sufficient to ensure sustainable development of the collaborative and peer-to-peer economy in Europe?

Sample specific questions for the discussion

1. Is there evidence of consumer detriment in online collaborative and peer-to-peer platform markets?
2. Should additional specific criteria be introduced to establish when a supplier qualifies as a "trader" in the meaning of EU consumer protection rules?
3. Should EU-level regulation be introduced to govern also the consumer-to-consumer (C2C) relations in online platform markets?

[2] *Communication from the Commission "A European agenda for the collaborative economy", 2.6.2016, COM(2016) 356 final.*