Targeted revision of EU consumer law directives


http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm

This Inception Impact Assessment aims to inform stakeholders about the Commission’s work in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Stakeholders are in particular invited to provide views on the Commission’s understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

The Inception Impact Assessment is provided for information purposes only and its content may change. This Inception Impact Assessment does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content.

A. Context, Problem definition and Subsidiarity Check

Context

The results from the Fitness Check of EU consumer law1 and from the evaluation of the Consumer Rights Directive 2011/83/EU (CRD)2 were published on 29 May 2017. The evidence gathered during these assessments indicate that, overall, the current EU consumer law acquis is still fit for purpose and does not require a major overhaul. However, findings also point to a need to improve awareness, enforcement of the rules and redress opportunities to make the best of the existing legislation. In addition, the reports set out possible follow-up actions, including a number of targeted amendments, including in the following areas:

- Providing more transparency on whom consumers conclude contracts with when buying on online platforms and whether EU consumer rights are applicable to such contracts;
- Extension of some consumer rights to contracts where consumers provide data instead of paying with money;
- Individual remedies for consumers harmed by unfair commercial practices, for example misleading green claims;
- More proportionate, effective and deterrent financial penalties to tackle breaches of consumer laws;
- Simplification of some rules and requirements.

The Impact Assessment will analyse possible non-legislative and legislative actions in these areas.

In addition, the Fitness Check report also concluded on the need to consider changes to the rules on misleading and comparative advertising in business-to-business (B2B) relations. The findings of the Fitness Check will therefore inform future action in the area of B2B relations (notably on platform-to-business relations) within the Digital Single Market context - which is hence not covered by the present initiative.

Moreover, a possible revision of the Injunctions Directive as suggested by the Fitness Check is closely linked to the evaluation of the 2013 Recommendation on collective redress. It will therefore be assessed at a later stage, and falls outside the scope of the present initiative.

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Problems the initiative aims to tackle

The following problems observed in the Fitness Check report and in the CRD evaluation will be addressed:

- **The consumer’s right to remedies/redress for harm caused by unfair commercial practices** are not always sufficiently guaranteed under national law. Diverging and ineffective national rules on remedies/redress lead to costs for traders engaging in cross-border trade and detriment for consumers resulting from continued existence of many breaches on national and cross-border level. These problems lead to a lack of consumer trust in purchasing, particularly cross-border, and thus to reduced frequency and volume of trade for both consumers and traders.

As concerns consumer harm, the issues related to remedies are closely linked to lack of compliance by traders with national rules transposing the Unfair Commercial Practices Directive. Results from the Fitness Check confirm that unfair commercial practices, such as misleading consumers about the environmental aspects of products ('green claims'), remain the most frequent consumer problem: according to the Fitness Check consumer survey, 33% of respondents indicated having experienced unfair commercial practices at least sometimes during the last year.

Consumer harm and costs for cross-border trading are amplified because remedies (such as rights for consumers to have their money back when they have been victims of misleading advertising) are set out differently in the different Member States. Only some Member States link remedies expressly to lack of compliance with rules on unfair commercial practices. In most Member States, consumers instead have to rely on general civil law remedies, which are often subject to certain limitations which may function as a barrier for consumers who want to invoke them. Overall, in the majority of Member States, Fitness Check findings indicate that the existing national remedies are not used very frequently in practice.

This initiative will analyse to which extent introducing EU-wide rights for victims of unfair commercial practices to individual remedies are likely to reduce consumer detriment and costs for traders resulting from divergent national rules on remedies. It will also be assessed if introducing such rights is likely to increase the enforcement by private parties of their consumer rights in cross-border situations and the overall effectiveness of the Directive. The initiative will analyse whether introducing EU-wide remedies is likely to contribute to tapping the full potential of cross-border trade and the completion of the Single Market.

- **Penalties for lack of compliance with consumer law**, as foreseen under national law, are not always proportionate, effective and deterrent enough to prevent lack of compliance by traders, which leads to consumer detriment. Penalties represent an important part of national enforcement systems, as they have an impact on the degree of deterrence provided by public enforcement. Today penalties for breaches of consumer law vary significantly between Member States, both in the way they are calculated and the maximum levels available under national law.

As is the case for remedies/redress, the issues of penalties are closely related to lack of compliance by traders with EU consumer rules as transposed in national law. While imposing penalties, the fact that a breach of consumer law has taken place in more than one Member State is not always sufficiently taken into account by national authorities. In addition, the level of penalties in some Member States is so low that, even if the maximum penalty is imposed, it is not proportionate to the widespread character of breaches. Different penalties for the same breaches (or similar breaches) of consumer law in different Member States also lead to a lack of level playing field for traders across Europe.

Infringements of consumer rights remain at relatively high levels. According to Eurobarometer survey data, there has been no significant progress regarding the number of consumer-rights related problems: in 2008 and 2016, respectively, 21% and 20% of consumer respondents reported having experienced such problems in the past year. This lack of compliance leads to consumer detriment, decreased consumer trust in the market and consequent sub-optimal volumes of cross-border trade. While it is not excluded that some of these problems are caused by inadequate application and enforcement of EU consumer law on national level, the Fitness Check results indicate that problems related to insufficiently proportionate, effective and deterrent penalties could be adequately addressed by targeted amendments of the EU acquis.

This initiative will analyse to which extent strengthening the level of penalties under EU consumer law is likely to curb lack of compliance with the rules, reduce consumer harm and lack of a level playing field for traders. It will also be assessed whether introducing more harmonised rules on penalties is likely to improve consumer trust in the market and to un-tapping the full potential of cross-border trade and the completion of the Single Market.
When consumers _buy online_ they often do not know the identity of their contractual partner and the extent of their rights. This may lead to _consumer harm if problems arise after the purchase_: According to a recent survey of active users of peer-to-peer platforms, 60% of peer consumers did not know who was responsible if something would go wrong and only 25% of peer providers responded that they exactly knew their rights and responsibilities. In addition, platforms suffer unnecessary costs and consumer trust in the platform environment is suboptimal due to different national rules on transparency obligations and liability in case of non-compliance. This leads to sub-optimal volumes of cross-border trade and lack of a level playing field for platforms.

This initiative will analyse to which extent introducing further transparency obligations for platforms is likely to reduce consumer detriment and costs for platforms due to different national rules on transparency obligations and to increase consumer trust and thus increase the frequency and volume of trade for both consumers and traders.

**Pre-contractual information requirements and the right of withdrawal** under the Consumer Rights Directive do not apply to online services that are not supplied against payment of a price, but where consumers provide data. Consumers firstly suffer detriment as a consequence of not receiving adequate information just before concluding contracts (pre-contractual information). For example, traders neither have an obligation to inform consumers about the interoperability of their services with hardware and software nor about the duration of the contract. Secondly, consumers do not benefit from a right to cancel the contract (right of withdrawal) _when they subscribe to online services that are not provided against payment of a price._

**Traders suffer unnecessary costs** from lack of clarity due to different rules under the Consumer Rights Directive for free digital content on the one hand and free online services on the other, which are typically similar products. The above problems lead to underuse of free digital services by consumers and sub-optimal volumes of cross-border trade in such services.

According to the 2015 Consumer Conditions Scoreboard, around 90% of cloud service users do not pay a price for this digital service and, based on data gathered for the 2017 Consumer Rights Directive evaluation, 48% of the consumers in the survey experienced difficulties when unsubscribing from 'free' online services. In this respect, there is a lack of coherence between the Consumer Rights Directive rules for services on the one hand and for digital content provided online on the other, as only the latter are covered by the Consumer Rights Directive if they are not supplied against payment of a price. A further _lack of coherence_ exists in relation to the 2015 Commission's proposal for a Directive _on the supply of digital content_, which provides consumers with a _right to remedies_ regarding both digital content and digital services, including when they are supplied without payment of a price.

This initiative will analyse to which extent making the Consumer Rights Directive more coherent by extending some consumer rights to contracts for online services where consumers provide data instead of paying with money is likely to reduce consumer detriment and costs for traders and to increase the number of consumers using free services, thus bolstering trade in such services.

**Traders face unnecessary administrative burdens** due to requirements to provide certain information to consumers at both the advertising and the pre-contractual stage. The Unfair Commercial Practices Directive imposes several information requirements already at the advertising stage, whilst the Consumer Rights Directive imposes the same and other, more detailed requirements for the subsequent pre-contractual stage (i.e. just 'before the consumer is bound by a contract'). According to the Fitness Check consumer survey and behavioural experiment, some of the information currently required by the Unfair Commercial Practices Directive already at the marketing/advertising stage seems less relevant for consumers.

Traders also face unnecessary burden due to the fact that the Consumer Rights Directive refers to a restricted number of possible means of distance communication (telephone, fax, email) to "enable the consumer to contact the trader quickly and communicate with him efficiently": this provision unnecessarily prevents traders from using other, technologically more advanced means of distance communication, which preserve the consumer's right to quickly and efficiently contact the trader, whilst keeping a proof of such exchanges on a durable medium.

This initiative will analyse to which extent administrative burdens for traders can be reduced by cutting overlapping information requirements in the Unfair Commercial Practices Directive and the Consumer Rights Directive and by updating the rules on means of distance communication in the Consumer Rights Directive.

**Traders consulted for the Consumer Rights Directive study have reported risk of financial losses in certain situations when consumers exercise their right to withdraw from online purchases. Firstly, traders are required to_ reimburse consumers without first having the possibility to inspect the returned goods._**

Secondly, traders have argued that the Consumer Rights Directive gives consumers a possibility to abuse
their right to cancel contracts and return products even after they have used them more than what is necessary to inspect them as they would do in a shop. The Consumer Rights Directive evaluation highlighted that if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, it would indeed risk distorting the right balance between a high level of consumer protection and the competitiveness of enterprises pursued by the Directive. This is also apparent when traders have to reimburse consumers without having inspected the returned goods.

This initiative will analyse to which extent the right to withdrawal under the Consumer Rights Directive causes disproportionate burdens for traders and, if this is the case, whether these burdens justify legislative changes.

### Subsidiarity check (and legal basis)

The legal base for the initiative would be Article 114 TFEU. Action at EU level on these issues is more effective than action at national level in securing the application of consumer rights in a coherent manner while ensuring that consumers benefit from the same high level of protection across the internal market.

It would also enhance legal certainty for businesses wanting to trade cross-border within the EU.

The Fitness Check and CRD reports confirm that the most important EU added value of the existing consumer law directives lies in the fact that their common harmonised rules make it possible for traders to sell and for consumers to shop cross-border more easily. Furthermore, these common rules enable the national enforcement authorities to address more effectively cross-border infringements that harm consumers in several Member States, especially in the context of the CPC framework, which is being currently revised. With markets getting more and more digital, infringements at EU level increasingly require EU-wide enforcement, which needs to be based on a common and uniform EU consumer protection legal framework.

### B. Objectives and Policy options

The general objectives of this initiative are those of the existing EU consumer legislation, namely increasing consumer trust and empowerment and promoting the internal market. As the Fitness Check concluded that the current legal consumer protection framework meets the objectives, a deregulation option will not be further analysed.

This initiative specifically aims at simplifying, streamlining and modernising EU consumer rules to ensure that they are future-proof and to reduce administrative burden and costs for traders, as well as enhancing the compliance of businesses with consumer protection rules and reducing consumer detriment.

**Policy options:**

1. **The baseline scenario** entails pursuing efforts to increase both traders' and consumers' knowledge of their rights and duties whilst stepping up coordinated enforcement via the Consumer Protection Cooperation (CPC) network, based on an improved CPC Regulation. This could, for example, consist of joint enforcement actions under the CPC Regulation targeted at an enhanced application of the Unfair Commercial Practices Directive (UCPD) vis-à-vis online platforms acting as intermediaries, based on the Commission guidance.

   Also case-law from the Court of Justice of the EU will continue to clarify many aspects of the existing EU rules and provide a harmonising influence as to their interpretation. The Commission is already trying to implement a non-legislative option regarding the better presentation of terms and conditions (T&Cs) and pre-contractual information. Specifically, it has invited the industry representatives to propose a voluntary agreement in the context of the REFIT Stakeholder Consultative group. Failing progress by end 2017, legislative intervention options will need to be considered as a separate legislative intervention, possibly for 2018, which would fall outside the scope of the present initiative.

2. **Non-legislative options** that would go beyond the baseline scenario include dialogue with Member States aimed at introducing or strengthening national penalties for infringements of consumer law, stepping up coordinated enforcement efforts as well as information campaigns, training activities and other efforts aimed to

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3 For more information on the EC proposal for the review of the CPC Regulation:

4 For more information on the REFIT Stakeholder Group, see information on the Register of Commission Expert Groups:
achieve enhanced compliance, as well as stimulating voluntary compliance of the digital industry with the CRD requirements also regarding online services that are currently not subject to its requirements.

The IA will examine to what extent unnecessary administrative burden due to the existing consumer legislation can be reduced (i.e. regarding overlapping information requirements and means of communication with consumers) without changing the relevant directives, and to what extent the consumer's individual redress rights under the UCPD can be improved within the current legal framework.

3. A targeted legislative action could adapt the relevant directives on specific evolved issues. These targeted changes could include

- Providing consumers with rights to individual remedies/redress against unfair commercial practices. Possible sub-options:
  - Limited intervention – Amend the Unfair Commercial Practices Directive to require Member States to provide contractual and extra-contractual remedies.
  - Full intervention – Amend the Unfair Commercial Practices Directive to provide EU-level harmonised provisions with contractual and extra-contractual remedies.

- Ensuring more proportionate, effective and deterrent financial penalties to tackle breaches of consumer laws to make them more proportionate, effective and dissuasive across the EU. Possible sub-options:
  - Limited intervention – Making administrative fines for breaches of key consumer law directives (such as Unfair Commercial Practices Directive (UCPD), Unfair Contract Terms Directive (UCTD), Consumer Rights Directive (CRD) and Price Indication) available in all Member States and harmonising the criteria for imposing them.
  - Full intervention – Making fines for breaches of key consumer law directives (such as UCPD, UCTD, CRD and Price Indication) available in all Member States and harmonising the criteria for imposing them, the level of fines as well as the method they are calculated (for example fines linked to the trader's turnover or calculated on the basis of traders benefits gained from the infringement).

- Introducing additional transparency requirements for online platforms, notably related to whom consumers conclude contracts with when buying on online platforms and whether EU consumer rights are applicable to such contracts. Possible sub-options:
  - Full intervention – In addition to the transparency obligations above, requiring platforms to verify information and making them liable for missing information.

- Making the CRD rules more coherent by extending some consumer rights to contracts for online services where consumers provide data instead of paying with money. Possible sub-options:
  - Limited intervention 1 – Extension of pre-contractual information requirements from the CRD to "free" digital services, where the consumer does not pay a price in money, but instead provides personal data.
  - Limited intervention 2 – Extension of right of withdrawal from the CRD to "free" digital services, where the consumer does not pay a price in money, but instead provides personal data.
  - Full intervention – Extension of pre-contractual information requirements and right of withdrawal from the CRD to "free" digital services, where the consumer does not pay a price in money, but instead provides personal data.

- Simplification of some rules and requirements. Possible sub-options:
  - Limited intervention 1 – Removing requirements to provide certain information at both the advertising and the pre-contractual stage and allowing traders to use modern means of distance communication and remove requirement to use out-dated means such as fax.
  - Limited intervention 2 – Review some rules concerning the right of withdrawal (e.g. its application to goods used by a consumer more than necessary to inspect them).
  - Full intervention – A combination of limited interventions 1 and 2.
## C. Preliminary Assessment of Expected Impacts [max 20 lines]

### Likely economic impacts

The future initiative would primarily be beneficial to consumers and better protect them against economic detriment, e.g. in case they are harmed by unfair or non-transparent commercial practices of businesses, including those providing misleading green claims or operating via collaborative online platforms.

Also economic actors, including SMEs, would benefit as the possible legislative changes would, amongst others, aim at reducing the costs linked to overlapping information requirements and improving efficiency in the traders’ online communication with consumers.

Rendering penalties more proportionate, effective and dissuasive will not generate additional costs for compliant businesses (i.e. the vast majority); there will rather bring benefits due to more deterrence against illegal practices and therefore a more level playing field.

Providers of online services that are currently not subject to the CRD requirements (regarding in particular pre-contractual information) will have additional compliance costs. On the other hand, there will be a more level playing field, legal clarity, coherence and technological neutrality if providers of online services and online digital content are made subject to the same rules under the CRD. Further harmonisation of consumer protection rules for online services would also strengthen consumers’ trust that will benefit intra-EU cross-border trade.

Providing for specific transparency requirements for online intermediaries would imply costs for businesses, including SMEs, for the adaptation of their websites to require certain information from third party traders and pass it on to consumers. At the same time, these intermediaries will benefit from additional clarity as to their role and responsibility in the transactions. Companies including SMEs that breach existing legal requirements will face additional costs due to the fact that consumers may more often claim remedies for the detriment that they will have suffered due to trader's behaviour.

Overall, the initiative will facilitate a more level playing field for businesses, i.e. the minority of infringing businesses will have less of an advantage over the majority of compliant businesses that will become more competitive. In addition, it will enhance consumer trust, by granting consumers an EU right to get individual redress when falling victim of an unfair commercial practice, on top of their existing EU right to complain to the authorities about it.

Under EU law, traders that target consumers in EU Member States are required to respect EU consumer law. This initiative will therefore have impacts in terms of costs and benefits also on traders that are based in third countries.

### Likely social impacts

By improving consumer information and redress opportunities, the initiative can contribute to increasing the consumers’ trust to acquire goods, services and digital content as well as boosting trust in green claims, which can encourage consumers to make more sustainable choices and contribute to a circular economy. No significant effects are foreseen in areas such as employment, health & safety, income distribution and good governance & administration. If legislative action is considered appropriate in the area of remedies and/or penalties, this initiative will have impact on the legal systems in the Member States.

### Likely environmental impacts

Stronger penalties and better individual redress opportunities against unfair practices will have beneficial environmental effects as they will act as deterrent also in case of unfair green claims (claims that omit or mislead about important environmental features of the product affecting the consumer’s transactional decision). More transparency on the part of online intermediaries may enhance consumer trust in more environmentally friendly forms of collaborative economy and sustainable consumption, for example for the purpose of car-pooling, ride-sharing, sharing of durable consumer goods, which might entail circular economy practices, sustainable production, reduced emissions, resource efficiency and waste reduction.

### Likely impacts on fundamental rights

Should legislative action be deemed necessary, any future proposal will be in accordance with Article 38 of the Charter of Fundamental Rights whereby the Union must ensure a high level of consumer protection. Better individual redress opportunities against unfair commercial practices would contribute to ensuring the right to an effective remedy enshrined in Article 47 of the Charter.

### Likely impacts on simplification and/or administrative burden

Depending on whether and which kind of action is chosen, (certain) traders (e.g. online platforms) may need to face additional limited compliance costs to adapt to the new rules. However, the simplification of the existing rules, such as on information requirements and distance communication with consumers, would entail some cost
reductions and alleviate administrative burden. For example, traders would have to provide some specific information only just before concluding a contract rather than already at the advertising stage.

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<tr>
<th><strong>D. Data Collection and Better Regulation Instruments</strong></th>
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<tr>
<td><strong>Impact assessment</strong></td>
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<tr>
<td>An impact assessment will be prepared to support this initiative and inform the Commission’s decision.</td>
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<tr>
<td><strong>Data collection</strong></td>
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<td>Substantive research is already available in a number of areas. The future impact assessment will rely chiefly on the information and evidence already gathered in the context of the Fitness Check and of the CRD evaluation. These included several studies by external consultants, Eurostat statistics, Consumer Scoreboard data, online public consultation (12 May – 12 September 2016), a high-level conference (2016 Consumer Summit) and a structured consultation with the main consumer and business stakeholders. Further data will be collected to complement the evidence base for the Impact Assessment, in particular through an online public consultation and an SME panel consultation, which will both explore simplification potential and burden reduction. In addition, specific ongoing studies, in particular on consumer issues in online platforms, collaborative economy and personalised pricing/offers in online markets will be taken into account.</td>
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<td><strong>Consultation strategy</strong></td>
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<td>Preparation of the initiative will include an online public consultation in mid-2017, an SME panel and discussions with the REFIT Stakeholder Consultative Group, which brings together the leading European and national consumer and business organisations. The Group already met five times before and after the publication of the Fitness Check report and further meetings are planned in the course of the preparation of the follow-up initiative. The launch of an online public consultation related to this initiative will be announced on the Commission's public consultations portal: <a href="https://ec.europa.eu/info/consultations">https://ec.europa.eu/info/consultations</a>.</td>
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<td><strong>Will an Implementation plan be established?</strong></td>
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<td>In order to address implementation issues and to improve future application, an implementation plan will be established to help Member States to transpose and successfully implement the possible future legislative changes.</td>
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