



Executive Summary of the Study on the application of the Consumer Rights Directive 2011/83/EU

May 2017

Background to the study

Directive 2011/83/EU of 25 October 2011 on consumer rights (CRD) was required to be transposed into the national laws of all EU Member States (MS) by 13th December 2013 and became applicable from 13th June 2014. It replaced two previous directives, Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises and Directive 97/7/EC on the protection of consumers in respect of distance contracts, and amended certain provisions of Directive 93/13/EEC on unfair terms in consumer contracts and Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

The CRD has fully harmonised certain consumer protection rules applying to off-premises and distance purchases of goods and services, as well as the provision of digital content, mainly related to pre-contractual information requirements and the right of withdrawal (RoW). It has also fully harmonised requirements regarding the conclusion of distance and off-premises contracts, and *inter alia*, rules on delivery and the passing of risk applicable to all consumer sales contracts, rules on fees for the use of means of payment and fees for communication by telephone.

The overall objective of this study is to assess the *effectiveness, efficiency, coherence, relevance and European added value* of the Consumer Rights Directive (Directive 2011/83/EU).

The approach has consisted of both a literature review and consultation. The latter has included targeted consultation by means of interviews in a sample of Member States (MS)¹ that were selected to ensure a high level of representativeness according to geographical coverage, population (i.e. large vs small countries) and the level of consumer protection that existed prior to the adoption of the Directive. An online survey was also used, targeting all types of stakeholders: individual consumers; individual traders; national consumer associations; national trade associations; national enforcement authorities and responsible ministries; and European Consumer Centres (ECCs).

The literature review has included a number of parallel studies conducted for DG Justice, such as a mystery shopping exercise and a behavioural experiment carried out within the Consumer and Marketing Law Fitness Check. The analysis of the results, responses and position papers provided under the Open Public Consultation (OPC) of the Consumer and Marketing Law Fitness Check² has also been a valuable source of information for this evaluation. Other sources of literature include stakeholder feedback collected during the Consumer Summit on the 17 October 2016 and a report issued by the European Economic and Social Committee (EESC) on the CRD and its evaluation.

¹ Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Finland, Greece, France, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Sweden, Slovakia and the United Kingdom.

² http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm

Last but not least, an EU-wide sweep was also conducted in 2015, with the results feeding into the evaluation of the CRD's effectiveness.

Comparison between the situation pre-CRD and post-CRD

The comparative analysis of the legislative situation pre-CRD and post-CRD has highlighted that, for many of the key provisions of the CRD, consumer protection has been strengthened in most, if not all, EU-28 MS.

This is because there was either no such protection previously (e.g. digital content and prohibiting default options on websites) or, where there was already some degree of protection, this has been increased by additional requirements on traders and harmonised rules on consumer protection (e.g. delivery and the passing of risk). In particular, the analysis has shown that:

- Prior to the implementation of the CRD, in almost all MS, consumers were not protected by legislation specifically concerning digital content. The only exception is Slovakia;
- The level of pre-contractual information defined under Art. 5(1) for contracts other than distance and off-premises (the minimum harmonisation approach) has increased in all MS.
- The level of pre-contractual information which traders are required to provide to consumers under Art. 6 (the fully harmonised provisions) has increased in all MS. Under Article 10, there are now greater consequences in most MS for failing to provide such information for distance and off-premises contracts, with the withdrawal period increasing to 12 months.
- The period for the Right of Withdrawal (RoW) (c.f. Art. 9) has increased in 15 MS; remained the same in 11 (BE, CY, CZ, DK, EE, EL, FI, LV, PT, SE and SI), and been reduced in two MS (although only in DE resulted in a substantive change³ since in MT only changed from 15 to 14 days);
- Reimbursement periods have now been shortened across most MS and the amounts that consumers are entitled to have reimbursed now include the delivery costs⁴;
- Delivery periods are now specified in a number of EU countries where this was not previously regulated (CZ, EE, ES, FR, IE, LV, MT, PT, SK, SE and the UK);
- The rules on the passing of risk have strengthened consumer protection in most countries (e.g. SE, DK, FI and the UK), since the rules are clearer than predecessor legislation; and
- A majority of MS previously had no provision in national legislation protecting consumers against additional payments, excessive telephone charges and inertia selling.

Moreover, the examination of national legislation in the different MS prior to the CRD's implementation has shown quite a significant degree of variation concerning the rules on consumer protection among MS. For instance, the rules on delivery varied as did the periods for the RoW. Thus, the CRD has reduced regulatory divergences among MS, and increased regulatory certainty across MS for those traders and consumers selling and buying cross-border.

Effectiveness of the CRD

The overall objective underlying the CRD was to contribute to the better functioning of the Business to Consumer (B2C) Internal Market and to achieve a high common level of consumer protection.

During the interviews, the CRD was viewed as having made a positive difference to consumer

³ Where the period for the RoW was previously 30 days.

⁴ Recital 46 makes clear that there is an exception, however, "if the consumer expressly chooses a certain type of delivery (for instance 24-hour express delivery)".

protection, in particular through its full harmonisation approach. The requirement on pre-contractual information for distance and off-premises contracts and the 14 day harmonised period for the RoW were the provisions regarded to be the most effective in achieving a greater level of protection.

The online survey has however highlighted some differences with regard to the effectiveness of the CRD depending on the type of contract. It appears that the perceived level of protection is not considered to be as high for digital content not supplied on a tangible medium as it is for goods and services with particular regard to the RoW. Both consumers and consumer associations shared the views that the level of protection for digital content purchases is not as effective as for goods and services due to lack of awareness among consumers as to how the RoW applies but also because of compliance, i.e. traders do not ask consumers' express consent and acknowledgment that they lose their RoW as soon as they start downloading the digital content supplied online⁵. Indeed, 39% of the national competent authorities responding to the questionnaire agreed that existing digital content related provisions require stronger enforcement, with some stakeholders thinking this would be of concern when dealing with the RoW.

Generally, the CRD is seen to have increased consumers' and traders' confidence in cross-border purchases and sales, however a number of factors are reported to still be hindering the effectiveness of the Directive's implementation. These are as follows:

- A lack of awareness and understanding by consumers and traders of the CRD's provisions. Despite efforts by both the Commission and national competent authorities, there appear to be a number of provisions where awareness is still low. These include exemptions from the RoW and inertia selling provision. However, the Directive is a relatively new Directive, thus the low level of awareness on specific new provisions is unsurprising;
- Low levels of compliance with specific provisions. Although the overall level of compliance with the CRD is considered to be good, there are specific provisions that traders appear to comply less well with. These include providing all the information requirements specified in Art. 6(1) and in relation to the RoW and the provision of a standard withdrawal form. National competent authorities agreed that these aspects will require enforcement in the future. In addition, compliance appears to be more of an issue for specific sectors, such as telecommunications and energy supply and specific contracts, such as telephone and catalogue distance selling; and
- Enforcement: there are mixed views as to the ability of competent authorities to enforce the CRD; although most competent authorities are engaged in joint actions and pre-enforcement actions, they are not being seen as particularly effective. Moreover, the number of enforcement actions taken against traders varies significantly by MS. Likewise, the level of financial penalties that can be levied also varies (see benchmarking of enforcement approaches in selected MS). The different level of enforcement across MS may reduce the effectiveness of the CRD in ensuring a high level of consumer protection and the competitiveness of enterprises within the internal market. Conversely, the new proposal to review the CPC Regulation may ensure more effective and coherent enforcement across borders in the future.

A further challenge that affects compliance levels is that there is a low level of awareness among traders of the existence of a new updated Directive to replace the predecessor legislation, or of the corresponding changes in the legal provisions. The consultation for this study and the results of the CRD Sweep found that many online traders are not aware that their website is non-compliant until they are contacted and alerted by the relevant national enforcement authorities. In the impact assessment

⁵ Art. 16 (m) on the exceptions from the RoW concerns digital contents and notes that the RoW may not apply if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his RoW.

that accompanied the CRD proposal (CEC, 2008) it was mentioned that the fragmentation of national legislation was one of the main reasons traders did not pursue cross-border trade. According to the survey, differences in national consumer legislation are no longer the main reason for not conducting cross-border trade and other reasons are more important. This would suggest that the CRD has been effective in reducing earlier fragmentation. Moreover, the regulatory choices available to MS when implementing the CRD do not appear to have had a significant detrimental impact on the achievement of objectives relating to reducing regulatory fragmentation.

In order to increase understanding and to help stakeholders to interpret certain provisions of the CRD, the European Commission's DG Justice and Consumers published a non-binding guidance document in 2014. The survey did not ask directly for views on the usefulness and quality of the interpretative guidance. However, feedback was obtained through the interviews and the Open Public Consultation (OPC) on the perceived usefulness and quality of guidance. Generally, the guidance was felt to be very helpful in providing practical examples as to how the Directive should be applied and in clarifying the scope in instances where there remained uncertainty (e.g. whether free online services and digital subscriptions are within scope or only paid-for services).

The CRD and the efficiency of its provisions

It has not been possible to quantify the benefits and costs of the CRD in monetary terms despite asking stakeholders for specific estimates. However, some qualitative feedback was obtained from different stakeholder types. There are mixed views as to the costs and benefits of the Directive. However, consumers generally reported positive impacts.

The impacts on traders vary from positive to negative according to the specific provisions concerned. Negative impacts were reported by traders in relation to some specific provisions, such as the reversal of the burden of proof regarding information provision on the RoW, the potential for increased volume of returns due to the extension in the duration of the RoW to a common 14 days (Art. 9) and the possibility for consumers to make use of their RoW even for products they have already used more than necessary to establish their nature, characteristics and functioning (Art. 14.2) but within the withdrawal period. Traders and their representative associations agreed that among those provisions with the greatest negative impact on competitiveness is the provision on pre-contractual information requirements for distance and off-premises contracts. The main concern was less the type of information required, but more the volume of information overall, which was considered too onerous and which many consumers are unlikely to read.

Some viewed the exceptions from the RoW as positive in balancing the impacts of the Directive on competitiveness in specific sectors, such as the hotel sector. However, the heating oil retailers (mostly SMEs) voiced serious concerns regarding the interpretation by a domestic court of Art. 16(h), concerning the exceptions from RoW of goods whose price is dependent on fluctuations in the financial markets. As a result of the court judgement, the RoW applies to heating oil distributors in Germany which is resulting in financial losses. The application of the RoW to online bidding platforms has also raised legal uncertainty as public auctions are exempt from the RoW.

Among the benefits reported by traders of complying with the Directive are increased sales through strengthened consumer confidence to shop cross-border and more repeat sales. Overall, however, traders did not notice an increase in sales due to the implementation of the CRD.

Stakeholders have also reported positive impacts from the CRD and its implementation, such as greater regulatory certainty (e.g. delivery, passing of risk).

The effects on SMEs are reportedly similar to the effects for larger companies and for trader respondents overall. Views were divided among respondents, with 22% of SMEs and micro-enterprises believing that the benefits outweighed the costs by a moderate to a significant amount. On the other hand, 40% of SMEs noted that the costs were greater than the benefits. For online B2C retailers, redesigning websites can be especially costly for micro and small firms. Larger firms are better able to spread the costs of compliance across their activities and sales channels.

Further challenges exist in meeting the potentially increased costs under the CRD from an increase in returns in areas of B2C commerce where there are low profit margins, e.g. online retail, which puts micro and small firms at greater financial risk resulting from consumers exercising their RoW (Art. 11). There are also concerns among SMEs relating to the requirement to meet the costs of returns (especially refunding delivery costs and postage and packaging) for high value products if consumers treat the right of withdrawal as an opportunity to test out products without intending to keep them.

In terms of unnecessary regulatory burdens, the main burden identified relates to the perceived duplication in information requirements between Art. 6(1) of the CRD and Art. 7(4) of Directive 2005/29/EC on Unfair Commercial Practices (UPCD). It was questioned by some stakeholders, especially the distance selling associations and their members, whether information really needed to be provided at both the marketing (UPCD) and consumer contract (CRD) stages. The extent of extra cost is arguably not too high since no traders interviewed identified the costs as being that high. Indeed, most provide the same information requirements in respect of all contracts. Opinion was divided at the European Consumer Summit and in stakeholder interviews as to whether it was desirable to eliminate the information requirements in the UPCD and only require traders to follow those in the CRD. Another possibility raised at the European Consumer Summit was the possibility of combining all consumer and marketing law (including the CRD) into a single piece of coherent legislation through the adoption of a Framework Directive in the form of a European Consumer Code. Although this provides potential scope for regulatory simplification in future, there is no consensus on this issue presently.

Most competent authorities reported moderate administrative costs to transpose the Directive but have experienced higher costs associated with raising awareness about the new requirements in the CRD, and in relation to enforcement activities (checking the compliance of traders' websites, writing pre-enforcement letters and checking traders' compliance after having received these, drawing attention to areas of non-compliance, taking court action in strategic deterrent cases). It should be noted that although they could not be quantified, the extent of costs and benefits were found to vary depending on the MS concerned, and the predecessor legal framework. Generally however, the costs of transposing the Directive are not considered to have been significant by most national competent authorities. More significant costs are associated with the implementation of the CRD and in carrying out enforcement activities to check compliance.

Coherence of the CRD

Overall, from an external coherence perspective, the Directive was found to be coherent with other relevant EU legislation. As for sectoral legislation, no major problems have been identified relating to coherence. This is because sectors with sector-specific legislation are generally exempt from the CRD and the *lex specialis* principles under Art. 3(2) note that if any provisions of the CRD conflict with a provision of another Union Act governing specific sectors, the provision of the Union Act shall prevail and shall apply to those specific sectors.

The CRD was found to be generally coherent with other EU consumer and marketing legislation

although overlaps were highlighted by survey and interviewees' responses between the information requirements of the CRD and Directive 2005/29/EC on Unfair Commercial Practices (UCPD). In addition, the information traders are required to provide about themselves is substantively similar across the CRD, the Services Directive and the e-Commerce Directive respectively but the CRD includes more detailed pre-contractual information requirements in respect of the description of the product (i.e. main characteristics, functionality and interoperability of digital content) and price. This means that the provision of pre-contractual information by a trader in accordance with the CRD is sufficient to comply with the requirements of the e-Commerce and Services Directives.

Some minor divergences were identified in the information requirements set out in the different pieces of horizontal legislation, such as whether an email, phone number, fax number or a combination of the three is required. This reflects the fact that the earlier legislation was drawn up at a time when the most appropriate pieces of information about the trader reflected the prevailing technologies at the time. The requirement for traders to provide an email address was seen as being essential by consumer associations and the current wording of requiring an "e-mail address, where available" was seen as insufficient. Examples were identified of complaints registered by consumer organisations and enforcement authorities of instances where unscrupulous traders deliberately did not include an email contact and only a phone number, but nobody responds to calls. Conversely, a fax number is no longer seen as being an appropriate information requirement, due to developments in ICT, communications and telephony.

There is scope in-built to prevent more substantive conflicts between the CRD and other horizontal legislation applicable to traders. Should a provision of the e-Commerce Directive or the Services Directive on the content or the manner in which the information is to be provided conflict with a provision of the CRD, the provision of the CRD shall prevail (according to Article 6(8)(2)). Notwithstanding differences in the underlying objectives of the legislation, some stakeholders agreed that steps could be undertaken to simplify information requirements (through an alignment process and future legislative review or by including all the general information provisions in the CRD and making explicit reference to these being applicable in other pieces of legislation, such as the UCPD, Services Directive and the e-Commerce Directive at such time as these undergo a process of revision). In addition, the text of the CRD will need to be updated at some point in the future to reflect recent legislative developments, such as the adoption and coming into force of the ADR Directive. Since this provides a more formalised approach to dispute resolution which could help traders and consumers, recourse to an ADR mechanism could be explicitly mentioned in the CRD as a tool to ensure dispute resolution between traders and consumers in case of disagreement (for instance, estimating the diminished value of goods in relation to products that have been used but are still within the 14 RoW period).

Relevance of the CRD

The CRD remains highly relevant because it provides a framework for a high common level of consumer protection across the EU through a full harmonisation approach. Stakeholders responding to the survey and participating in the interview programme have thus recognised that the CRD is, relevant overall in terms of promoting the growth and development of B2C e-commerce. From an internal market perspective, the CRD is seen as crucial to ensure protection for the cross-border online purchases of goods, services and digital content and in engendering confidence and trust among consumers.

However, some gaps have been identified by stakeholders that need to be addressed, with particular reference to free online services, which are not covered by the Directive, and digital content, which is covered, but with low awareness levels. The fact that the Directive covers digital content for the first

time is especially relevant from the point of view of pursuing the objectives in the DSM Strategy which was adopted in 2015.

The relevance of all pieces of pre-contractual information requirements under Art. 6(1) is not clear to all stakeholders. Concerns have been raised as to whether consumers read and/or understand the majority of the information provided, especially when this is incorporated into very detailed terms and conditions (although according to consumers, most pieces are relevant). The online survey asked stakeholders about their view on whether pre-contractual information requirements could be simplified by using a graphical model (e.g. with icons). 40% of consumers agreed that the presentation of pre-contractual information in graphic form would be useful. The view of the consumer and trade associations differs, although 31% of the trade associations agree on the use of a graphical model with icons but believe that this should not be binding, another 45% disagree on the use of it. The findings of the behavioural experiment suggest however that icons do not improve the use and understanding of pre-contractual information. A key finding from the European Consumer Summit was that whilst the possible future use of a model form with icons to communicate the required information to consumers was welcomed, there was a consensus that this should be voluntary only, since some written information is still required. Perhaps, a possibility is to include this under the self and co-regulation advocated by traders, owing that traders appear not to object to the use of icons (as reflected in the survey responses).

Added value of the CRD and its implementation

A key added value from the Directive was the reduction in the level of regulatory fragmentation in respect of consumer rules concerning distance and off-premises contracts thus benefiting cross-border trade. The analysis of consultation feedback suggests that overall, the CRD has added value to the level of consumer protection across most MS, with very few exceptions. In addition, through a maximum harmonisation regulatory approach, a further added value is in strengthening consumer trust in shopping cross-border.

This is not to say however that the CRD would not benefit from further simplification in order to reduce the administrative burden on traders. In particular, the simplification of pre-contractual information requirements has been recommended by some stakeholders, although there are practical considerations in this regard, since there were limited suggestions as to which specific information requirements should be dropped.

Summary of recommendations

Based on the evaluation, the following recommendations have been made:

- To explore the scope for the simplification of pre-contractual information requirements by aligning these with other pieces of EU legislation within the EU consumer acquis. In particular, consideration should be given to only requiring information requirements at the pre-contractual rather than the marketing stage (i.e. eliminating these within Art. 7(4) of the UPCD);
- To update certain information requirements so as to better reflect technological/market developments, e.g. web-based contact forms as an alternative to a trader's fax number, and/or referencing via hyperlinks. The use of a model form with icons to present pre-contractual information could be explored on a sector by sector basis. However, it is not recommended to apply a binding model for all sectors to which the CRD applies;
- To reconsider the appropriateness of the RoW for goods that consumers have already used more than necessary to establish their nature, characteristics and functioning and therefore have a

diminished value (due to the difficulties in estimating and agreeing the value between traders and consumers and the risk of traders incurring losses due to used goods not being resaleable);

- To engage in sector-based discussions to address legal uncertainties affecting specific sectors with regard to the RoW (e.g. online bidding platforms, digital content provision, heating oil distribution);
- To clarify the rules applicable to online platforms and to ensure that these are enforced effectively. There is general support among stakeholders as to the need to clarify the applicable requirements, with particular regard to pre-contractual information requirements and the RoW;
- To continue awareness-raising campaigns and/or ensure that there are means to facilitate these. It is suggested that information campaigns focus on those provisions of greatest interest to consumers and traders. For consumers, these include RoW and its exceptions, provisions on digital content and inertia selling. For traders, these include complying with pre-contractual information requirements and ensuring familiarity with other key provisions of the CRD where there is a difference with predecessor legislation⁶;
- To ensure that national competent authorities have the resources available to conduct enforcement activities and focus on specific provisions, such as the provision of information on traders and/or the provision of withdrawal forms so that RoW can be availed, if needed. On the other hand, the new proposal to review the CPC Regulation may ensure more effective and coherent enforcement of the CRD across borders in the future; and
- There may be scope for national competent authorities to increase the level of penalties so that they are set at a level that can act as a deterrent for traders; further action or guidance at EU level may be needed to achieve greater uniformity in determining the national approaches to penalties so as to be in keeping with the maximum harmonisation approach that underpins the CRD.

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⁶ A best practice example was found through consultation with a trade association that provided their members with a template compliant with all pre-contractual information requirements so by using the template members could save time and resources rather than developing their own list from scratch.