Position Paper

UEAPME[1] position on the Public Consultation on the targeted revision of EU consumer law directives

Key Messages

The main conclusion of the recent Fitness Check on consumer law that the Commission carried out, stated that: "*The evidence gathered during the Fitness Check of EU consumer law and the evaluation of the Consumer Rights Directive (CRD) indicate that, overall, the current EU consumer law acquis is still fit for purpose and does not require a major overhaul*.[2]" UEAPME and its member organisations could not agree more with this conclusion. However this does not mean that no changes at all to the acquis and improvements would be required. Our suggestions can be found further in this paper. At the same time we cannot agree with the statement in the questionnaire that "infringements of consumer rights (lack of compliance with consumer law by traders) remain relatively high levels". Indeed the Fitness Check of EU consumer law and the evaluation of the CRD Report gives a different view. It states that "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" In addition, none of the options, put forward in the questionnaire on the question "what should be done to ensure that traders comply better with consumer protection rules", are recommendable. As the complexity of the rules is the main reason for the unintentionally non-compliance, the only solution is to invest in prevention and to better inform the traders and, if possible, to make the rules more intuitive.

Platform Transparency

In the consultation document the Commission asks "if consumers encounter problems with online platforms, in the sense that they don't know whether they buy from the online market place, or from someone else, and that they are not sure which rights they have. "

UEAPME is fully aware that this can be indeed a problem. In our view it should be clear for consumers who they are buying from, and therefore, which rights they have. If the consumer does not buy directly from the platform, but from a third party, it is in our view the responsibility of the online platform to provide the possibility for this third party to give the necessary information on its status (consumer or professional seller). It should also be the responsibility of the platform to make sure that the third party seller indicates this status clearly (for example: the platform could foresee that the third party cannot join the platform, unless it indicates this status). However, it should not be the responsibility of the platform to check if the indicated status is correct: if the third party indicates it is a consumer, and not a professional seller, it should not be up to the platform to check if this information is correct.

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

[2] Introduction to the Public consultation on the targeted revision of EU consumer law directives

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"Free" Online services

Contracts which are free for the consumer should not require extensive pre-contractual information due to the minor consequences of the conclusion of the contract for the consumer.

Free services have limited contractual consequences for the consumer. Should the consumer no longer want the service, he can stop using it at any time.

Means of communication

The technological developments have led in the last decennia to the development and raise of different and new communication means between traders and consumers.

In UEAPMEs opinion, the e-mail address and the telephone number remain the main means of communication (and should thus also be communicated). Other means of communication (chat, social media) show increasing importance, but are not generally used by all traders.

Better enforcement and redress opportunities for consumers

The consultation document of the Commission states that:
"*Currently, EU rules do not give consumers who have suffered harm from unfair commercial practices, such as misleading advertising, any individual rights to remedy their situation. Furthermore, the consumer's right to remedies/redress for harm caused by unfair commercial practices are not always sufficiently guaranteed under national law. Different and ineffective national rules on remedies/redress may 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 lack of consumer trust in purchasing, particularly cross-border, and thus to reduced frequency and volume of trade for both consumers and traders*."

UEAPME does not agree at all with this conclusion. In any case, we do not see any evidence at all why different national rules on remedies/redress may lead to costs for traders engaging in cross-border trade, nor why consumers would not be able to remedy the consequences resulting from unfair commercial practices.

In light of this conclusion, the Commission asks whether penalties for infringements of consumer law should be harmonised. UEAPME is definitely against such harmonisation. The consumer acquis currently provides a variety of sanctions that are created specifically for the rules they try to protect. Providing an additional layer of sanctions in the form of penalties would be disproportionate. The introduction of fines within the acquis itself would undermine the possibility for Member States to provide for the most adequate sanctions on infringements.

Especially in the field of unfair commercial practices, the introduction of individual EU- remedies for consumers cannot be supported. Whether a commercial practice is unfair always has to be analysed on a case-by-case basis, with the exception of the list of practices that are always unfair, provided for in Annex I of Directive 2005/29. Establishing whether a practice is unfair should therefor be left to the competent authorities. Individual means of pressure (such as the provision of individual remedies) should not be provided for in the acquis. Furthermore, if a competent authority would consider a certain practice to be unfair, the consumer has the possibility to claim damages afterwards according to the applicable national law.

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Fines for formally infringing consumer law should always be the last resort. Given the complexity of consumer law, the risk for small and medium sized enterprises (SMEs) with no legal department is particularly high to commit unintentional infringements. Financial sanctions are only appropriate if the violation was intentional and/ or is committed repeatedly. An adequate approach that would serve the aim of better compliance much more than high fines would be to lay down the principle "Advising instead of Fining and Suit-filing" for enforcement. This means that enforcement authorities and qualified entities should first advise a non-compliant enterprise. If then compliance is fulfilled it should be refrained from sanctions or injunction actions.

In addition, penalties should not constitute financial incentives to make a business out of complaining against consumer law infringements. This would aggravate the already problematic and sometimes abusive warning practice. As in some national laws there should be a general principle that prevents a person or a company to make money on damages.
A breach of consumer protection rules is punishable in all EU Member States. The level of fines is not decisive for the frequency of violations.
UEAPME explicitly rejects the allegation that companies do not behave lawfully unless they are threatened by sanctions.

Simplification of Rules on the right of withdrawal

Doorstep selling

The Commission has become aware of the fact that there are rules in some Member States that appear to ban or come very close to banning doorstep selling as a sales channel in general.

UEAPME does not agree that Member States should have the possibility to introduce a general ban on doorstep selling. This type of selling can take many different forms (many of which are still evolving), and should not be categorised as 'unfair' or 'misleading' all together.

In this context we would like to recall that UEAPME often warned the EU-legislators already during the decision making process of the CRD against the inclusion of contracts when the business contact was established by the consumer into the regime for off-premises contracts (e.g. the consumer calls the craftsman like a painter to his home and the contract for painting the flat is concluded there). Decision makers became then aware of the fact that the proposed regime for off-premises contracts is absolutely inadequate for SMEs and inserted at least some specific exceptions from the right of withdrawal (e.g. for urgent repairs). Nevertheless the whole regime, e.g. the information requirements on the right of withdrawal and getting the consumer's express consent and acknowledgement that he will lose his right of withdrawal once the contract has been fully performed are highly problematic and too complex for SME especially with regard to so called mixed purpose contracts (encompassing goods and services) which are typical in the crafts sector.

The highly detailed information requirements for off-premises, the way in which they must be fulfilled (respectively "on paper") together with the fact that the burden of proof that the information has been correctly provided is on the craftsmen, forces them to use enormous contracts forms containing every information, confirmation, request and consent in the right order in duplicate. Apart from the bureaucratic burdens the tremendous legal risks of e.g. correctly assessing the contract as either a sales contract or a service contract is on the craftsman that usually has no legal expertise.
The CRD has definitely created a legal minefield many European SMEs might be presumably not even really aware of: making any, even a small mistake with regard to the information on the withdrawal right leads to an extension of the period of 12 months in favour of the consumer. The consumer can withdraw from the contract even if the service is completely fulfilled and will not have to pay anything for it or can claim his already paid money back.

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For off-premises contracts the requirements of the CRD are not manageable for an average craftsman and it has become extremely difficult for him to conclude such contracts."

In our view, these and other problems of the CRD have to be seriously discussed and tackled with priority instead of considering further draconian fines or additional Consumer-remedies at European level. UEAPME is still convinced that a general distinction between solicited and unsolicited contracts would be the optimum solution from the perspective of SMEs. Contracts negotiated away from business premises where the consumer himself initiated the business contact should be subject to the information requirements set for on-premises contracts instead.

Simplification of rules

In the evaluation, several businesses, and especially SMEs, reported specific burdens in complying with the 14-days right of withdrawal. Specifically, some of them criticise the CRD rule whereby the trader is obliged to refund the consumer as soon as the consumer provides evidence of having returned the goods. As a consequence, the trader may have to refund the consumer even before he is in a position to determine whether the goods have been used more than strictly necessary and therefore have a diminished value.

UEAPME fully acknowledges these problems with the 14-days right of withdrawal. The feedback from our members mainly concern the following problems:
It appears that consumers increasingly abuse the right of withdrawal in the context of e-commerce in order to use the purchased good and then send it back. In these cases the use of the good clearly exceeds normal 'testing'. Certainly in sectors such as fashion (buying expensive dresses, shoes, fur coats, … to wear them one evening and then send them back), electro (using televisions during sport events such as the world cup of soccer), … It is clear that these kinds of misuse constitute an unacceptable practice for the economy and the merchants in particular, incurring unnecessary costs and waste of time.
It is of utmost importance to find solutions to this problem that are pragmatic. Such a solution could exist in providing an exception to the right of withdrawal, such as the existing exception on the right of withdrawal for sealed goods3:
"Member States shall not provide for the right of withdrawal set out in Articles 9 to 15 in respect of distance and off-premises contracts as regards the following (e) the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;"

This exception could be extended, by deleting the words "due to health protection or hygiene reasons". In that case, sellers could provide a clear mark on the product (such as a sticker or a tag) in such a way that consumers would still be able to fit, test or inspect the purchased good, but they would not be able to use the product (for example they would not be able to wear the dress to an evening out) without taking this mark off. If the mark would be taken off, the right of withdrawal would no longer apply.

The most adequate solution in order to prevent such clearly abusive conduct by consumers would be to exclude the right of withdrawal when the goods are not only inspected to establish their nature and functioning but actually used.
Another problem concerns the obligations of the trader in the event of withdrawal. The trader has to reimburse all payments received from the consumer, including the costs of delivery, which can be (relatively) high, taking into account the costs of delivery itself, but also the costs of payments, and the relation with the cost of the product. This is often reported as an important burden.

[3] Article 16, e) of DIRECTIVE 2011/83/EU on consumer rights

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Another aspect that is reported as a problem is the complexity of the model instruction on the right of withdrawal that is not suitable especially for SMEs in many cases. The different options foreseen in the model have to be correctly chosen by traders who are not legally trained experts. Otherwise the information on the withdrawal right would be wrong with the above described absolutely disproportionate consequences for the trader. Especially for cases of "mixed contracts" covering goods and services the existing model instruction cannot be used, at all. If the European legislator burdens enterprises - 99,8% of them are SMEs and 93% microenterprises with less than 10 employees - with the burden to inform consumers in an increasingly detailed and complex manner about their in any case mandatory rights the European legislator shall - at least - provide a model instruction that can be easily used as such, covering all possible cases to avoid the difficult task for SME to select the correct ones out of many options.

In addition UEAPME would like to stress two topics not dealt with in the questionnaire:

Information requirements

The current acquis asks merchants to provide a wide range o information, at different stages of the contractual process. Although the consultation seems to imply the abolition of two very specific information requirements (geographical address of the trader and the complaint handling policy) within the Unfair Commercial Practices Directive. This is far from sufficient. The problem of the entire consumer acquis, and therefore also of the information requirements, is that they are far too detailed, and spread over several directives. For SME's it is virtually impossible to find, let alone apply all these rules. They should therefore be simplified and be made clearer and more transparent. The above mentioned revision of the model-instruction, encompassing all cases without options to choose from, should be a first step.

Right of redress of the seller

In case of legal guarantee, the right of redress of the seller towards the producer should be reinforced. It is of crucial importance for the seller to have a watertight right of redress. It should therefore be clearly provided that the producer cannot refuse the redress and has to pay for all the expenses the seller had to make in order to be able to provide for the remedy.

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