

Position paper on the fitness check of EU consumer law

Introduction

Ecommerce Europe welcomes the opportunity to provide feedback to the public consultation on 'digital fairness – fitness check on EU consumer law'. We appreciate that the Commission is conducting a thorough evaluation of the existing horizontal consumer law instruments to assess whether it is still adequate for ensuring a high level of consumer protection in the digital environment. Businesses, whether online, offline or omnichannel, have a long-term interest in building trust by protecting customers. We therefore fully support the Commission's objective of ensuring a safe and trustworthy digital environment.

In general, we believe that the EU already possesses a very complete and flexible legislative framework for consumer protection. However, we are committed to constructively collaborating with EU policymakers to further assess if there are any legal gaps or enforcement problems reducing the effectiveness of the regulatory framework.

In this paper, Ecommerce Europe will outline its views on the issues that are central to the current evaluation on digital fairness. We would however also like to raise several general observations as we believe that for any rule to function successfully, all actors involved need to be aware of their rights and responsibilities and these need to be followed-up by effective enforcement.

1. It is crucial to ensure all businesses, large and small can understand and implement the rules. Authorities can help businesses with this. Ideally already from the implementation phase, and not only through fines or sanctions in case of non-compliance.
2. It is important to ensure consumers are also informed and aware of their rights and are able to effectively exercise these. This is dependent of successful implementation of the Omnibus Directive and the Representative Actions Directive and the ongoing evaluation of the Directive on Alternative Dispute Resolution.
3. It is equally important to ensure that these rules can be implemented and enforced effectively in order to protect the consumer, but also the investment of compliant businesses. Unfortunately, in many policy areas, the EU is still a mosaic of different interpretations and transpositions of legislation. These differences do not help businesses, which are increasingly operating cross-border, but also do not help consumers understand their rights, especially when shopping cross-border. It is therefore imperative to ensure more harmonised implementation of the rules and to equip authorities with sufficient resources and technical expertise.

Unfair practices

The public consultation asks if there is a need for stronger protection against digital practices that unfairly influence consumer decision-making. This question has also been central to the discussions between stakeholders and the European Commission so far.

In principle, Ecommerce Europe fully supports the objective to protect consumers against practices that would unfairly influence their decision-making capacities. This should be a channel-neutral principle that is applicable regardless of the sales channel, so both in an offline and online environment. Generally, Ecommerce Europe considers that unfair commercial practices are already sufficiently covered by existing legislation. In particular, the Unfair Commercial Practices Directive (UCPD) 2005/29/EC is flexible enough to cover most unfair commercial practices due to its case-by-case approach based on broad criteria.

On 30 January, the European Commission and the CPC Network released the results of a screening of retail websites¹. In response, Commissioner Reynders argued that the “screening shows that nearly 40% of the online shopping websites rely on manipulative practices to exploit consumers' vulnerabilities or trick them.” While there may be some rogue traders active on the market that do not respect the rules, Ecommerce Europe is convinced that the vast majority of businesses aims to be compliant with EU legislation and does not intend to harm the consumer. On the contrary, consumer trust is essential to successfully running a business and for customer loyalty. We therefore believe that instead of highlighting certain percentages of businesses that are not fully compliant, without clarity on the methodology, it would be more constructive to find out why these businesses were not acting in line with EU legislation. The regulatory fragmentation and significant legislative changes over the last years have contributed to a lack of legal clarity for businesses. We would therefore argue that policymakers could look into which practices are particularly unclear to companies and only if there is sufficient evidence of practices that are deemed unfair but fall in a “grey” area of the UCPD, they could be further specified. However, considering this is already sufficiently covered by legislation, no general ban of so-called “dark patterns” should be introduced.

Additionally, in the last years, the Commission is encouraging companies to support sustainable consumption, beyond what is required by law. For instance, in the sustainable consumption pledge, retailers are invited to increase the visibility of EU Ecolabel products in their shops. Ecommerce Europe believes these are very positive developments, as they could guide consumers in making more sustainable consumption choices. However, the current discussion seems to consider such green nudging practices, which influence the ranking of products on an interface, as negatively impacting the consumer's choice. Ecommerce Europe asks policymakers to consider the importance of encouraging more sustainable behaviour and stresses that the room for manoeuvre should not be too tight for retailers.

Terms & Conditions

Terms and conditions (T&Cs) are an important tool to ensure fairness and transparency in B2C contracts. While Ecommerce Europe believes it is essential to ensure easy access to terms and conditions, we are cautious about the idea to introduce a summary of the key T&Cs. We think that providing a summary could be misleading for consumers, as depending on the variety of products or services provided, detailed T&Cs may be necessary to ensure reliable information for all use cases that the consumer may encounter. The information contained in the terms and conditions of sale is, in most cases, pre-contractual information required by European or national law. It is difficult to determine which T&C are the most relevant in a particular trade and the related contract. Therefore, as a summary of the key T&Cs could not be comprehensive, it would risk litigation with consumers claiming they were not informed about all T&Cs. The trader bears the risk that the T&Cs are interpreted in their disadvantage or deemed invalid, if not properly communicated to the consumer. Currently, there are already examples of requiring T&Cs summaries in

¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418

financial regulations. Before considering something similar for T&Cs in general, it would be relevant to examine whether they have proven to be effective.

Ecommerce Europe agrees that a simplification of T&Cs would be in the interest of the consumer and the trader. However, in the last years, legislative changes have only contributed to further complexity of information obligations [esp. Sales of Goods and Digital Content Directives but also e.g., Omnibus Directive, Accessibility Act and soon ECGT related rules]. Therefore, the first priority should be reducing the overall number of information obligations, which are a large part of any T&Cs. Additionally, it would be helpful to explore how T&Cs can be more easily understood. We encourage the Commission to research in which form information is best understood by the consumer. A leading role could be taken by the Commission for instance to develop infographics or other visual information methods.

Cancellations of contracts

Ecommerce Europe fully supports the objective of enabling consumers to cancel subscriptions in an easy manner. We therefore also believe that cancellation online should be easily accessible and actionable by the users of a service. However, imposing a precise technical solution for cancellation with a one-size-fits-all approach would be problematic, due to the variety of digital services (e.g., a user experience on a social network or a search engine is very different from the use of an e-commerce website) and website architectures. We advise against overly prescriptive rules that mandate precise technical solutions. We believe this would impede innovation and could lead to a distortion of competition with actors based outside the EU, which do not have to adhere to such strict standards. Instead, we would rather support a principle-based norm stating that it should be simple for a consumer to cancel their contracts.

Article 7(4)(e) of the Unfair Commercial Practices Directive (UCPD) states that the existence of a right of withdrawal or cancellation must be mentioned in invitations to purchase whenever applicable. In these cases, traders are required to inform consumers about the existence of such rights, but do not have to detail the conditions and procedures to exercise them. Instead of a cancellation button, it may also be considered to more explicitly mention the conditions and procedures for cancellation.

Regarding the suggestion to introduce a requirement for a trader to send the consumer a confirmation (e.g., via email), this is something that can be considered. It will most likely be more relevant for subscriptions than for the sale of goods, as you cannot cancel contracts for goods, you can only withdraw. In any case, a confirmation should not be sent immediately when receiving the termination notification, but only after the trader has had the chance to check that the consumer is eligible to cancel the service and is following the agreed terms and conditions. Businesses offering a subscription service to consumers frequently offer a free trial to consumers so that they can experience the service before having to pay. However, payment details are often already requested to ensure there is a real person (likely not a bot) with a valid identity (likely not a fake or stolen one) signing up for a free trial. It also helps to avoid situations in which consumers subscribe to free trials repeatedly, which could ultimately lead to businesses no longer offering free trials.

Personalisation

Personalised offers are an important tool for retailers of all sizes, in particular small ones, to be able to reach consumers to offer their products and services, ensuring that consumers are met with relevant offers. We believe that personalisation is a key feature of a seamless online experience, especially as, due to the ongoing digitalisation of the economy, consumers require easy access to relevant content. We believe that existing legislation, in particular the General Data Protection Regulation (GDPR), notably Article 22(1), already effectively lays down the principles for automated processing, including profiling. Additionally, the UCPD and the new provisions of the DSA also already contain relevant rules in this regard.

Professional diligence

In the public consultation, the Commission is suggesting clarifying the concept of the trader's 'professional diligence'² towards consumers in a digital context. Ecommerce Europe believes that professional diligence can and does have legal significance (but only) as common law, complementing statutory rules or even supplementing dispositive ones. The concept is currently defined in the Unfair Commercial Practices Directive (UCPD) so that it can be applied in a flexible and broad way. This is crucial considering the diversity of the retail sector, in which traders in various sectors interact in many different ways with consumers. Professional diligence depends at least as much on the type of products and services offered as on the context they are offered. Professional diligence can mean one thing in a certain context, but could be quite different in another. In principle, we believe that online and offline channels should be treated equally from a regulatory perspective. Ecommerce Europe advocates for channel neutrality in legislation and we do not consider it appropriate to amend this concept in the Directive specifically for traders in the digital sector. Ecommerce Europe believes the current text ensures sufficient protection for consumers. However, if any clarification of the concept would be given, this would be best achieved by updating the existing guidance on the UCPD.

Burden of proof

Trust is paramount for e-commerce, e-merchants need to provide a safe and trustworthy environment in order to gain and retain customers. Shifting the burden of proof would undermine good faith and loyalty as core principles of consumer law. Rather than assuming as a basic principle that traders are not acting in good faith, two alternative courses of action could improve consumer protection. First, we point to the need to enforce existing regulation towards all actors. Only effective enforcement can ensure that any existing (or new) rule is properly executed. Second, we strongly encourage consumer protection authorities to establish a close dialogue with traders, to inform and guide businesses in applying legislation when needed (especially for small traders).

The Commission proposes as a policy option to shift the burden of proof of compliance with legal requirements to the trader in certain circumstances. For instance, when only the company knows the complexities of how their digital service works. Ecommerce Europe fears that this could be an opening for unsubstantiated claims, as many issues could be considered as "complexities" in digital services.

A general shift of the burden of proof would often be complicated, burdensome and/or redundant. However, similar to the new proposal for a revised Product Liability Directive, it could be considered to add provisions requiring businesses to disclose evidential information that a claimant would need to prove their case in court, however including a safeguard for the protection of trade secrets. To be able to comment more thoroughly, further details on the Commission's suggestions would be required.

'Average consumer'

The concept of the 'average consumer'³ is well-established in both case law and Recital 19 and Article 5(3) of the Unfair Commercial Practices Directive, which address how to deal with consumers who are particularly vulnerable to a certain practice. The UCPD guidance further clarifies that the concept of vulnerability is not limited to the characteristics listed in Article 5(3), but it also covers context-dependent

² [In general, 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers - honest market practice and/or the general principle of good faith in the trader's field of activity.]

³ According to the case law of the EU Court of Justice, the average consumer is defined as reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. Under current EU law, vulnerable consumers are those that are particularly vulnerable to unfair commercial practices, for example because of their mental or physical infirmity, age or credulity.]

vulnerabilities. Ecommerce Europe believes that these provisions provide an appropriate degree of flexibility to protect consumers. If there are criteria for average or vulnerable consumers laid down by the CJEU which have not yet been consolidated in directives, those could be integrated to benefit legal clarity. However, any “adaptation” should avoid an overhaul of the fundamental concept of the ‘average consumer’. In the public consultation, the Commission refers to potential ‘additional benchmarks or factors’. It is unclear what would constitute such additional benchmarks or factors, making it difficult to provide substantive comments. Overall, we believe that if any clarifications would be required, they would be best integrated in the existing guidance on the UCPD. Ecommerce Europe also encourages the Commission to research which alternative methods may exist to increase resilience of consumers, both online and offline. There may be certain formats which are more successful to fulfil certain information requirements than others. Our members would be very keen to think along with the Commission on how consumers can be best informed about their rights and obligations when shopping, whether this is in a digital, brick-and-mortar, or omnichannel environment.

Better regulation

Ecommerce Europe appreciates the approach taken by the Commission to conduct this fitness check, including a call for evidence, public consultation, various evidence-gathering exercises and ample opportunity for stakeholders to contribute their views. However, while the evaluation on the fitness of EU consumer law is still ongoing, there are several relevant developments occurring in the same field. For example, the proposal for a Directive on Empowering consumers in the green transition amends both the UCPD and the CRD. Moreover, the proposal on financial services contracts concluded at a distance also amends the CRD, mostly regarding financial services, but also by extending the obligation to introduce a withdrawal button from financial services to all distance contracts. While we recognise the importance of targeted changes to consumer law, based themselves on consultations of stakeholders and analysis of existing regulatory gaps, we are particularly concerned by the current extension of the scope of the discussion beyond these topics.

We believe it is important to have an open discussion on both the manners in which consumers can exercise their withdrawal right as well as on the position of consumers in the green transition. However, both the discussion on financial services contracts and empowering consumers are now being used as vehicles to amend the CRD horizontally. We are concerned that such far-reaching amendments to the legislation are premature, and wonder how they will be incorporated in the fitness check. We are also concerned that these changes will affect compliance costs for business and legal certainty for both consumers and businesses. There could be a scenario in which businesses have to start implementing the changes made to the CRD and UCPD now, only to restart the whole process if the fitness check concludes fundamental changes need to be made to consumer legislation. Overall, the fitness check is assessing whether consumers are sufficiently protected and can effectively exercise their rights online, this includes the topics raised above. We therefore consider the fitness check the appropriate venue for further discussions on issues such as cancellations, withdrawals, returns, etc.

Enforcement

Ecommerce Europe generally believes that many of the concerns raised in the consultation are sufficiently covered by legislation, and the best way to address them should be by ensuring effective enforcement instead. In fact, the Commission’s behavioural study also points out that the “effectiveness of the existing EU legal framework may be undermined by insufficient public and private enforcement”⁴. To remedy this, the study suggests improving the resources and powers of enforcement authorities and making use of collective redress. Ecommerce Europe strongly welcomes the proposal to further empower national

⁴ European Commission, Directorate-General for Justice and Consumers, Lupiáñez-Villanueva, F., Boluda, A., Bogliacino, F., et al., Behavioural study on unfair commercial practices in the digital environment : dark patterns and manipulative personalisation : final report, 2022, <https://data.europa.eu/doi/10.2838/859030>, p. 122

authorities by increasing their resources. We believe there are already some very helpful initiatives from national enforcement bodies aimed at facilitating compliance. For instance, the Dutch Authority for Consumers & Markets (ACM) has published guidelines⁵ for designers and developers on how to protect consumers online against deception. In addition to ensuring sufficient resources for enforcement bodies, we strongly recommend the European Commission to make efforts to streamline such initiatives so that consumers and businesses in all EU countries can benefit from better information and easier compliance.

With regards to enforcement actions executed by the CPC authorities, such as sweeps, Ecommerce Europe appreciates the coordinated approach across Europe. However, we do believe authorities could improve transparency of the manner in which they set their (and Member State authorities') priority areas of compliance and on how they organise the cooperation process. We believe there could be a considerable benefit in structural dialogue between authorities and stakeholders (consumer and industry organisations and businesses) to help identify the key areas of concern with regards to consumer law compliance across the EU. Ecommerce Europe would therefore like to invite the enforcement authorities to pro-actively reach out to relevant stakeholders to discuss the goals of and the reasons behind coordinated enforcement activities (for instance sweeps), so that stakeholders can play a role in preventing any future infringements.

⁵ Dutch Authority for Consumers and Markets (ACM). Guidelines: Protection of the online consumer Boundaries of online persuasion. <https://www.acm.nl/sites/default/files/documents/2020-02/acm-guidelines-on-the-protection-of-the-online-consumer.pdf>