

## **CALL FOR VIEWS ON PROPOSED EU DIRECTIVE ON BETTER ENFORCEMENT AND MODERNISATION OF EU CONSUMER PROTECTION RULES**

### **I Background to proposal**

In May 2017 the European Commission published the results of its Fitness Check of a number of the most important pieces of consumer protection legislation, including Directive 93/13/EEC on unfair terms in consumer contracts and Directive 2005/29/EC on unfair business-to-consumer commercial practices. A separate evaluation report on Directive 2011/83/EU on consumer rights was published at the same time. The reports concluded that while EU consumer law overall was fit for purpose, there was a need for targeted legislative changes to address certain identified shortcomings in the Directives and to take account of developments in the digital sphere. There was a requirement in particular for improved enforcement of the Directives and enhanced redress options for consumers. The evaluations further concluded that there was a need to reduce the regulatory burden on traders in some areas.

The proposed Directive is a follow-up to the Fitness Check and the evaluation of the Consumer Rights Directive and forms part of the 'New Deal for Consumers' announced by the European Commission on 11 April 2018. It provides for a number of substantive amendments to Directive 2005/29/EC on unfair consumer practices and Directive 2011/83/EU on consumer rights as well as for more effective, proportionate and dissuasive penalties for infringements of these two Directives, Directive 93/13/EEC on unfair terms in consumer contracts and Directive 98/6/EC on the indication of the prices of products offered to consumers. The proposed Directive can be accessed at [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-185\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-185_en) .

The Directives to be amended by the proposed Directive have been given effect in Ireland as follows:

- Directive 93/13/EEC on unfair terms in consumer contracts was given effect by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995; the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (S.I. No. 307 of 2000); the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160/2013); and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336/2014).
- Directive 98/6/EC on the indication of the prices of products was given effect by the European Communities (Requirements to Indicate Product Prices) Regulations 2002 (S.I. No. 639 of 2002);
- Directive 2005/29/EC was given effect by the Consumer Protection Act 2007 (Number 19 of 2007);

- Directive 2011/83/EU on consumer rights was given effect by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484/2013) and the European Union (Consumer Information, Cancellation and Other Rights) (Amendment) Regulations 2014 (S.I. No. 250/2014).

## **II Proposed penalties provisions applicable to all four Directives**

The proposed penalties provisions include a number of elements new to EU consumer protection legislation:

- A requirement on Member States to ensure that courts and administrative authorities give due regard, where relevant, to a number of specified criteria when deciding on whether to impose a penalty and on its level, including the number of consumers affected domestically and in other Member States, the intentional or negligent character of the infringement; and the financial benefits gained, or losses avoided, by the trader due to the infringement. These criteria may not be relevant however in deciding on penalties for non-serious infringements.
- Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of the Directive in other Member States shall be taken into account in the determination of its amount.
- A requirement on Member States to ensure that the penalties for widespread infringements and widespread infringements with a Union dimension include the possibility to impose fines, the maximum amount of which shall be at least 4% of the trader's annual turnover in the Member State or Member States concerned. Widespread infringements are essentially acts or omissions contrary to EU consumer protection law that harm, have harmed or are likely to harm the collective interests of consumers in at least three Member States. Widespread infringements with a Union dimension are acts or omissions contrary to EU consumer protection law that harm, have harmed or are likely to harm the collective interests of consumers in at least two-thirds of Member States, accounting together for at least two-thirds of the population of the European Union.
- When deciding about the allocation of revenues from fines, Member States shall take into account the general interest of consumers and should consider allocating at least part of the revenues from fines to enhance consumer protection within their jurisdictions.

### **III Proposed Amendments to Directive 2005/29/EC on Unfair Commercial Practices**

#### *Clarifying the rules on misleading marketing of 'dual quality' products*

The proposal includes an addition to Article 6 of the Directive to provide that it shall be a misleading commercial practice to market a product as identical to the same product marketed in several other Member States where those products have significantly different composition or characteristics. This provision aims in particular to address concerns about food products that are marketed as identical but which are of different quality in some Member States.

#### *Enhanced scope for Member States to regulate off-premises transactions*

The proposal clarifies that the Directive does not prevent Member States from adopting national rules to protect the legitimate interests of consumers from aggressive or misleading commercial practices that occur in the context of unsolicited visits by a trader to a consumer's home or of commercial excursions organised by a trader.

#### *Requirement to make clear to consumers where result of online search query has been paid for by trader*

The proposal provides that it will be a prohibited commercial practice to provide information in response to a consumer's online search query in order to promote a product where a trader has paid for the promotion but has not made that fact clear in the search results.

#### *Right to individual remedies for consumers*

The proposal provides that consumers harmed by unfair commercial practices should have the right to individual contractual and non-contractual remedies. At a minimum, the contractual remedies should include the right to contract termination. Non-contractual remedies should, as a minimum, include the right to compensation for damages. A right of action for damages for consumers aggrieved by a prohibited commercial practice is provided for at section 74 of the Consumer Protection Act 2007.

### **IV Proposed amendments to Directive 2011/83/EU on Consumer Rights**

#### *Extending application of Directive to 'free' digital services*

While the Consumer Rights Directive applies to digital content contracts for which the consumer provides personal data instead of paying a price, it does not apply similarly to digital services contracts where personal data is provided instead of payment. These 'free' services include cloud storage, social media and email contracts. Bringing such contracts within the scope of the Directive will give consumers the right to pre-contractual information and to cancel distance and off-premises contract within a 14-day 'cooling off' period.

### *Greater transparency in online marketplaces*

The proposal will require online marketplaces to inform consumers whether a third party offering goods, services, digital content or digital services is a trader and accordingly whether consumer rights under EU legislation will apply to a contract concluded with that party. Online marketplaces will also be required to inform consumers about the main parameters determining the ranking of the offers presented to consumers in response to a search query on the marketplace.

### *Reducing burdens for businesses*

The proposal would allow traders to have more flexibility in choosing the most appropriate means of communication with consumers and to use new means of online communication, such as web forms or chats, instead of an e-mail address, provided these means of communication constitute a durable medium under which the consumer can store the information in question for an adequate period of time and which permits the unchanged reproduction of the stored information.

The proposal also provides for two amendments to the Directive with a view to reducing the burden on traders arising from aspects of the existing right of consumers to withdraw from distance and off-premises contracts. It proposes, first, that a trader would not have to reimburse the consumer for goods subject to the right of withdrawal until the trader had received the goods back. Under the existing Directive the trader must also reimburse the consumer where the consumer has supplied evidence of having sent the goods back. Secondly, the Directive currently provides that a consumer who returns goods to a trader on foot of the exercise of the right of withdrawal is liable for any diminished value of goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods. The proposed amendment provides that the right of withdrawal would no longer apply to goods handled in this way. If a consumer returned goods that had been handled excessively on foot of a claimed right of withdrawal, therefore, the trader would be entitled to reject the claim on the ground that the right did not apply.

### **V Responses to call for views**

Responses to this call for views should be sent by close of business on **Friday 29 June 2018** by e-mail to [conspol@dbei.gov.ie](mailto:conspol@dbei.gov.ie) or by post to Competition and Consumer Policy Section, Department of Jobs, Enterprise and Innovation, Earlsfort Centre, Lower Hatch Street, Dublin 2, D02 PW01. Responses may be made available on the website of the Department of Business Enterprise and Innovation. Any material contained in responses which respondents do not wish to be made public in this way should be clearly identified as confidential in the submission. Respondents should also be aware that responses may be disclosed by the Department following a request under the Freedom of Information Act 2014. Any information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information

Act, the Departments will consult with respondents about information identified as commercially sensitive before deciding on such a request.