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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

No. Cion doc.: SWD(2017) 208 final

Subject: COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY
OF THE FITNESS CHECK on Directive 2005/29/EC of the European
Parliament and of the Council of 11 May 2005 concerning unfair business-
to-consumer commercial practices in the internal market and amending
Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and
2002/65/EC of the European Parliament and of the Council and Regulation
(EC) No 2006/2004 of the European Parliament and of the Council ('Unfair
Commercial Practices Directive'); Council Directive 93/13/EEC of 5 April
1993 on unfair terms in consumer contracts; Directive 98/6/EC of the
European Parliament and of the Council of 16 February 1998 on consumer
protection in the indication of the prices of products offered to consumers;
Directive 1999/44/EC of the European Parliament and of the Council of 25
May 1999 on certain aspects of the sale of consumer goods and
associated guarantees; Directive 2009/22/EC of the European Parliament
and of the Council of 23 April 2009 on injunctions for the protection of
consumers' interests; Directive 2006/114/EC of the European Parliament
and of the Council of 12 December 2006 concerning misleading and
comparative advertising.

Delegations will find attached document SWD(2017) 208 final.

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Brussels, 23.5.2017
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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE FITNESS CHECK

on

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive');

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers;

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees;

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests;

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

{SWD(2017) 209 final}

This REFIT Fitness Check carried out a comprehensive evaluation of six directives:

- the Unfair Commercial Practices Directive 2005/29/EC (the ‘UCPD’);
- the Unfair Contract Terms Directive 93/13/EEC (the ‘UCTD’);
- the Price Indication Directive 98/6/EC (the ‘PID’);
- the Consumer Sales and Guarantees Directive 1999/44/EC (the ‘CSGD’);
- the Injunctions Directive 2009/22/EC (the ‘ID’);
- the Misleading and Comparative Advertising Directive 2006/114/EC (the ‘MCAD’).

Over the last 25 years, these directives have built up the core *horizontal* (i.e. applying to all sectors) EU consumer and marketing law, which covers the whole cycle of the business-to-consumer (B2C) transaction: from advertising and contract conclusion to contract performance¹. The ID sets out **procedural rules** for dealing with infringements of consumer rights while the other five directives lay down **substantive rights and obligations**. The one remaining instrument of EU *horizontal* consumer law — the Consumer Rights Directive 2011/83/EU (CRD), which entered into application in June 2014 – underwent a separate evaluation in parallel to the Fitness Check. The CRD evaluation report is being published today along with this Fitness Check report. The Fitness Check includes analysis of whether the Directives covered by this Fitness Check are consistent with the CRD, without, however, duplicating the specific findings of the CRD evaluation. **The conclusions of the Fitness Check and those of the CRD evaluation jointly feed into the Commission’s follow-up activities on consumer and marketing law.**

Analysis under the **effectiveness** criterion focused on the extent to which the Directives’ objectives of greater consumer trust and empowerment and internal market integration have been achieved. The Directives covered by this Fitness Check were adopted over a long period of time and were not accompanied by impact assessments; hence there is no single baseline for this assessment. The Fitness Check therefore relied on available Eurobarometer data to track developments. These show that while **consumer trust in traders and cross-border shopping** has steadily increased in the last decade, the average **incidence of problems** reported by consumers was almost identical in 2008 and 2016, with 21 % of consumers in 2008 encountering consumer rights-related problems and 20 % in 2016.

These results show that the level of consumer protection has not significantly improved. Nevertheless, this can still be considered an overall positive outcome, as infringements happening online can now harm more consumers across the EU at the same time. As shown by enforcement experience, particularly in the context of the joint actions and online ‘sweeps’ by national consumer enforcement authorities under the Consumer Protection Cooperation (CPC)² network, the **substantive rules of the evaluated directives are capable of addressing the existing consumer problems, including new infringements in the online environment** even if they were adopted before the age of e-commerce kicked in.

On this basis, the Fitness Check report concludes that the key solution for achieving the Directives’ consumer protection objectives lies in **better enforcing the existing rules, coupled with increasing awareness** among consumers, traders and enforcement bodies. The Commission is already acting to improve legislative measures on enforcement via its review of the CPC Regulation. The Commission has also identified a legal loophole concerning the

¹ The MCAD applies to business-to-business (B2B) relations but indirectly also impacts the way businesses advertise products to consumers.

² Established under Regulation (EC) No 2006/2004 on consumer protection cooperation (the CPC Regulation): http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm.

CSGD that has come to light against the backdrop of the needs of the digital age. The loophole consists in the fact that the CSGD does not contain any rules to protect consumers against the provision of defective digital content. The Commission is already addressing this gap via the Digital Contracts Proposals tabled in December 2015³, which include a specific proposal on the supply of digital content. In addition, the Fitness Check has also concluded that there is a need for other **legislative and non-legislative action to improve the effectiveness** of the Directives under assessment.

The evaluation of **efficiency** examined the costs and benefits associated with applying the Directives. The evaluation showed that all stakeholder groups largely agree that the Directives have significant benefits for consumer protection and cross-border trade. The estimated costs of complying with the Directives are deemed proportionate when compared to annual turnover and with the significant benefits they bring for the functioning of consumer markets.

The evaluation of **coherence** examined whether the six Directives were consistent with other EU action on consumer protection. The horizontal Directives covered by this Fitness Check act as a ‘safety net’ for issues not expressly regulated in EU sector-specific legislation. However, the evaluation showed that there is potential for streamlining and clarifying some issues. All the Directives covered by the Fitness Check apply in the same manner to online and offline sales channels. However, the Commission Proposal of December 2015 on distance sales of goods proposes to introduce fully harmonised amended rules only for the online sector. On this point, the Fitness Check evaluation confirms the need to maintain coherent rules applicable to both the online and offline sectors, as is the case under the current CSGD. The Commission is therefore already actively assisting Parliament and the Council in their discussion on possibly expanding the scope of its December 2015 proposal to cover all sales channels.

Analysis under the **relevance** criterion examined the extent to which the objectives and content of the Directives are consistent with market developments and current needs and trends in consumer behaviour. The evaluation showed that the consumer protection and internal market integration objectives pursued by all of the Directives continue to remain highly relevant. Consumers continue to attach strong importance to consumer rights in their decision-making. EU-wide infringements of consumer rights require and will continue to require enforcement action at EU level. To be effective, EU-wide enforcement must be grounded in common and uniform EU consumer protection legal framework, as provided by the six Directives in question here.

Finally, the evaluation of **EU added value** showed that by ensuring more consistency across the EU, these Directives generate coordination gains in enforcement work and more legal certainty and stability for cross-border traders in the EU. Specifically, the common harmonised rules laid down by these Directives make it possible for the national enforcement authorities to address more effectively, under the CPC framework in particular, cross-border infringements that harm consumers in several Member States. The Directives have also increased the level of consumer protection in many Member States.

In conclusion, the Fitness Check considers the **Directives to be still fit for purpose**, even in the context of the digitalisation and expansion of online retail trade. As long as the Directives are effectively applied, they are capable of addressing the current problems. For this reason, the proposed follow-up activities have a strong focus on awareness raising and making the

³ Consisting of a proposal on the supply of digital content and a proposal on distance sales of goods. For more information on the Digital Contracts Proposals: http://ec.europa.eu/justice/contract/digital-contract-rules/index_en.htm.

rules better understood by all market players and enforcement bodies. Specifically, the Fitness Check found that further improving the overall effectiveness, efficiency and coherence of the six Directives requires three strands of action:

- 1) ensuring that not only consumers, traders and their associations, but also judges and other legal practitioners, have **better knowledge** of all rights and duties under this part of EU consumer and marketing law;
- 2) ensuring **stepped-up enforcement** and easier redress when the substantive law provisions in question are breached;
- 3) considering **targeted amendments** to simplify the regulatory landscape where this is fully justified.

Concerning the first strand of action, the Commission will run targeted awareness-raising campaigns for consumers and traders. It will also work on training and capacity building of legal practitioners and consumer organisations and on creating a new Consumer Law Database. Guidance on the UCTD (similar to the existing documents for the UCPD and CRD) could help make it easier to understand and apply the Directive. In addition, the Fitness Check identified problems with consumers' understanding of standard terms and conditions. The Commission has already started working with stakeholders towards a voluntary agreement to improve the presentation of both standard contract terms and pre-contractual information.

Concerning the second strand of action, the evaluation points to the lack of direct consumer rights under the UCPD to individual remedies and the need to strengthen the level of penalties for breaches of EU consumer law. There is also a clear need to make the ID more effective. This can be achieved by, for instance, expanding the Directive's scope of application to cover more pieces of consumer legislation and by further harmonising the injunction procedure. Such reform needs to take due account of: (i) the ongoing review of the CPC Regulation; (ii) the implementation of alternative and online dispute resolution; and (iii) the assessment of the 2013 Recommendation on collective redress.

Finally, concerning the third strand of action, the evaluation has established that there is limited potential for reducing some of the information requirements provided in the UCPD because they are duplicated in the CRD.