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COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

Proposals for

DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

(1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules

and

(2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

{COM(2018) 184 final} - {SWD(2018) 98 final}

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Table of contents

List of abbreviations 3

Glossary 4

1 INTRODUCTION 6

1.1. Context 6

1.2. Scope of the impact assessment and interplay with other legal and policy instruments at EU level 7

2 THE PROBLEM DEFINITION 12

2.1. Conclusions from recent evaluations 12

2.2. Overview of problems and robustness of data 16

2.3. Main problem 1: Still many traders do not comply with EU consumer law 17

2.3.1. Scale and consequences of non-compliance 17

2.3.2. Drivers of lack of compliance 18

2.3.3. Driver 1: Ineffective mechanisms to stop and deter infringements 19

2.3.4. Driver 2: Ineffective mechanisms for individual consumers redress 21

2.3.5. Driver 3: Ineffective mechanisms for consumer redress in mass harm situations 23

2.4. Main problem 2: Ineffective consumer protection and unnecessary costs for compliant traders 25

2.4.1. Scope for modernising and simplifying EU consumer law 25

2.4.2. Driver 1: Lack of transparency and legal certainty for B2C transactions on online marketplaces 25

2.4.3. Driver 2: Lack of transparency, consumer protection and legal certainty for "free" digital services 26

2.4.4. Driver 3: Overlapping and outdated information requirements 28

2.4.5. Driver 4: Imbalances in the right to withdraw from distance and off-premises sales 29

2.5. How will problems evolve? 30

2.5.1. Main problem 1: Traders do not comply with EU consumer law 30

2.5.2. Main problem 2: Ineffective consumer protection rules and unnecessary costs for compliant traders 31

3 WHY SHOULD THE EU ACT? 33

3.1. Legal basis 33

3.2. Subsidiarity: Necessity of Union action 33

3.3. Subsidiarity: Added value of EU action 34

4 WHAT IS TO BE ACHIEVED? 36

5 WHAT ARE THE AVAILABLE POLICY OPTIONS? 36

5.1 Improve compliance with EU consumer law 36

5.1.1. Overview of the Options 36

5.1.2. Options discarded at an early stage 37

5.1.3. Option 0: Baseline 38

www.parlament.gv.at

5.1.4. Option 1: Improving enforcement to stop and deter infringements 38
5.1.5. Option 2: Improving enforcement and individual consumer redress 41
5.1.6. Option 3: Improving enforcement and individual and collective consumer redress 42
5.2. Modernise consumer protection and eliminate unnecessary costs for compliant traders 43
5.2.1. Overview of the Options 43
5.2.2. Options discarded at an early stage 44
5.2.3. Lack of transparency and legal certainty on online marketplaces (driver 1) 44
5.2.4. Insufficient consumer protection and legal certainty for "free" digital services (driver 2) 46
5.2.5. Overlapping and outdated information requirements (driver 3) 47
5.2.6. Imbalances in the right to withdraw from distance and off-premises sales (driver 4) . 47
6 WHAT ARE THE IMPACTS OF THE POLICY OPTIONS? 49
6.1 Improve compliance with EU consumer law 50
6.1.1. Option 1: Improving enforcement to stop and deter infringements 50
6.1.2. Option 2: Improving enforcement and individual consumer redress 55
6.1.3. Option 3: Improving enforcement and individual and collective consumer redress 59
6.2 Modernise consumer protection and eliminate unnecessary costs for compliant traders 62
6.2.1. Options to address lack of transparency and legal certainty for B2C transactions on online marketplaces (driver 1) 62
6.2.2. Options to address lack of transparency, consumer protection and legal certainty for "free" digital services (driver 2) 67
6.2.3. Options to address overlapping and outdated B2C information requirements (driver 3)72
6.2.4. Options to address imbalances in the right to withdraw from distance and off-premises sales (driver 4) 74
6.3 Expected impacts on SMEs 76
6.3.1. Interventions to improve compliance with EU consumer law 76
6.3.2 Interventions to modernise consumer protection rules and eliminate unnecessary costs for compliant traders 77
7 COMPARISON OF THE OPTIONS 78
7.1. Improve compliance with EU consumer law 78
7.2. Modernise consumer protection and eliminate unnecessary costs for compliant traders 81
7.3 Preferred package of Options 85
8 PREFERRED PACKAGE OF OPTIONS AND OVERALL IMPACTS 85
8.1 Brief overview of the impacts of the preferred packages of Options 85
8.2. Synergies of the proposed interventions 86
8.3. Potential risks, unintended consequences and trade-offs under the Preferred Options 87
8.3.1 Improve compliance with EU consumer law 87
8.3.2 Modernise consumer protection and eliminate unnecessary costs for compliant traders 88
8.4. REFIT (simplification and improved efficiency) 89
9 MONITORING AND EVALUATION 91

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List of abbreviations

B2B	Business-to-Business
B2C	Business-to-Consumer
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer
CPC (Network/authorities)	Consumer Protection Co-operation Network (national consumer law enforcement authorities)
CPN	Consumer Policy Network (national ministries)
CMEG	Consumer Market Expert Group (experts nominated by Member States to advise the Commission on matters related to the Consumer Scoreboards, market and behavioural studies)
CRD	Consumer Rights Directive 2011/83/EU
CSGD	Consumer Sales and Guarantees Directive 1999/44/EC
DCD	Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)0634 final of 9.12.2015.
ECCG	European Consumer Consultative Group (Commission's main forum to consult national and European consumer organisations)
EEN	Enterprise Europe Network
IA	Impact Assessment
IIA	Inception IA
ID	Injunctions Directive 2009/22/EC
MCAD	Misleading and Comparative Advertising Directive 2006/114/EC
MS	Member State
OPC	(Online) Public Consultation (carried out for this IA)
PID	Price Indication Directive 98/6/EC
SMEs	Micro, Small and Medium-sized Enterprises
SWD	Commission Staff Working Document
T&Cs	Terms and Conditions (standard contract terms)
UCPD	Unfair Commercial Practices Directive 2005/29/EC
UCTD	Unfair Contract Terms Directive 93/13/EEC

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Glossary

Collective Redress Report	Report on the implementation of the 2013 Recommendation on Collective Redress, COM(2018) 40
Communication on Online Platforms	Communication on Online Platforms and the DSM - Opportunities and Challenges for Europe, COM(2016) 288 final, 25 May 2016: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN
CPC/CPN/CMEG survey	Targeted consultation of CPC, CPN and CMEG authorities of the Member States, carried out for this IA via EUsurvey
CRD Evaluation Report and SWD	Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU, COM(2017) 259 final, 23 May 2017; Staff Working Document SWD(2017)169 final and SWD(2017) 170 final, 23 May 2017, all available via: http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=59332
CRD Guidance	DG Justice Guidance Document on the CRD, June 2014, https://ec.europa.eu/info/files/guidance-document-consumer-rights-directive_en
ECCG survey	Targeted consultation of ECCG members, carried out for this IA via EUsurvey
Fines	Pecuniary penalties (for "penalties", see below).
Fitness Check Report	Commission Staff Working Document SWD(2017) 208 final and SWD(2017) 209 final, 23 May 2017, available at: http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=59332
Fitness Check public consultation	Online public consultation from May to September 2016 on the Fitness Check and the evaluation of the Consumer Rights Directive (CRD)
"Free" digital services	Online services for which consumers stipulate contracts not against payment of a price, but by providing personal data (e.g. e-mail account, cloud storage, social media), in line with the DCD Proposal
"Green" and "environmental" claims	Marketing that creates an impression that a good or a service has a positive or no impact on the environment or is less damaging to the environment than competing goods or services
Injunctions procedure	Court/administrative procedure under the ID
ID survey	Targeted consultation of CPC, CPN, CMEG, Member States authorities, consumer associations, business associations and lawyers associations on the possible revision of the ID carried out for this IA via EUsurvey
Mass harm situation	A situation in which a large number of consumers can be harmed by the same illegal practice
Online marketplace	A service provider which allows consumers to conclude online contracts with third party suppliers on its digital interface
Penalties	Sanctions imposed or to be imposed for a violation of consumer protection rules such as fines (see definition above)
Platform Markets Study	Exploratory Study of consumer issues in online peer-to-peer platform markets, 12 June 2017: http://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=77704
Platform Transparency Study	Behavioural Study on the transparency of online platforms, Consortium LSE&Partners for the European Commission, *soon to be published*

Pre-contractual information	Information that the trader is required to provide to the consumer before the conclusion of a contract
Public consultation	Commission's public consultation of 2017 for this IA. https://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives_en
Recommendation on Collective Redress	EC Recommendation (2013/396/EU) of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law: http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32013H0396
"Redress" and "remedies"	What consumers can get/do to remedy the situation when their consumer rights have been breached (e.g. terminating contract, getting their money back)
Revised CPC Regulation	Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.345.01.0001.01.ENG&toc=OJ:L:2017:345:TOC
SMEs	For the purpose of this report SMEs are determined in terms of staff count (<250), for further information see: http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en. Data on micro enterprises include self-employed if not indicated otherwise.
SME panel consultation	Consultation of SMEs for this IA (total of 291 included 5 responses from large companies, i.e. companies with 250+ employees). The SME panel consultation is a tool that allows Commission services to reach out to SMEs in a targeted way. For more information see Annex 2.
Unfair commercial practices	Breaches of national laws transposing the Unfair Commercial Practices Directive 2005/29/EC (UCPD), such as misleading advertising and aggressive commercial practices by traders
UCPD Guidance	Guidance on the implementation/application of Directive 2005/29/EC in unfair commercial practices, SWD(2016) 163 final of 25.5.2016

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1 INTRODUCTION

1.1. Context

Consumer expenditure accounts for 56% of EU GDP.[1] A healthy consumer environment therefore supports economic growth, as shown by the positive relation between consumer conditions and the economic situation in Member States.[2]

Effective consumer policies have a significant impact because they affect both the demand and the supply side of the economy. On the demand side, they reduce consumer detriment, support trust and empower consumers to drive markets. On the supply side, they contribute to fair competition and legal certainty for business.

On 13 September 2017, Commission President Juncker announced a "**New Deal for Consumers**",[3] which aims to ensure fair and transparent rules for EU consumers.

> *"The success of the internal market ultimately depends on trust. This trust can easily be lost if consumers feel that remedies are not available in cases of harm. The Commission will therefore present a New Deal for Consumers to enhance judicial enforcement and out-of-court redress of consumer rights and facilitate coordination and effective action by national consumer authorities."*
>
> *Commission Work Programme 2018, COM(2017) 650 final*

Recent large-scale cross-border infringements of EU consumer law, such as the "Dieselgate" scandal[4], have sparked a debate about problems in public and private enforcement mechanisms and redress systems. Thus, in line with the 2017 State of the Union Address, the New Deal for Consumers aims at stepping-up enforcement of EU consumer law in the context of growing risks of EU-wide infringements. It also addresses the European Parliament's call for the establishment of an EU-wide system for collective redress.[5]

This Impact Assessment (from now onwards: IA) **mainly builds on the findings of:**

- The **Fitness Check of EU Consumer and Marketing law**, published on 23rd May 2017 (from now onwards: "Fitness Check"),[6]
- The **evaluation of the 2011 Consumer Rights Directive** conducted in parallel with the Fitness Check and published the same day (from now onwards: "CRD Evaluation"),
- The **Report on the implementation of the 2013 Recommendation on Collective Redress**, published on 25th January 2018 (from now onwards: "Collective Redress Report").[7]

The Fitness Check and the CRD Evaluation concluded that the substantive EU consumer rules are overall fit for purpose. However, they also stressed the importance of applying and enforcing the

[1] Eurostat, GDP and main components (output, expenditure and income) [nama_10_gdp], P31_S14_S15 - Household and NPISH final consumption expenditure.

[2] Data from the Commission's Consumer Scoreboards show a consistently positive relation between consumer conditions and the economic situation in different Member States.

[3] See the State of the Union Address and Letter of Intent to the President of the Council and the EP, available at: https://ec.europa.eu/commission/state-union-2017_en

[4] See case description in Section 2.3.2 describing drivers of lack of compliance.

[5] European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP)).. The European Parliament also previously demanded EU-level action to address mass harm situations, in particular in its resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' 2011/2089(INI), which was based on a comprehensive own-initiative report on collective redress. The EESC supported the Commission's initiatives and called for legislative action in its opinion on the Commission 2013 Communication and Recommendation on collective redress, highlighting the importance of both injunctive and compensatory collective redress (EESC opinion "European Framework for Collective Redress" 10 December 2013, INT/708).

[6] It covered the Unfair Contract Terms Directive 93/13/EEC (UCTD), Consumer Sales and Guarantees Directive 1999/44/EC (CSGD), Price Indication Directive 98/6/EC (PID), Unfair Commercial Practices Directive 2005/29/EC (UCPD) and Injunctions Directive 2009/22/EC (ID). See for results SWD (2017) 208 final and SWD(2017) 209 final (both on the Fitness Check) and COM(2017) 259 final, SWD(2017)169 final and SWD(2017) 170 final (on the CRD evaluation), all of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

[7] COM(2018) 40.

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rules effectively and identified scope for some targeted amendments of the consumer directives. As concerns procedural EU consumer rules, the Collective Redress Report notably supports the Fitness Check conclusion that existing individual redress mechanisms are not sufficient in mass harm situations. National collective redress mechanisms, where available, are often reported not to be effective enough to fully reach their objectives.[8]

In line with these results, this IA addresses two main problems:

1. Across all economic sectors – online as well as offline – there is still a relatively high level of lack of compliance by traders with EU consumer law.
2. In some specific areas, ineffective consumer protection rules and unnecessary costs for compliant traders have been identified.

This IA is expected to form the basis for a legislative package within the New Deal for Consumers, which would be likely to include:

1. A review of the 2009 Injunctions Directive (ID); and
2. Targeted amendments to substantive consumer protection rules in four Directives.[9]

1.2. Scope of the impact assessment and interplay with other legal and policy instruments at EU level

The EU consumer law directives assessed in the Fitness Check, CRD Evaluation and Collective Redress Report apply horizontally across all economic sectors. Due to their general scope, they apply to many aspects of business-to-consumer (from now onwards: B2C) transactions that are also covered by other EU legislation. The interplay between the different bodies of EU law is regulated by the "lex specialis" principle, whereby the provisions of the horizontal consumer law directives come into play only when relevant aspects of B2C transactions are not disciplined by the provisions of sector-specific EU law. Consequently, the general EU consumer law directives work as a "safety net", ensuring that a high level of consumer protection can be maintained in all sectors, including by complementing and filling gaps in other EU law.

The Directives covered by this initiative aim at protecting the economic interests of consumers. The Treaties (Articles 114 and 169 TFEU) and the Charter of Fundamental Rights (Article 38) require a high level of consumer protection in the EU. EU consumer legislation also contributes to the proper functioning of the Internal Market. It aims to ensure that B2C relations are fair and transparent, which ultimately supports the overall welfare of European consumers and the EU economy. The directives have been developed over the past 25 years. This diagram illustrates how they cover the whole cycle of B2C economic transactions, from advertising and contract conclusion to contract performance, and how they complement one another.

[8] See section 2.1 "Conclusions from recent evaluations" and Annex 5 for a detailed overview of the findings from these evaluations.
[9] UCPD, CRD, UCTD, PID (see Figure 4 "Overview of proposed amendments to specific directives" in Section 7.3).

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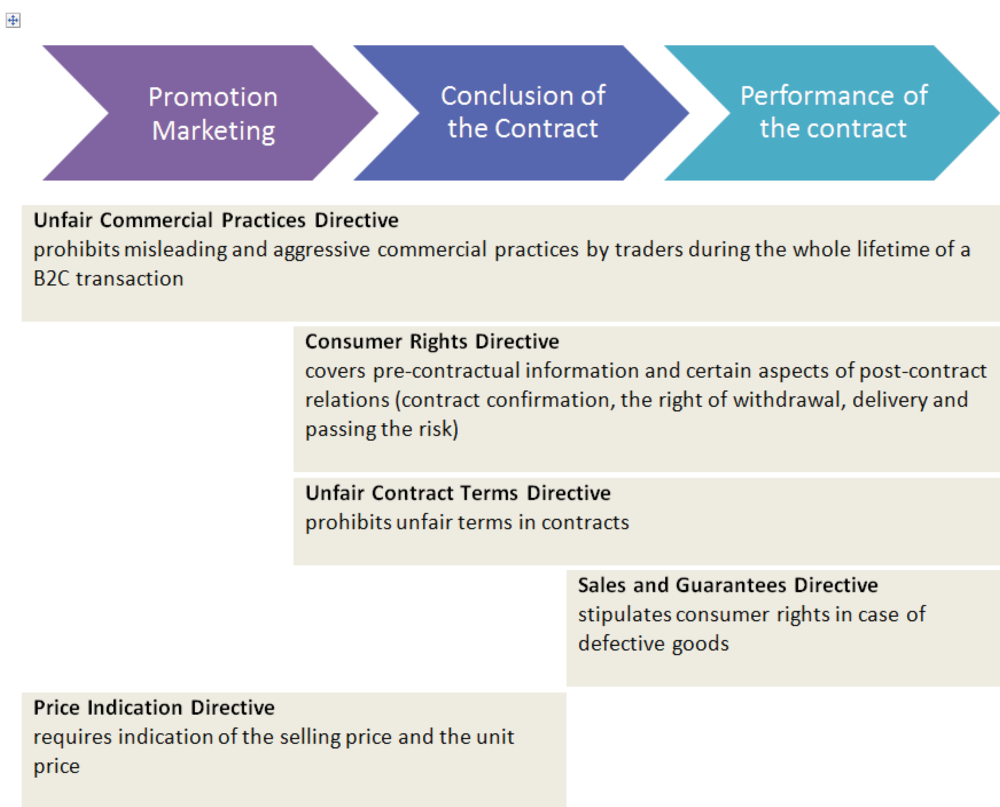
Figure 1: Consumer law directives subject to this IA



This IA takes into account the recently adopted **revision of the Consumer Protection Cooperation (CPC) Regulation.**[10] While the revised CPC Regulation supports public enforcement, this IA assesses possibilities for strengthening private enforcement. According to a long-standing Commission position, supported by the European Parliament,[11] private enforcement should be independent and complementary to public enforcement. This is because the main aim of public enforcement is to curb unlawful behaviour in the general interest, whereas private enforcement aims to ensure redress for the victims. Not only do public and private enforcement serve different aims, public enforcement alone is not sufficient, as public authorities are often not able or willing to follow up on each infringement due to reasons such as limited resources and discretion concerning enforcement priorities. For public enforcement, the CPC Regulation lays down a basis for national consumer protection authorities to work together against cross-border infringements. Its revision makes cross-border public enforcement more effective and gives national authorities a uniform set of powers to cooperate more efficiently. It also enables the European Commission to launch and coordinate common enforcement actions to address EU-wide infringements.

[10] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

[11] European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)); European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP).

Apart from the general interplay between public and private enforcement, there are also specific links between the revised CPC Regulation and interventions assessed in this IA. Firstly, although it was highlighted during the negotiations for the revised CPC Regulation that *"effective, proportionate and dissuasive"* penalties in all Member States would be essential for the success of the Regulation, the co-legislators decided that it was more appropriate to address the need for a strengthened level of penalties in connection with the possible revision of substantive EU consumer law.[12] It is therefore dealt with in this IA.

Secondly, the revised CPC Regulation did not introduce rights to redress for consumers harmed by cross-border or EU-wide infringements. Public enforcers can only receive or seek from the trader voluntary remedial commitments.[13] Nonetheless, during the negotiations for the Regulation, the need for strong private enforcement measures complementing public enforcement was acknowledged.[14] Private enforcement measures related to individual and collective consumer redress are assessed in this IA.

Thirdly, interventions assessed in this IA related to UCPD remedies, to revising the Injunctions Directive (ID) and to strengthening penalties for infringements of EU consumer law would ensure strong synergies with the revised CPC Regulation. In particular, measures assessed in this IA would:

a. Include specific provisions to ensure the coherence of decisions within possible parallel proceedings under public and private law (e.g. staying of judicial proceedings and suspending prescription periods for consumer claims during the administrative procedures);
b. Draw inspiration from the 2014 Antitrust Damages Directive, with a view to give decisions by public enforcers the legal strength of proof of breaches of law, in order to facilitate subsequent follow-on redress actions by consumers, individually or collectively;
c. Ensure that remedies voluntarily provided by traders following CPC enforcement action are duly taken into account within judicial collective redress proceedings. Similarly, in accordance with the new CPC Regulation (e.g. Article 21), the measures related to penalties assessed in this IA would require Member States to take into account, when deciding on whether to impose a penalty and on its level, any action taken by the trader – voluntarily or as a result of civil proceedings – to mitigate or remedy damage suffered by consumers.

This IA is also based on the **Commission 2013 Recommendation on Collective Redress**, which recommended that all Member States provide for injunctive and compensatory collective redress mechanisms for violations of rights granted under Union law. It also set out common principles for such mechanisms. The measures relevant for mass harm situations under the ID analysed in this IA follow up on the **Collective Redress Report**. It concludes that, amongst others, the Commission "*intends to follow-up this assessment of the 2013 Recommendation in the framework of the forthcoming initiative on a "New Deal for Consumers", as announced in the Commission Work Programme for 2018, with a particular focus on strengthening the redress and enforcement aspects of the Injunctions Directive in appropriate areas*". The Collective Redress Report shows that there

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[12] See Recital 16 of the revised CPC Regulation, which reads: *"... In view of the findings of the Commission's Report of the Fitness Check of consumer and marketing law, it might be considered to be necessary to strengthen the level of penalties for breaches of Union consumer law."*
[13] Revised CPC Regulation, Recital 46 and Article 9(4)(c).
[14] See Recital 17 of the revised CPC Regulation, which reads: *"Consumers should be entitled to redress for harm caused by infringements covered by this Regulation. Depending on the case, the power of the competent authorities to receive from the trader…. additional remedial commitments for the benefit of consumers that have been affected by the alleged infringement covered by this Regulation….should contribute to removing the adverse impact on consumers caused by a cross-border infringement (...). This should be without prejudice to a consumer's right to seek redress through appropriate means."*

has been limited follow-up to the 2013 Recommendation, with 9 Member States still not providing any collective compensatory redress mechanism.[15] Evidence shows that the absence of an EU wide collective redress mechanism is of particular practical relevance in the field of consumer protection. This IA has found that many national authorities would support such an EU intervention on redress. The fact that not all Member States have ensured horizontal collective redress measures following the Recommendation on Collective Redress does not necessarily contradict this support, which was expressed in the survey on a possible revision of the ID for this IA (from now onwards: ID survey). The support comes mainly from national authorities (ministries, enforcers) responsible for consumer protection, i.e. for the area for which the 2018 Collective Redress Report identified the greatest practical relevance of this instrument. Such authorities' views may not always suffice to prompt corresponding legislative measures at national level. Some such authorities may also consider that EU intervention, rather than different national solutions, would be more appropriate given the high level of regulatory harmonisation in the field of consumer protection and the cross-border implications at stake. Nonetheless, account is also taken of the fact that in some Member States introducing specific collective redress instruments for consumers is being discussed.[16]

Existing EU-level measures on individual redress are taken into account, but they are not the subject matter of this IA.[17] Under the Directive on consumer **alternative dispute resolution (ADR),**[18] EU consumers have access to quality-ensured out-of-court dispute resolution systems for domestic and cross-border contractual disputes. Member States are also encouraged[19] to ensure that collective ADR schemes are available. An **online dispute resolution platform** (ODR platform) set up by the Commission[20] also helps consumers and traders resolve domestic and cross-border disputes over online purchases of goods and services.[21] The 2013 ADR/ODR legislation is tailored for individual redress actions, whereas the ID is aimed at redress actions brought by qualified entities designated by the Member States to act in the collective interest of consumers. The 2013 Directive on consumer ADR states in its recital 27 that "*This Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.*"

The possible revision of the ID assessed in this IA takes into account the findings of the Collective Redress Report and the underlying call for evidence, which show that it is highly effective to have out-of-court dispute resolution mechanisms in place, also in the framework of collective redress cases, as this incentivizes the parties to the dispute to find a settlement.

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[15] CY, CZ, EE, IE, HR, LU, LV, SI, SK. Moreover, in AT there is no compensatory mechanism specific for collective actions, in DE the existing compensatory collective redress procedure applies only to investors cases, therefore not covering all consumer protection areas and in NL there is no judicial compensatory collective redress mechanism.

[16] See draft German law for a 'Musterfeststellungsklage' of 31 July 2017. https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Musterfeststellungsklage.html

[17] For an overview of enforcement and redress opportunities and the already existing EU legal framework providing for efficient out-of-court dispute resolution, speedier and cheaper court proceedings in consumer cases and procedural consumer protection, including EU instruments in private international law, see Annex 6.

[18] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, available at : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011

[19] By Directive 2013/11/EU on alternative dispute resolution.

[20] Available since 15 February 2016, based on Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524

[21] The Commission adopted its first report on the functioning of the ODR platform on 13 December 2017, see: https://ec.europa.eu/info/online-dispute-resolution-1st-report-parliament_en

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Measures related to the modernisation of EU consumer law are also closely related to the Commission's **Digital Single Market** (DSM) **Strategy.**[22] Within the DSM Strategy, the Commission proposed, in December 2015, a **Directive for contracts for the supply of digital content** (DCD).[23] It defines consumer rights when digital content and digital services acquired by the consumer, including upon provision of personal data without any payment in money, are not in conformity with the contract, for example because they do not correspond to the specifications provided before contract conclusion. Pre-contractual information requirements are laid down in the CRD, which, however, currently does not apply to “free” digital services. The DCD will provide remedies for consumers in case of lack of conformity with the contract for both "free" digital content and "free" digital services. This makes it urgent to remedy the current legal incoherence within the CRD, whose pre-contractual information requirements and right of withdrawal apply to the free provision of digital content, but not to the "free" provision of digital services, thus creating legal uncertainty for both users and providers. The possible introduction of individual rights to remedies for consumers harmed by unfair commercial practices, as assessed in this IA, is also related to the DCD, which includes remedies for non-conformity with the contract, but without covering all aspects of unfair commercial practices.

This IA also takes into account key issues identified in the Commission's 2016 **Communication on Online Platforms**[24] and planned initiatives related to platforms. The Platform Communication stresses consumer expectations to improve platform transparency, and refers to the UCPD and the CPC Regulation as tools to reach this goal. In December 2016, the European Economic and Social Committee suggested to adapt pre-contractual information requirements to needs linked to the "platform" phenomenon in general.[25] The European Council supports this goal and, on 19 October 2017, underlined "*the necessity of increased transparency in platforms' practices and uses*".[26]

Whilst this IA does not address business-to-business (B2B) relations, it is complementary to the Commission's action on **unfair platform-to-business (P2B) contract terms and trading practices** (P2B initiative), as announced in the May 2017 Mid-Term Review of the DSM Implementation.[27] Both the New Deal for Consumers and the P2B initiative pursue the goal of enhanced transparency and fairness of transactions through online platforms. However, contrary to the B2B area, existing EU consumer law (and in particular the UCPD and the UCTD) indiscriminately applies to all traders, including all on-line platforms which qualify as traders. EU consumer law ensures protection to consumers vis-à-vis such traders.[28] Therefore, this IA deals with the specific problem,

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[22] https://ec.europa.eu/commission/priorities/digital-single-market_en.

[23] Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)0634 final of 9.12.2015. At the same time the Commission presented a parallel Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 of 9.12.2015. This Proposal provided for further harmonisation and updating of the rules on remedies for tangible goods sold at distance. On 31 October 2017, the Commission presented an amended Proposal for a new Directive on consumer sales and guarantees for all sales channels fully replacing the current CSGD (Amended proposal for a Directive on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, COM (2017) 637 of 31.10.2017. For further information: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en and http://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=606582.

[24] COM(2016) 288 final of 25 May 2016, page 11: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN.

[25] Opinion by the Economic and Social Committee on the Communication on Online Platforms, TEN/601-EESC-2016, http://webapi.eesc.europa.eu/documentsanonymous/EESC-2016-04519-00-01-AC-TRA-en.docx

[26] European Council Conclusions on Migration, Digital Europe, Security and Defence (19 October 2017): http://www.politico.eu/wp-content/uploads/2017/10/19-euco-conclusions-migration-digital-defence-1.pdf?utm_source=POLITICO.EU&utm_campaign=af65e58c5d-EMAIL_CAMPAIGN_2017_10_20&utm_medium=email&utm_term=0_10959edeb5-af65e58c5d-189614505.

[27] Communication COM(2017) 228 final of 10 May 2017 https://ec.europa.eu/digital-single-market/en/content/mid-term-review-digital-single-market-dsm-good-moment-take-stock. add reference to the IA for the P2B initiative on promoting fairness and transparency for business users of online intermediation services when it becomes available.

[28] See in particular Chapter 5.2 of the revised Guidance on the UCPD (UCPD Guidance), SWD(2016) 163 final, 25.05.2016.

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identified by the CRD Evaluation that consumers who shop on online marketplaces often do not know who their contractual counterpart is and whether they benefit from protection under EU consumer rules. The proposed new transparency rules assessed in this IA will thus only apply to "online marketplaces", which will be defined in line with definitions that already exist in EU law.

The two initiatives are also complementary to the extent that, next to findings from the studies carried out in relation to P2B practices, also the CRD Evaluation identified a call for enhanced transparency of **ranking criteria of offers on online marketplaces**. The two initiatives therefore both address this issue, with this IA assessing if there is a need to require online marketplaces to inform consumers about the criteria determining the ranking of different offers in response to search queries by consumers.

Furthermore, the findings of the Fitness Check on the need of strengthening the B2B rules of the Misleading and Comparative Advertising Directive and on the possibility of extending the B2C rules of the Unfair Contract Terms Directive also to B2B contracts have informed the P2B initiative.

The initiative assessed in this IA to extend the CRD to cover "free" digital services is linked to the **General Data Protection Regulation** 2016/679 (GDPR). Since the GDPR does not regulate the contractual consequences of consumers' withdrawal of consent to the processing of personal data, extending the CRD to cover "free" digital services could build upon and enhance the protection provided by the GDPR. Specifically, it would introduce a general right to terminate the contract within 14 days from the conclusion of the contract, which will complement the rights provided by the GDPR, e.g., right to access, right to be forgotten and right to data portability.

This IA does not discuss which individuals are to be regarded as traders, neither in the so-called **collaborative economy**[29] nor on other types of online marketplaces where both traders and consumers offer goods and services. This is a general question concerning the entire traditional and collaborative, online and offline economy. It is not specific to the issues of online marketplaces discussed in this IA.

Positive impacts of more effective EU consumer legislation can also be expected on other EU policy areas where B2C commercial transactions play an important role. One example is **sustainable consumption,** as addressed by the Commission's Circular Economy Action Plan.[30] Here, misleading "green" claims are a major issue. Although already prohibited under the UCPD, stronger enforcement and redress tools are needed to combat such infringements.

2 THE PROBLEM DEFINITION

2.1. Conclusions from recent evaluations

As mentioned in Section 1.1, this IA builds on the findings of the Fitness Check of EU Consumer and Marketing Law and the CRD Evaluation, both published in May 2017, as well as on the Collective Redress Report, published in January 2018.

The Fitness Check concluded that most of the substantive provisions of the relevant directives are overall fit for purpose. Although consumer protection provisions are also laid down in numerous EU sector-specific instruments, the Fitness Check concluded that the horizontal Directives under analysis and EU sector-specific consumer protection legislation complement one another, and that stakeholders largely agree that the combination of horizontal and sector-specific rules provides a clear and coherent EU legal framework.

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[29] See DG GROW initiative on collaborative economy in the accommodation sector (https://ec.europa.eu/growth/content/opening-plenary-collaborative-economy-tourism-accommodation-sector-0_en).

[30] Communication from the Commission "Closing the loop - An EU action plan for the Circular Economy", COM/2015/0614 final of 2.12.2015, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0614 .

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However, the Fitness Check concluded that the effectiveness of the rules is hindered by lack of awareness both among traders and consumers, as well as by insufficient enforcement and consumer redress opportunities.

It therefore recommended future action to improve compliance by strengthening enforcement and making consumer redress easier, in particular by increasing the deterrent effect of penalties for breaches of consumer law and introducing UCPD remedies. In this respect, it also recommended making the ID more effective, for example, by expanding its scope and further harmonising the procedure to: (i) facilitate access to justice and reduce the costs for qualified entities, (ii) increase the deterrent effect of injunctions, and (iii) produce an even more useful impact on the affected consumers. The Fitness Check also recommended acting in order to ensure that not only consumers, traders and their associations, but also judges and other legal practitioners have better knowledge of rights and duties under EU consumer law. Finally, the Fitness check recommended simplifying the regulatory landscape where this is fully justified.

DG JUST is currently following up on all the Fitness Check recommendations.

In particular, in relation to the need to ensure better knowledge among consumers, traders and legal practitioners about EU Consumer Law, DG JUST will launch a **2018 EU-wide awareness raising campaign on consumer rights**, which will build upon the lessons learnt from a 2014-2016 Consumer Rights Campaign.[31] Additionally, it is carrying out a **pilot project on training SMEs in the digital age** (the "ConsumerLawReady" initiative[32]) and plans to roll out a number of training activities for judges and other legal practitioners within the **revamped European Judicial Training Strategy** for 2019-2025 (currently under preparation).[33] Furthermore, to make it easier for all market actors to understand their contractual rights and duties, DG JUST is coordinating a **self-regulatory initiative within the REFIT stakeholder group** aimed to secure a clearer presentation of both mandatory pre-contractual information and standard Terms and Conditions. Finally, to further enhance legal certainty for all market actors, DG JUST has been working on several Guidance documents to ensure better compliance with EU consumer law[34] and is about to publish a new **Consumer Law Database within the E-Justice Portal**, displaying EU and national case-law and administrative decisions in relation to the EU consumer acquis.

In relation to the need to ensure stepped-up enforcement and easier redress, this IA takes duly into account the recently revised **CPC Regulation** to boost cross-border public enforcement and the efforts being done at EU level to make it easier for individual consumers to seek redress thanks to the revised **Small Claims Regulation** and the **ADR/ODR provisions**; it thus focuses on the precise gaps identified by the Fitness Check recommendations, thus assessing the need for an increased deterrent effect of penalties for breaches to EU consumer law and for individual remedies to consumers affected by breaches to the UCPD, whilst assessing different options to make the ID more effective.

Also in relation to the concrete, and limited, areas for simplifying and enhancing the effectiveness of the current regulatory landscape, this IA assesses in particular the need for eliminating duplications of requirements between the UCPD and the CRD. It does however not assess any further targeted amendments to the UCTD, apart from that aimed at introducing also in this

[31] See also: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=30149

[32] The European Commission has launched a *ConsumerLawReady* training project for SMEs, thanks to financing received by the IMCO Committee of the European Parliament. A consortium consisting of BEUC, UEAPME and Eurochambres is managing this project on the Commission's behalf. Training material has been prepared, translated and adapted for each Member State. The training of SMEs started in December 2017 and will continue throughout 2018. A dedicated website was created in November 2017: www.consumerlawready.eu

[33] Roadmap available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247_en

[34] UCPD Guidance, SWD(2016 163 final of 25.05.2016. Guidance on the application of EU food and consumer protection law to issues of Dual Quality of products - the specific case of food, 26 September 2017 (C(2017) 6532 final). A new Guidance on the Unfair Contract Terms Directive is planned for the end of 2018 and updated Guidance on the Consumer Rights Directive in 2019.

Directive an Article on the appropriate level of penalties. Indeed, in light of the rich and recent case-law of the European Court of Justice, national case-law and administrative decisions identified in the Consumer Law repository and the recent findings of a Study on national procedural laws[35], it appears that the issues identified in the 2017 Fitness Check mainly require explanations of the current Directive and are thus best addressed through a **Commission guidance on the UCTD**.

The CRD evaluation found that the CRD has **contributed positively to the functioning of the B2C internal market** and ensured a high common level of consumer protection. However, it identified emerging gaps in relation to developments in the digital economy. The evaluation recommended amendments in the area of B2C relations as regards in particular the following: i) transparency of transactions on online marketplaces; ii) alignment of the rules governing digital content contracts with those for "free" digital services (such as cloud storage and webmail); iii) simplification of some of the existing information requirements in the UCPD and the CRD that overlap; iv) reduction of the burden on traders, especially SMEs, regarding the right to withdraw from distance and off-premises sales, where the consumer has used goods beyond what is strictly necessary; and v) information requirements on the means of communication between traders and consumers. The evaluation also recommended further awareness-raising activities and guidance documents as follow-up actions.[36]

DG JUST is currently following up on all these legislative and non-legislative activities.

Detailed information on follow-up to the recommendations from the Fitness Check and the CRD evaluation, including those not addressed in this IA, is provided in Annex 5. Synergetic impacts expected by the policy measures assessed in this IA and on-going/planned non-legislative measures are presented in Chapter 8.

The **2018 Collective Redress Report** concluded that the 2013 Recommendation created a benchmark in relation to the principles for a European model of collective redress. However, it also demonstrated that there has been only a rather limited follow-up to the Recommendation in legislative terms.[37] This means that the potential of the principles of the Recommendation in facilitating access to justice is still far from being fully exploited. Whilst the Recommendation has a horizontal dimension given the different areas in which mass harm may occur, evidence shows that the absence of an EU wide collective redress mechanism is of particular practical relevance in the field of consumer protection, as demonstrated by concrete cases, including the diesel emissions case (see description in Chapter 2.3.2). On this point, the Fitness Check found that the limited effects of the current ID on harmed consumers is one of its biggest shortcomings, especially according to the qualified entities that are able to use the ID.

Some Member States have found it necessary, for various reasons, to introduce **bans or restrictions on specific types of off-premises selling such as doorstep selling**. While going against the fully harmonised nature of the UCPD, such restrictions have no or very limited cross-border implications (due to the very nature of doorstep selling) and therefore are unlikely to affect the single market. Therefore, considering the principles of subsidiarity, the possibility for Member States to introduce such bans or restrictions based on clear justifications will be considered as part of the targeted revision of the UCPD. However, the issue is not covered in this IA since the introduction of such

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[35] 2017 MPI Study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law study of national procedural laws, second strand published on 25 January 2018, available at [add link to the study].

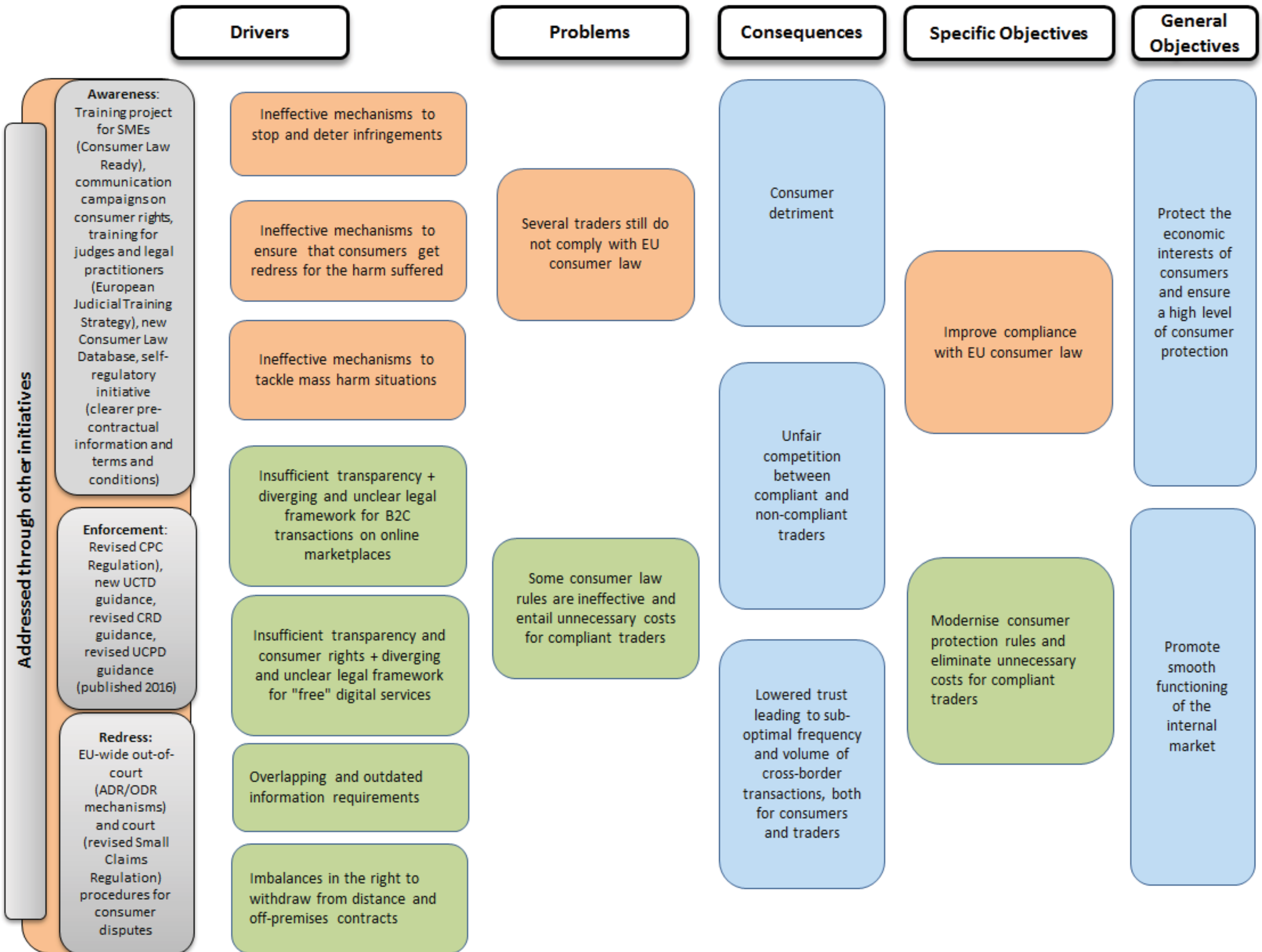
[36] Section 6 of the CRD Report and Section 7 of the CRD SWD(2017) 208 final.

[37] The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU. The impact of the Recommendation is visible in the two Member States where new legislation was adopted after its adoption (BE and LT) as well as in SI where new legislation is pending, and to a certain extent in the Member States that changed their legislation after 2013 (FR and UK).

bans would be the decision of the Member States, who will have to justify it, and should have no or very limited cross-border implications.

2.2. Overview of problems and robustness of data

Figure 2: Overview of drivers, problems and objectives



Robustness of data for this IA

Quantitative data received for this IA[38] has been complemented by robust data collected for the Fitness Check, the CRD evaluation, the Collective Redress Report and from other information sources, such as desk research, Eurobarometer data and relevant studies. Furthermore, qualitative assessments have been used as much as possible to supplement quantitative data.

2.3. Main problem 1: Still many traders do not comply with EU consumer law

2.3.1. Scale and consequences of non-compliance

Across all sectors – online as well as offline – there is still a relatively high level of lack of compliance by traders with EU consumer law. According to the Consumer Conditions Scoreboard 2017, the number of consumers reporting consumer rights-related problems in 2016 was 20.1%.[39]

Retailers also agree that many traders do not comply with consumer law. In 2016, only 67% of retailers considered that competitors in their country comply with consumer legislation, and 24% of traders considered that compliance with consumer law in their country and sector is not good enough.[40]

Lack of compliance causes consumer detriment and disrupts fair competition.

According to a recent study on consumer detriment,[41] consumers suffered, in total for all the 6 markets covered,[42] detriment after seeking redress of between EUR 20.3 billion and EUR 58.4 billion over the last 12 months in the EU-28.[43] These values amount to between 0.2% and 0.7% of the overall level of total private consumption in the EU-28, which stood at EUR 8 285 billion in 2015.[44] As regards cross-border infringements of EU consumer rules, the IA for the revised CPC Regulation estimated the financial detriment for individual consumers caused by non-compliance with consumer rules in a sample of five cross-border online markets at EUR 770 million per year.[45]

Not all of the problems and the related detriment reported by consumers are caused by non-compliance with consumer law. A consumer's own assessment of whether his or her rights have been breached may not always be legally correct. However, lack of compliance with the rules is very likely an important source of consumer problems and detriment. For example, in the public consultation for the Fitness Check, almost all responding consumer associations (95%) and public

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[38] For more information about the consultation process, see Annex 2.

[39] The figure was collected through the 2016 edition of the survey on "Consumer attitudes towards cross border trade and consumer protection" – percentage of consumers who experienced at least one problem with a good or service in the last 12 months.

[40] Source: "Retailers' attitudes towards cross border trade and consumer protection" (2016). The survey was one of the main data collection tools for the Consumer Conditions Scoreboard 2017.

[41] Study on measuring consumer detriment in the European Union (2017), available at: https://publications.europa.eu/en/publication-detail/-/publication/b0f83749-61f8-11e7-9dbe-01aa75ed71a1/language-en, https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/market-studies_en

[42] Mobile telephone services; clothing, footwear and bags; train services; large household appliances; electricity services; and loans, credit and credit cards.

[43] These estimates refer to the revealed personal consumer detriment (sum of total post-redress financial detriment and monetised time loss). Post-redress detriment is understood as sum of financial detriment (monetary costs and losses incurred by the consumer either as a direct result of a problem or from trying to solve a problem) and monetised time loss, after compensation received from the seller/provider or obtained via alternative dispute resolution, legal procedures etc. Estimates are conservative in nature. Hidden detriment that consumers experience but are unaware of is excluded. The same is true for psychological detriment, situations in which consumers tried to make a purchase but failed or were denied market access as well as other dimensions of personal detriment.

[44] Source: https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/macro-economic-database-ameco/ameco-database_en ‘Private final consumption expenditure’ refers to the expenditure on consumption of goods and services of households and non-profit institutions serving households. Goods and services financed by the government and supplied to households as social transfers in kind are not included.

[45] IA for the Proposal for the revised CPC Regulation, SWD(2016) 164 final, 25 May 2016, p. 6.

authorities (86%) said that non-compliance with consumer protection rules by traders is an important problem.[46]

Consumer legislation is not considered particularly burdensome when compared to other areas of EU legislation.[47] Compliance costs identified by the Fitness Check were also moderate.[48] Nonetheless, the minority of non-compliant traders that do not bear such costs have a **competitive advantage** over the majority of law-abiding traders.

2.3.2. Drivers of lack of compliance

The Fitness Check concluded that the main obstacle to ensuring a high level of consumer protection is lack of compliance due to: (1) insufficient enforcement of the rules,[49] (2) lack of awareness about consumer rights[50] and (3) limited consumer redress opportunities.[51]

As described in Section 2.1, a number of steps have already been or are being taken to improve awareness about and enforcement of consumer law, whilst facilitating consumer redress.

Consequently, this IA focuses on the outstanding drivers of lack of compliance that have not already been addressed by other initiatives: ineffective mechanisms to (1) stop and deter infringements of consumer law, (2) ensure that consumers get redress for the harm suffered and (3) tackle mass harm situations.

Example of drivers for lack of compliance with EU consumer law: the "Dieselgate" scandal

In September 2015, the Volkswagen Group admitted it had installed so-called 'defeat devices' in Diesel cars in order to manipulate emission test results. According to estimates, over 11 million cars had such devices installed worldwide, 8 million of them in Europe.[52] This resulted in mass harm for consumers buying cars manufactured by the Volkswagen Group, as these consumers were misled by untruthful claims about the environmental performance of the cars. Such misleading advertising is prohibited in Europe by the UCPD.

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[46] The public consultation for the Fitness Check was carried out between May and September 2016. The total of 436 respondents comprised: 86 business associations (51 national + 35 at the European level), 20 consumer associations and 28 public authorities (13 government authorities in charge of consumer policy, 10 national consumer enforcement authorities, 5 national sector-specific -e.g. energy/telecom- enforcement authorities). The detailed results are available in Part 2 (report of the public consultation) of the 'Study for the Fitness check of consumer and marketing law', p. 80-92, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

[47] The Commission assessed costs to SMEs of complying with EU regulation in 2012 in the 'TOP 10 most burdensome legislative acts for SMEs'. The area of 'Consumer protection — safe shopping (distance selling, advertising, unfair commercial practices, timeshare of holiday properties, etc.) scored as the second least burdensome for SMEs among 32 surveyed areas. In the 'Annual Burden Survey' in 2017 (available at: (http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2129) half of all surveyed companies (50%) thought that regulatory costs due to consumer protection laws remained unchanged in the last financial year. Three in ten companies (30%) said costs increased, 2% thought that costs decreased. Perceptions of regulatory cost increases were the 2nd lowest among the six surveyed regulatory areas, most widely cited in MT (50%), followed by FR; least widely cited in EE (8%), SE, HR, LV, LT and DK. A relatively high proportion of companies (18%) was unable to provide an opinion on this area of legislation.

[48] For instance, the overall compliance costs with rules in the areas of marketing (including B2B marketing) and standard contract terms were estimated to amount to approximately 0.024 % of annual turnover. For further information, see Chapter 6.2.4. of the Fitness Check report (SWD(2017) 209 final).

[49] For example, in the public consultation for the Fitness Check, most consumer associations and public authorities pointed to the lack of legal powers for national administrative enforcement authorities, inactivity by such authorities and the complexity of administrative procedures as important problems for consumer rights.

[50] The Fitness Check showed that lack of awareness is an important impediment to well-functioning consumer protection: the percentage of consumers complaining to the seller or service provider increased with increasing consumer rights awareness: no less than 64 % of respondents with very high consumer rights awareness (i.e. scoring between 75 % and 100 % on the consumer awareness index) took action to solve their problem, as opposed to just 47 % doing so among the respondents with a very low consumer awareness (i.e. scoring between 0 % and 25 %). For further details see p. 32-34 of the Fitness Check report.

[51] The majority of consumer associations and public authorities considered existing mechanisms for injunction proceedings too complex, lengthy and costly. They also highlighted significant differences among national injunction proceedings as an obstacle to the effectiveness of the Injunctions Directive, particularly in cross-border situations. For further details see Annex 5.

[52] http://www.bbc.com/news/business-34324772

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Only two national consumer protection authorities have imposed financial penalties on the car producer for breaching the UCPD.[53] However, the level of fines is unlikely to be sufficiently deterrent to prevent similar infringements by large multinational companies in the future.[54]

Furthermore, despite efforts by the Member States, consumer organisations and the European Commission to persuade the car producer to remedy the harm it has caused, it has refused to compensate European consumers.[55]

There have also been few private actions by European consumers and consumer organisations. This is partly because in many Member States there is no direct link between breaches of the UCPD and the right to remedies, such as rights to refunds or damages. Moreover, some national remedies only apply where there is a contract between a consumer and a trader. Consumers can then only seek remedies against their contractual counterparts, which in this case are usually car sellers, not the car producer, which is likely to be responsible for the misleading advertising in this case.

As concerns collective redress, only 4 consumer organisations and 1 ad hoc association[56] have brought cases to court (in BE, IT, ES, PT and PL). So far, only the collective redress actions in IT and BE have been deemed admissible by the competent courts. In IT, around 90 000 consumers have indicated their interest in joining the action during the registration phase[57] and in BE the court admitted that all affected consumers would be represented by the collective action ('opt-out' approach).[58]

2.3.3. Driver 1: Ineffective mechanisms to stop and deter infringements[59]

Sanctions deter traders from engaging in or continuing illegal behaviour. For this reason, the CRD, UCPD and PID contain a requirement for Member States to have in place 'effective, proportionate and dissuasive penalties' to tackle breaches of the national law provisions transposing these Directives. The CSGD and UCTD do not include such a requirement[60], although no less than 11 Member States already provide for penalties also in case of breaches of national laws transposing these directives.

Member States have very different rules on penalties (see Annex 7, Table 1 for an overview). Fines for breaches of the above-mentioned five Directives exist as penalties in many Member States. However, the maximum level of such fines is, in several Member States, set at a very low level. Some countries have turnover-based fines at least for infringements of the UCPD, although in most cases also these countries apply an absolute cap to fines. For example, fines for infringing the UCPD may reach 10% of a company's annual turnover in FR, PL and NL whilst it is capped at EUR 8 688 in LT, EUR 13 157 in HR and EUR 32 000 in EE.

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[53] The Italian Competition and Consumer Protection Authority (AGCM) has imposed a fine of EUR 5 million. The Dutch Consumer and Markets Authority (ACM) has imposed a fine of EUR 450 000.

[54] For instance, the bonuses of the top managers of Volkswagen have only in 2017 been capped to EUR 5,5 million http://www.reuters.com/article/us-volkswagen-results-managementpay-idUSKBN16321P, i.e. more than the Italian fine.

[55] By contrast, more substantial public and private enforcement action has been taken in the US. The US Environmental Protection Agency imposed dissuasive penalties, e.g. the obligation to pay USD 2.7 billion into a special trust that supports environmental programmes and an additional USD 2 billion more to promote zero emissions vehicles. Furthermore, US consumers have succeeded in collective private actions. More than 200 class actions have been launched in US courts, which were subsequently bundled into a single law-suit, which led to a settlement. According to the terms of the settlement, consumers could either choose to return the vehicle to the company, which then would compensate them for the value of the car, or have the car repaired. In both options, the consumers would also get a compensation payment of $ 5,000 - 10,000.

[56] An association created under Polish law for the purpose of representing rights of consumers affected by "Dieselgate".

[57] Altroconsumo press release 7.11.2017 https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2017/class-action-dieselgate-respinto-reclamo-vw

[58] See Test-Achats' press release of 19 December 2017 https://www.test-achats.be/mobilite/autos/news/action-collective-dieselgate-vw

[59] See Annex 7 for further details on the problem description in this area.

[60] The amended proposal for a Directive on certain aspects concerning contracts for the sale of goods, COM(2017)637 of 31.10.2017, which aims at repealing and replacing the CSGD, does not provide for any penalties either.

Results of hypothetical case studies about fines that could be imposed for the same infringement in different countries on a micro and a large company demonstrated both the lack of deterrence (especially vis-à-vis large companies) and the disproportionate character of the fines that can be imposed under the current national rules.

As regards deterrence, for infringements of the UCPD by a large company, the estimated fine ranges in different countries from just 0.002% to 0.179% of the company turnover, i.e. the economic impact of the fine in one country is 90 times lower than in another country. Consequently, traders established in 'low-fine' countries may not be deterred from pursuing the infringement harming consumers in other Member States. The survey responses of the national consumer authorities also show that, in most cases, the fact that the infringement has affected consumers also in other Member States is not systematically taken into account in the imposition of fines.

As regards proportionality, the case study demonstrated that the median fine-to-turnover ratio for breaches of the UCPD would be 2.36% for micro companies but just 0.011% for large companies. This means that the economic impact of the fine on a micro company would be 215 times higher than on a large company. Accordingly, the current systems for fines, which are in most cases based on absolute maximum amounts, treat large and small companies in a highly disproportionate manner, to the disadvantage of smaller ones. Thus, it does not seem surprising that in the SME Panel consultation, only between 20% and 25% of the 210 respondents considered the current level of fines as proportionate.

The "Dieselgate" case shows the limits of the fining systems based on maximum absolute fines. Although the Italian consumer enforcement authority AGCM imposed the maximum fine of EUR 5 million available under Italian law (this is also one of the highest absolute maximum fines across the EU), several consumer associations commented in their replies to the ECCG survey that "*Such a cap, which is lower than the annual bonus of the VW managers involved, will clearly not unfold dissuasive effects. By contrast, companies would be advised to ignore consumer protection law to maximise their profits*." More recently, the Dutch consumer enforcement authority imposed a lower fine of EUR 450 000 for the same infringement; again, this was the maximum fine available under national law at the time of the infringement.[61] Consequently, even relatively high absolute fines may not be sufficiently deterrent and proportionate when large companies and mass-harm situations are involved.

In the public consultation, most consumer associations and public authorities agreed that differences in the nature and level of fines for the same or similar breaches of EU consumer laws lead to insufficient compliance and insufficient deterrence especially for breaches that take place in more than one Member State. Among business associations only 17% and 23% agreed that these differences lead to, respectively, insufficient compliance and deterrence. In contrast, in the same consultation, 46% of 41 SMEs agreed (42% disagreed, 12% did not know regarding insufficient compliance and 34% disagreed, 20% did not know regarding insufficient deterrence) and large companies were divided in their views (5 agreed and 5 disagreed, 6 did not know)

The different levels of fines shown by these hypothetical case studies can also have a negative impact on tackling cross-border infringements in the CPC framework. The CPC provides a coordinated procedure to assess the infringement and decide how to address it concretely. In most cases, the national authorities will seek to obtain commitments from the trader to cease or modify a practice. If this approach does not work, each country concerned will have to take enforcement measures as foreseen in their national law, including fines or other measures such as blocking websites. They should seek to take these measures in a coordinated manner and simultaneously.

[61] Decision of the Authority for Consumers & Markets to impose a fine on Volkswagen AG, 18 October 2017, available at: https://www.acm.nl/sites/default/files/documents/2017-11/acm-fines-volkswagenag-for-unfair-commercial-practices.pdf. Since 2016, the Netherlands have introduced turnover-based fines for consumer law infringements.

However, this is unlikely to be the case as concerns fines under the current divergent national systems.

In the public consultation, most consumer associations and public authorities agreed that these differences lead to a lack of level playing field between traders operating in Member States where fines are relatively low and traders operating in Member States where fines are relatively high. 39% of business associations agreed with this statement (49% disagreed). In contrast, in the same consultation 25 of 41 SMEs and 7 of 15 large companies agreed with these statements.

Example of different fines for the same infringement

In December 2011, the Italian consumer enforcement authority imposed a fine of EUR 900 000 on Apple for misleading advertising of its commercial guarantee scheme and misleading information on applicable legal guarantees stemming from EU law. A regional consumer protection authority in Spain imposed a penalty of EUR 40 000 for the same infringement. Consumers in the other EU Member States were targeted by the same practice.

2.3.4. Driver 2: Ineffective mechanisms for individual consumers redress[62]

Misleading and aggressive commercial practices are the consumer-rights related problems that consumers experience most often (see Table 1 in Annex 8). Such practices are prohibited as "unfair commercial practices" under the UCPD. However, their continued prevalence means that lack of compliance is a significant problem.

The UCPD does not harmonise rules on what consumers can do to remedy the situation when they have become victims of unfair commercial practices. This Directive rather leaves it to the Member States to determine if and how civil remedies, such as the right to terminate a contract and get a refund, should be available to consumers.[63] The absence of a clear framework for individual remedies in the UCPD go back to its drafting history, when, at the time of its adoption in 2005, enforcement against unfair commercial practices was rather viewed as a matter for public enforcement, shortly after the creation, in 2004, of the CPC network. The UCPD was thus designed to mainly regulate the market conduct of traders.[64]

With the benefits of more than 10 years of experience, however, the impacts of the lack of individual remedies in the UCPD have become clearer. This can be illustrated by comparing consumer behaviour under the UCPD and the Consumer Sales and Guarantees Directive (CSGD). The CSGD regulates legal consequences of the lack of conformity with the contract for consumer goods. As opposed to the UCPD, the CSGD ensures consumers EU-wide rights to remedies, such as having the defective good brought into conformity with the contract by repair or replacement, having the price reduced and the contract rescinded. In the consumer survey for the Fitness Check, many more respondents who had been confronted with unfair commercial practices reported that they had not taken action to solve the problem (27%) than what was the case for consumers that had bought defective goods (10%) (see Table 2 in Annex 8). This indicates that the CSGD is more effective than the UCPD in ensuring that consumers can solve problems when their rights have not

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[62] For a more complete analysis of the problems related to redress mechanisms under the UCPD, including stakeholder views see Annex 8.

[63] For the black-listed 'inertia selling' (no 29 of Annex I to the UCPD), Article 27 of the CRD provides that consumers shall be exempted from the obligation to provide any consideration for unsolicited goods or services.

[64] See also the IA for the UCPD (COM(2003)356 final), where, under section 7.2 on "more ambitious options that were rejected", there was a discussion on harmonising aspects of consumer contract law in addition to commercial practices. At that time, harmonising both was considered to be unmanageable in a single instrument and contract law aspects were expected to be "addressed elsewhere". However, subsequent legislative action in the area of consumer contract law (aside from the adoption of the CRD) has not been successful and therefore the gap identified in the original IA remains.

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been respected. It seems likely that this is, at least to some extent, linked to the fact that the CSGD gives consumers rights to take specific action to get problems remedied, contrary to the UCPD.

National rules are diverging and two main groups of Member States can be identified. Firstly, 14 Member States have made links between civil remedies and breaches of national provisions transposing the UCPD. However, the specific rules within these Member States differ significantly. Secondly, 14 Member States have not made explicit references to remedies in case of breaches of national legislation transposing the UCPD. However, it may still be possible for consumers in these Member States to rely on certain remedies under general civil law. Table 8 in Annex 8 gives an overview of the civil remedies in the different Member States.

Despite the existing possibilities for remedies under national law, the Fitness Check did not identify significant examples of case law where victims of unfair commercial practices had claimed remedies. This contrasts with the fact that unfair commercial practices are the most frequent consumer rights-related problem across Europe. It indicates that the existing possibilities for remedies do not ensure that consumers can solve problems when their rights under the UCPD have been breached.

Example: Dual quality of products and lack of remedies in the UCPD

Identically branded products with different compositions may mislead consumers who expect a certain quality from products or brands. Concerns have been raised that consumers in some Member States are sold products, especially foodstuff, of lower quality than in other countries, despite the packaging and branding of the products being identical. The Commission has started several interventions to meet these concerns, including dialogue with the parties concerned, guidelines for a common testing methodology and a Notice to facilitate the practical application of existing EU law.[65]

While the provisions of sector-specific EU food law are the first legal basis for assessing issues related, for example, to misleading marketing of foods, the UCPD does come into play to address those aspects of the commercial practice that are not covered by sector-specific EU rules. However, if enforcement authorities conclude that the identical branding of a product, while having significantly different composition, is contrary to the UCPD, affected consumers would currently have very different possibilities to get their money back and/or receive compensation for damages suffered, depending on whether the relevant Member State law ensures links between breaches of the UCPD and remedies for transactional decisions prompted by those unfair commercial practices.

Against this backdrop, it would appear that the current situation – where it is left to the Member States to determine if and how remedies should be available – keeps the UCPD from being fully effective. The Directive does not seem to fully reach its dual purpose: to contribute to the proper functioning of the Internal Market and achieve a high level of consumer protection.

As concerns the Internal Market, diverging national rules have created a fragmented legal landscape. This creates unnecessary costs for compliant traders engaging in cross-border trade, who need to adapt to different rules and assess risks related to possible legal challenges. At the same time, it is difficult for consumers to enforce their rights under the UCPD. This lack of effective mechanisms for individual redress means that traders do not have the added incentive to comply with the UCPD that they would have had if consumers had been ensured rights to claim remedies for breaches of the UCPD.

In the public consultation, 59% of citizens reported having experienced problems with getting redress from traders. A majority of stakeholders confirmed that, in their experience, consumers face

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[65] See an overview of these actions in the Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food; C(2017) 6532 final: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=604475

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such problems. 18[66] of 42 SMEs (16 disagreed, 8 did not know) and 9 of 17 large companies confirmed this as well. On the other hand, 30 of 68 (14 confirmed[67], 24 did not know) business associations did not think consumers face problems with getting redress. A majority of stakeholders in the public consultation also agreed that differences between national rules on remedies under the UCPD cause harm to consumers. 21 of 40 SMEs and 7 of 16 large companies agreed (7 disagreed, 2 did not know). Only 10 of 74 business associations agreed. Also in the public consultation, a majority (including SMEs and large companies) found that differences between national rules on remedies cause costs for traders engaging in cross-border trade. However, 34 of 74 business associations disagreed (29 agreed, 11 did not know). See Section 3 of Annex 8 for a detailed breakdown by respondent category.

2.3.5. Driver 3: Ineffective mechanisms for consumer redress in mass harm situations68

The risk of mass harm situations that affect the collective interests of consumers continues to increase due to globalisation and digitalisation. Infringing traders may affect thousands or even millions of consumers with the same misleading advertisement or unfair standard contract terms in various economic sectors, such as telecommunications, financial services, environment and energy. The "Dieselgate" scandals is a greatly publicized example of mass harm situations taking place across the EU.

As demonstrated by the Fitness Check, the existing individual enforcement and redress possibilities appear insufficient particularly in mass harm situations and infringing traders are not sufficiently deterred from non-compliance. Reliance on individual private enforcement results in consumer detriment and under-deterrence of infringements.[69] A comparison of this data with EC data from 2008 shows that EU consumers today face the same problems while seeking redress individually as ten years ago, such as excessive length of the procedures, perceived low likelihood of obtaining redress, previous experience of complaining unsuccessfully, uncertainty about consumer rights, not knowing where or how to complain and psychological reluctance.[70]

The need for an EU instrument that addresses the collective interests of consumers was already evident in 1998 when the Injunctions Directive was first adopted. The ID made it possible for "qualified entities", mainly consumer organisations and independent public bodies, to bring actions for the protection of the collective interests of consumers with the primary aim of stopping infringements of EU consumer law. Such actions may be brought to challenge both domestic and cross-border infringements without an explicit mandate from the affected consumers.

The 2008 and 2012 Commission reports on the application of the ID as well as the Fitness Check have all confirmed the significant role of the ID in the EU-level regulatory toolbox for reducing non-compliance. However, these reports have also concluded that there are considerable shortcomings to the current ID, which, if left unaddressed, will continue to hinder its full effectiveness and lead to its sub-optimal use. Even in those Member States where injunctions are considered effective and are widely used, its potential is not fully exploited due to a number of elements which are not sufficiently regulated by the ID. The key identified shortcomings are its limited scope, the cost and length of the procedure, as well as its limited effects on consumers.

The scope of the ID is limited to the EU instruments enumerated in its Annex I, leaving out several instruments that are important for the protection of the collective interests of consumers from

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[66] 6 stated consumers encounter problems a few times, 8 said often and 4 indicated "yes, once".
[67] 6 stated yes, a few times, 5 said yes, often and 3 yes, once.
[68] For a comprehensive analysis of the problems related to mass harm situations see Annex 9.
[69] Fitness Check, Lot 1 Study, Part 1 Main report, p. 159,
[70] 2017 Consumer Condition Scoreboard, p. 58, Survey carried out within the 2017 Study on Procedural Protection of Consumers available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847 and Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (2008 Problem Study), p.42, available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm

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various policy areas, such as passenger rights, energy, telecommunication and data protection. Moreover, the ID has limited effects on individual consumers and infringing traders. Due to a lack of publicity obligations, the affected consumers are not necessarily made aware of the breach identified in the injunction order and the infringing traders are not deterred by the "naming and shaming" effect of such publicity. Due to a lack of redress effects, consumers may not be able to rely on the injunction order to obtain redress and have to litigate against that trader for the same issues, including proving the infringement anew. The lack of clarity about whether the ID may also cover redress for the victims of the infringement is widely considered a key reason for its insufficient effectiveness and deterrence. As shown by the 2018 Collective Redress Report, the impact of the 2013 Commission Recommendation on Collective Redress, which explicitly called Member States to ensure in their legal systems the existence of injunctive and compensatory collective redress in all areas of EU law, has been limited. Even in Member States where compensatory redress exists, it is still reported to be not effective enough to fully reach its objectives, with respondents referring to the cost, length and complexity of procedure.

Since the ID applies to both domestic and cross-border infringements, problems related to its effectiveness have cross-border implications. The use of injunctions for cross-border infringements is low and qualified entities from different Member States are not cooperating with each other sufficiently, i.e. not exchanging best practices or developing common strategies to challenge widespread infringements.

Examples of mass harm situations and ineffective mechanisms to tackle them:[71]

Length of the procedure: In Germany, in the injunction case of *RWE* on unfair standard terms in gas contracts regarding increasing price[72], the injunction claim was brought in 2006, whereas the last instance decision was rendered in 2013. Under German law, prescription periods for individual damages actions that could follow an injunction order are not suspended while a collective action on the same issue is pending.[73]

Publication costs for qualified entities: In Italy, the consumer organisation Altroconsumo has been active in bringing collective redress actions. However it has regularly faced significant costs for informing consumers about the ongoing actions. Recently, in the Volkswagen defeat device case, it had to pay EUR 130 000 for publishing announcements in five Italian newspapers to alert the relevant consumers.[74]

Lack of effective enforcement of injunction orders: In Spain, within an action brought by the consumer organisation Organización de Consumidores y Usuarios, the court declared in 2013 that 20 of the general terms and conditions used by the Irish airline Ryanair were unfair. It was reported, within the 2017 Fitness Check, that Ryanair has not yet removed in Spain the unfair clause related to the law applicable to conflicts with consumers.[75]

Lack of compensatory collective redress mechanism: In Ireland, around 160,000 consumers were mis-sold a credit card protection policy, with the total damage equivalent to between EUR 15 - 30

[71] Several recent studies and reports have identified examples of mass harm in different economic sectors: 2017 Fitness Check Study Lot 1, part 4, p. 13, EC 2017, Call for evidence on collective redress (not yet published), 2008 Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (2008 Problem Study), p.21, 2012 Commission report on the application of the ID, Brussels, 6.11.2012 COM(2012)635final, p. 4-5 available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434096245408&uri=CELEX:52012DC0635.

[72] CJEU, judgment of 21/3/2013, Case C-92/11 *RWE*,

[73] Fitness Check Study, Part 1, page 121

[74] European collective redress – what is the EU waiting for? BEUC contribution to the 2017-2018 EU initiatives on collective redress available at http://www.beuc.eu/publications/beuc-x-2017-086_ama_european_collective_redress.pdf

[75] Fitness Check Study, Part 3, p. 1145.

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million. However, there is no collective redress system in Ireland enabling consumers to seek compensation for damages.[76]

Complexity of compensatory collective redress mechanism: In Germany, in 2012 the Federal Court of Justice decided that certain contract clauses regarding the surrender value of life insurances were invalid. As reported, this could have been the basis for redress claims for millions of consumers. The Consumer Association of Hamburg took action against Allianz Lebensversicherungs AG in front a court. According to the Consumer Association's estimate, claims against Allianz added up to EUR 1.3 to 4 billion. Only 80 consumers, who had ceded their claims to the consumer organisation, were refunded € 114,000. It has been reported that the recovery claims procedure used in this case is too complex to be used for large numbers of consumers.[77]

2.4. Main problem 2: Ineffective consumer protection and unnecessary costs for compliant traders

2.4.1. Scope for modernising and simplifying EU consumer law

The Fitness Check and the CRD evaluation identified possibilities for modernising EU consumer law in the following areas of B2C relations:

- transactions on online marketplaces;
- contracts for "free" digital services (such as cloud storage and webmail);
- information requirements in the UCPD and the CRD that overlap;
- information requirements on the means of communication between traders and consumers;
- right to withdraw from distance and off-premises sales, for example where the consumer has used goods more than necessary to establish their nature, characteristics or functioning.

Although these are different areas of EU consumer law, they are grouped together in this IA as they are addressed for the same reasons: the underlying consumer rules are not sufficiently effective and do not ensure an adequate level of consumer protection. They also create unnecessary costs for compliant traders.

2.4.2. Driver 1: Lack of transparency and legal certainty for B2C transactions on online marketplaces[78]

Online marketplaces are a category of online platforms (intermediaries) that enable consumers to directly conclude contracts with third party suppliers. Online marketplaces are already defined in EU legislation and have specific information obligations related to B2C online dispute resolution[79].

Over the last years, online marketplaces have experienced substantial growth. Survey data suggest that a great majority of users consider it beneficial that online marketplaces provide them with a variety of offers. However, according to the Platform Markets Study, almost 60% of consumers are not sure who is responsible when something goes wrong with their transaction on the online marketplace. In fact, users may be under the impression that the online marketplace is the supplier, whereas in reality the counterpart is a third party. Similar data emerge from the public consultation: Over 50% of 90 responding citizens said it was unclear to them with whom they had concluded their contract on the online marketplace. They were thus also unsure as to whether their transaction could benefit from EU consumer rights. Over 50% of responding business associations (34 of 58) agreed that consumers face situations of lack of clarity regarding the identity of their contractual

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[76] BEUC additional comments to the EC Inception impact assessment 'A New Deal for Consumers – revision of the Injunctions Directive', p. 1, available at : http://www.beuc.eu/publications/beuc-x-2018-004_a_new_deal_for_consumers.pdf

[77] Ibidem

[78] For a comprehensive analysis (including stakeholder views) of the problems related to B2C transactions on online marketplaces see Annex 10.

[79] The term 'online marketplace' is defined in Article 4(1)(f) of Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (Consumer ODR Regulation), as a service provider allowing consumers and traders to conclude online sales and service contracts on the online marketplace's website.

counterpart. Over 50% of SMEs (28 of 50) agreed. On the contrary, a majority of large companies (10 out of 18) disagreed.

The Platform Transparency Study indicates that the ranking of products can be decisive when consumers decide which product to buy. When consumers have no information about the criteria used for ranking their search results, first ranked products have a 47% higher chance of being chosen than other products on the same list. Studies also show that around 80% of consumers only look at the first page of search results.[80] As a consequence, there is potential for detriment if consumers are misled by ranking due to lack of transparency about the ranking criteria used by online marketplaces.[81]

Consumers buying on online marketplaces suffer mostly hidden detriment because they are not aware that they only benefit from EU consumer rights in transactions with third party suppliers that are traders, as opposed to suppliers that do not qualify as traders, e.g. in contracts with other consumers. The Platform Transparency Study reveals that, when trying to get a faulty product bought through an online marketplace replaced or repaired, no less than 12% of consumers found that the seller was not a trader and, because of that, they did not have the right to legal guarantee. 7% report that, for the same reason, they could not withdraw from the contract in the two week cooling-off period applicable to online B2C contracts.[82] The targeted consultation of Member State authorities confirmed that there are many consumer complaints in this area. There is also sub-optimal consumer trust: data shows that European consumers have concerns when using online marketplaces for their purchases.

Businesses, too, face problems. Online marketplaces are subject to different national requirements related to platform transparency. Authorities in 17 Member States report that they require online marketplaces to indicate whether the contract is concluded with the online marketplace itself or with third party suppliers. Indicating whether the third party supplier is acting as a trader or not is required in 15 Member States. 12 Member States require indicating to the consumer whether consumer law applies to the contract. The replies received to the targeted consultation indicate that marketplaces have different perceptions of what they are required to do under different applicable laws and that they incur compliance costs due to varying national requirements. These costs include time to differentiate relevant web-pages as well as legal costs to ensure compliance.

In addition to differences between national rules, the lack of clarity of rules also creates costs for businesses. According to the recently published Platform Markets Study, 40% of the third party providers on platforms do not know or are unsure about their rights and responsibilities, and only 30% think they know about them.[83] Specifically, when a consumer has not been made sufficiently aware of the applicable procedure and contact persons in case of problems, he or she will often contact the wrong person who will then have to individually assess and reply to complaints. Thus, online marketplaces incur costs in handling consumer queries and complaints even in cases where they have no possibilities to solve the problem.

2.4.3. Driver 2: Lack of transparency, consumer protection and legal certainty for "free" digital services[84]

Existing EU consumer law does not offer protection in all digital transactions.

Indeed, the CRD applies to contracts for the supply of digital content, regardless of whether the consumer pays a price in money (paid digital content) or provides personal data ("free" digital content). Digital content includes, for example, the typically one-off relation with a trader for the

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[80] See, for example, “The Power of Ranking: Quantifying the Effects of Rankings on Online Consumer Search and Choice”, Raluca M. Ursu 2015, pages15-16.

[81] Platform transparency study, pages 21 and 29.

[82] Platform transparency study, page 24.

[83] Platform markets study, p. 117.

[84] For a comprehensive analysis of the problems related to "free" digital services see Annex 11.

purpose of receiving a given app, a given game, a given video or a given computer programme, irrespective of whether such content is accessed by the consumer through downloading or streaming from a tangible medium or other means. For all such contracts, the CRD provides consumers with EU rights to pre-contractual information and to a 14 days' right withdraw unless the consumer gives his consent to the start of the performance.[85] The CRD does not apply if no contract is concluded, for instance in case a consumer merely accesses a website or uses a search engine without providing anything in return.[86]

However, the CRD does not ensure adequate protection for consumers that conclude contracts for digital services. Digital services include, for example, the typically longer-term relation with a trader for the purpose of accessing, creating, processing, storing or sharing of data in digital form, such as subscription contracts to content platforms (e.g. iTunes, GooglePlay), cloud storage (e.g. Dropbox, iCloud), webmail (e.g. Hotmail, Gmail) and social media (e.g. Facebook, Instagram). The CRD applies to digital service contracts supplied against the payment of a price in money (paid digital service), but does not apply to contracts where the consumer provides personal data ("free" digital service).

It is difficult to justify such a legal gap in consumer protection, in particular given the steady growth of digital B2C transactions, the similarities between digital content and digital services and the interchangeability of paid digital services and "free" digital services, made available in exchange for personal data.

The CRD evaluation highlighted the legal gap in the current scope of the CRD for "free" digital services, which was not foreseen at the time of the adoption of the Directive. The CRD Report found that practical difficulties arise when distinguishing between "free" digital content and digital services.[87] As only one of these categories is currently covered under the scope of the CRD, there is legal uncertainty about the applicable rules, and the legal protection of consumers entering into contracts for similar digital products differs dramatically. The different treatment will be further highlighted once the proposed Digital Content Directive (DCD) is adopted, as it will provide remedies for consumers in the case of lack of conformity with the contract for both "free" digital content and "free" digital services. In situations where the consumer provides personal data, such rights to remedies would apply in parallel with the rules of the new General Data Protection Regulation.

Against this background, the CRD evaluation concluded that, in order to ensure that the CRD remains fully relevant and able to meet current challenges, its scope should be expanded to cover contracts for ‘free’ digital services while making sure, where appropriate, that it ensures equal treatment of digital services and digital content.[88]

The unclear legal framework under the CRD creates unnecessary costs for compliant traders due to diverging national rules addressing contracts for "free" digital services; such existing costs are linked to the need to check and comply with possible national mandatory rules on pre-contractual information and right of withdrawal for "free" digital services. In the public consultation, 7 out of 10 of responding business associations considered the current costs due to diverging national requirements as unreasonable.[89] These costs are likely to increase in the future if the EU does not act, as the targeted consultation points to ongoing discussions in some Member States about

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[85] Under Article 16(m) CRD the consumer does not have a right to withdraw from the digital content supply if the performance has begun with his prior express consent and acknowledgment that, by accepting to have the performance starting, he no longer has the right to withdraw.
[86] See page 64 of the DG Justice Guidance Document on the CRD.
[87] CRD Report, p. 9.
[88] Idem.
[89] Question 92 of the public consultation. 7 out of 10 responding business associations considered such costs not to be reasonable. The only responding company also considered these costs unreasonable.

introducing national rules aimed to extend the notion of "payment of a price", laid down by the CRD in relation to "service contracts", also to the provision of personal data .

Furthermore, there is unfair competition between traders. Depending on whether they supply the exact same digital service against personal data or against the payment of a price, traders are subject to different rules. Similarly, traders that supply digital content for "free" have to comply with the CRD rules, unlike traders that supply digital services for "free". Moreover, these divergences are likely to create difficulties for compliance with consumer law for business models that combine elements of "free" and paid digital services.

The lack of protection for "free" digital services leads to detriment for consumers, with many consumers reporting problems with contracts for such services, which include, for instance, difficulties when unsubscribing, or different characteristics of the digital service compared to what has been promised by the trader. In particular, the CRD study found that 48% of the surveyed consumers experienced difficulties with unsubscribing from such services. Furthermore, the IA for the DCD proposal estimated that almost 1 in 3 consumers across the EU had experienced at least one problem in the previous 12 months with contracts for digital products, including contracts for "free" digital services (such as cloud storage with which 30% reported problems).[90] In addition, in response to the public consultation, majority of individuals, consumer associations and national authorities indicated that the lack of pre-contractual information and the right of withdrawal is problematic and can create harm for consumers when using "free" digital services cross-border. 48% of citizens replying to the public consultation, over 80% of consumer associations and over 40% of national authorities reported that "free" digital services would be used more often if consumers had such rights. Business associations disagree on both aspects (consumers experiencing detriment and "free" digital services used more if rights existed), while companies expressed mixed views, with a higher share of SMEs acknowledging consumer harm than large companies. For additional information on question and responses, see Subsection 3 of Annex 11.

2.4.4. Driver 3: Overlapping and outdated information requirements

The Fitness Check analysed the interaction and possible overlap between information requirements in the UCPD and the CRD. The UCPD (Article 7(4)) contains some information requirements for the "invitation to purchase" of specific products at a specific price. These information requirements apply already at the advertising stage, whilst the CRD imposes the same and other, more detailed requirements at the pre-contractual stage (i.e. just before the consumer enters into a contract; see Figure 1 in Section 1.3). Consequently, traders may have to provide the same information in advertising (e.g. in the ad displayed on an online newspaper) that they are required to provide once again at the pre-contractual stage (e.g. on the pages of their online web-shop).

The Fitness Check found that consumers regarded UCPD information requirements about complaint handling and traders' geographical address as relatively less relevant at the advertising stage (see Figures 1 and 2 in Annex 12).[91]

In the public consultation, respondents held mixed views, with business associations supporting the deletion of these two requirements at the advertising stage whereas consumer associations were against it. Most of the public authorities thought that the trader's address was important at this stage, also for enforcement purposes, but not information about complaint handling. In the same consultation, 9 of 15 SMEs agreed that information about the geographical address is necessary already at advertising stage but only 2 considered necessary the information about the complaint handling.[92] Among 6 large companies that responded to this question, 4 considered that information

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[90] The IA of the DCD proposal also indicates that consumers incurred costs as a result of a problem also when no money was paid in exchange for the digital content or service; the net cost incurred by consumers averaged EUR 5.79 per consumer for 'free' music, EUR 6.42 for "free" games, EUR 8.80 for "free" antivirus and EUR 5.59 for "free" cloud storage. See annex 11, subsection 2.

[91] Based on a consumer survey and a behavioural experiment; Fitness Check Report, p. 82.

[92] Question 162 in the public consultation - See more information in Annex 12.

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about geographical address is not necessary at the advertising stage and 3 considered that information about complaint handling was not necessary at the advertising stage.

The pre-contractual information requirements under the CRD for distance and off-premises contracts (Article 6) additionally include "fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently". The CRD Report found, in respect of the obligation to provide trader's fax number and e-mail address, that other, more modern means of communication (such as web-based forms) could be sufficient.[93]

In the public consultation, all stakeholders found web-based communication nearly as relevant as e-mail, whereas fax was considered largely irrelevant.[94] These findings show that there is a potential for modernisation and simplification of the above-mentioned requirements and, consequently, for some cost reduction for traders.

2.4.5. Driver 4: Imbalances in the right to withdraw from distance and off-premises sales

During the implementation and evaluation of the CRD, several business stakeholders expressed concerns especially about the following two aspects related to the exercise of the right of withdrawal according to current CRD provisions.

The first relates to the consumer right to withdraw from sales contracts concluded at a distance (e.g. online) or outside the business premises (e.g. at an occasional fair) even after using goods more than necessary to establish their nature, characteristics and functioning (Article 14(2) CRD). According to Article 14 of the CRD, within the 14-day right of withdrawal period, the consumer should handle and inspect the goods only to the extent necessary to establish their nature, characteristics and functioning. The idea is that this allows the consumer to inspect the goods as he/she would be able to do in a physical shop. If the consumer uses the goods more than allowed (hereinafter: "unduly tested goods"), he/she will still be able to withdraw from the online/off-premises purchase, but would then become liable "for any diminished value of the goods".

Within the CRD evaluation, business stakeholders reported regulatory costs associated with the consumer right to return also unduly tested goods. Specifically, traders found it difficult to assess the "diminished value" of the returned goods and to resell them as second-hand goods. This problem was also discussed in the framework of the REFIT Platform of the European Commission.[95] The CRD evaluation concluded "that if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, it would indeed risk distorting the right balance between a high level of consumer protection and the competitiveness of enterprises pursued by the Directive in accordance with its recital 4".[96]

The second relevant aspect raised by business stakeholders during the CRD evaluation concerns its rule (Article 13) according to which traders can withhold the reimbursement until they have received the goods back, or until the consumer has supplied evidence of having sent them back, whichever is the earliest. The latter option may, in some circumstances, effectively require the traders to reimburse the consumer even before having received back the returned goods and having had the possibility to inspect them (hereinafter: "early reimbursement").

In the SME panel consultation, close to 50% of the respondents (48 out of 99) from across 15 Member States replied that they face disproportionate burden due to these obligations at least

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[93] CRD Report, p. 57.
[94] Question 103 in the public consultation – for more information see Annex 12.
[95] For information on REFIT Platform, see https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en. See in particular the opinion of the REFIT Platform adopted on 23.11.2017 on the submissions by different organisations on the Consumer Rights Directive, https://ec.europa.eu/info/sites/info/files/vi-1-a-f-consumer-rights_en.pdf.
96 CRD SWD(2017) 169 final, p. 39.

'sometimes' or 'rarely' in relation to "unduly tested goods"; their share went down to 40% (39 out of 97 respondents) in relation to "early reimbursement".[97]

The public consultation showed that similar problems are experienced not only by SMEs (with 28% of them – 26 out of 92 - having experienced them at least once), but also by larger companies (with almost 50% of them – 8 out of 17 - having experienced them at least once). In line with the fact that this is a new obligation stemming from a Directive applying across the EU only since June 2014, evidence indicates that the matter is still an emerging one, as shown by the fact that 67% (62 out of 92) of the SMEs replying to the public consultation, next to a lower 41% (8 out of 17) of larger companies, chose the option "do not know". Interestingly, close to 50% of the consumer associations (7 out of 16) and more than 50% of the public authorities (10 out of 16) acknowledged that the right of withdrawal for unduly tested goods creates disproportionate/unnecessary burden for traders to 'a large' or 'some extent'. Very few respondents provided quantitative data/estimates. 12 respondents (out of which 10 micro-companies, 1 large company and a national business association) indicated that, on average, 20% of goods are "unduly tested" in proportion to all returned goods. For more information, see Annex 13.

2.5. How will problems evolve?

2.5.1. Main problem 1: Traders do not comply with EU consumer law

Compliance rates have not significantly improved over the last decade. This lack of compliance is likely to continue to cause consumer detriment and to disrupt competition between traders.

A number of ongoing or upcoming EU initiatives are likely to contribute positively to improving compliance with EU law. This is particularly the case for the various initiatives following up on the recommendations from the Fitness Check, CRD Evaluation and Collective Redress Report, as described in Sections 2.1 and 2.2, with further details provided in Annex 5. The interventions expected to have the most significant impact on improving compliance are the following ones:

- An EU-wide communication campaign on consumer rights and a training project for SMEs, both aiming to raise awareness among consumers and traders about key consumer rights and obligations.
- A new Consumer Law Database to facilitate awareness of consumer law among legal practitioner.
- Multi-stakeholder work to develop a self-regulatory set of principles for better presentation of consumer information and terms and conditions.
- New Commission Guidance on the application of the UCTD and updated Commission Guidance on the CRD. Updated Guidance on the UCPD was published in 2016.
- Stepped-up enforcement of EU consumer law, including through common actions by national enforcers within the framework of the revised CPC Regulation.

Several initiatives that are not follow-up actions to our recent evaluations can also be expected to contribute significantly to better compliance with EU consumer law. The most relevant are described in Section 1.2 Policy context. In particular:

- The revised CPC Regulation will make cross-border public enforcement more effective and give national authorities a uniform set of powers to work more efficiently together against widespread infringements.
- The Directive on alternative dispute resolution will continue to ensure access to quality-ensured out-of-court dispute resolution systems for domestic and cross-border consumer disputes.

[97] Question 1 in section C.1 of the SME panel consultation – For additional information on question and responses see Annex 13.

- The online dispute resolution platform will continue to help consumers and traders resolve their domestic and cross-border disputes over online purchases of goods and services.

Important steps have thus been taken to meet the needs identified in the Fitness Check, CRD Evaluation and Collective Redress Report to ensure better knowledge about EU consumer law, strengthened enforcement and easier possibilities for consumer redress. However, the evaluations also recommended complementing these measures with targeted legislative interventions. Such legislative measures would aim at aspects of the problem that many traders do not comply with EU law that cannot be adequately addressed through other interventions. This applies, in particular, to the specific problem drivers described in Sections 2.3.3 to 2.3.5.

As concerns these problem drivers, ineffective mechanisms to stop and deter infringements (driver 1) will remain. National systems for fines in many countries will continue to lack deterrent effect and proportionality, thus undermining also enforcement co-operation on cross-border infringements under the revised CPC Regulation.

Ineffective mechanisms for individual consumers redress (driver 2) will also remain. Insufficient remedies for the victims of unfair commercial practices will still be an important reason for lack of compliance with the UCPD. Traders engaged in cross-border trade will also continue to face costs due to diverging national rules in this area.

Ineffective mechanisms for consumer redress in mass harm situations (driver 3) will continue. The ID will still lack adequately deterrent effect and will not be applicable to redress issues. In the Member States that currently provide for compensatory collective redress, consumers will continue to benefit from these procedures. However, the collective redress landscape will remain divergent across the EU, resulting in unequal consumer protection.

2.5.2. Main problem 2: Ineffective consumer protection rules and unnecessary costs for compliant traders

The potential for modernising EU consumer law identified in the Fitness Check and the CRD evaluation would not be addressed. As a consequence, there will likely still be instances of ineffective consumer protection rules and unnecessary costs for compliant traders.

The Commission will also carry through several initiatives to promote consumers' and traders' awareness of their rights and obligations, as explained in Section 2.1. Several of these activities, notably the planned EU-wide Campaign on consumer rights, training project for SMEs, creation of a Consumer Law Database and issuing of revised guidance on the CRD will help consumers and traders to be better informed about key consumer rights and obligations, including when shopping on online marketplaces and using "free digital services". Enforcement of the existing rules will also be stepped up, including through common actions for consumer law enforcers within the framework of the revised CPC Regulation. However, consumer protection for "free" digital services will remain a matter to be regulated through national rules.

Consumer detriment due to current lack of transparency on online marketplaces will remain, and possibly increase due to the growth of this business model. The Commission has sought to ensure that existing EU rules are applied in a way that increases transparency on online marketplaces through issuing a revised guidance document on the UCPD.[98] However, analyses on national level indicate only little compliance with the rules and the Guidance.[99] Consumer organisations confirm that the Commission guidance has not led to improvement of transparency of online marketplaces[100] and that the application of EU consumer law when facilitating contracts on platforms is still unclear,

[98] European Commission Guidance on the implementation/application of the UCPD, SWD(2016) 163 final.
[99] Platform Transparency Study.
[100] Position paper of VzBv in the public consultation.

leading to a low legal standard for ensuring the correctness and validity of information provided.[101] Several business associations also take the view that the fragmented nature of the EU market for (digital) goods, content and services is still a stumbling block for consumers and businesses.[102]

The forthcoming P2B initiative might provide in the future greater transparency on issues such as ranking criteria of offers on online marketplaces that would benefit not only businesses but also consumers.

However, even if progressive improvement of the situation could be expected, it is likely that the current opacity regarding transactions on online marketplaces will continue.

Consumers would continue to experience detriment when using "free" digital services, due to the lack of pre-contractual information and of a right to withdraw from contracts for such services. Consumer confidence in such services could therefore decrease, leading to a potential suboptimal use of the services. Compliant traders would continue facing costs due to diverging national rules and lack of a coherent legal framework at EU level as regards digital content and digital services. Concerning differences in national laws, uncertainty would become even more important for compliant traders who wish to sell cross-border, since they would have to assess if and which rules apply in each Member State to "free" digital services and whether they are mandatory. This can represent a big obstacle for small companies that wish to enter a market, but also for bigger companies when developing a new business model that could apply EU-widely, thus undermining the correct functioning of the DSM. Existing costs were deemed to be disproportionate by 7 of 10 business associations in the public consultation. They are likely to increase in the future, since at least three Member States have already regulated such services and others are likely to regulate them in the future, based on replies received to the targeted consultation.

Legal incoherence within the CRD will remain. With the upcoming DCD there will also be added legal incoherence and legal uncertainty for both users and providers of "free" digital content and "free" digital services.

Traders will still have to provide the same information twice due to overlapping information requirements under the UCPD and the CRD. Outdated information requirements related to means for consumers to contact traders will also remain.

Burdensome aspects for traders of the right of withdrawal related to unduly tested goods and early reimbursement will continue and are likely to increase due to growing e-commerce and increasing awareness of consumer rights, in particular of the right of withdrawal.

According to the 2017 Consumer Conditions Scoreboard, the right of withdrawal is the best known consumer right, with 67.4% of consumers giving correct answers in relation to it, which scores also as the largest increase in knowledge compared to two years ago (+11 percentage points). When increased awareness and exercise of a right is combined with an imbalance in how that right is defined, it might lead to higher/disproportionate burden on the other party (businesses in this case). The CRD rights to return unduly tested goods and to early reimbursement have been criticised by business associations from the very start of the CRD implementation and also discussed in the REFIT Platform. The CRD Evaluation concluded "that if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, it would indeed risk distorting the right balance between a high level of consumer protection and the competitiveness of enterprises pursued by the Directive in accordance with its recital 4".[103]

[101] Position paper of BEUC in the public consultation.
[102] They observe significant differences in Member State implementation of the CRD and the UCPD. While they also consider fully harmonized rules to address this, they prefer adopting further guidelines and recommendations. See position paper of BusinessEurope and EDiMA.
[103] CRD SWD(2017) 169 final, p. 39.

3 WHY SHOULD THE EU ACT?

3.1. Legal basis

Consumer protection belongs to the **shared competences** between the EU and the Member States. As stipulated in Article 169 of the TFEU, the EU shall contribute, inter alia, to protecting the economic interests of consumers as well as to promoting their right to information and education in order to safeguard their interests. Possible legislative action to be taken in relation to the problems analysed in this IA would be based on Article 114 TFEU, which refers to the context of the completion of the internal market, in conjunction with Article 169 TFEU.

3.2. Subsidiarity: Necessity of Union action

This IA addresses problems related to the effectiveness of the existing EU consumer protection rules, whose adoption at EU level has been deemed necessary and in line with the principle of subsidiarity. A better functioning internal market cannot be achieved by national laws alone: EU consumer protection rules remain relevant in the context of deepening the internal market, notably due to the increasing number of intra-EU consumer transactions.[104]

From an economic perspective, the behaviour of traders towards consumers is likely to have a large impact on the functioning of consumer markets, or markets more generally, since the influence on consumers' information and decision-making in such markets is very significant. Consumer policy has therefore the potential to positively interact with market forces to foster competition and improve both allocative and productive efficiency.

Within the EU, the size and intensity of cross-border trade are high enough (in fact, higher than in any other large trading area in the world)[105] to make such economic activity in the Single Market vulnerable to inconsistent or even merely divergent policy choices by Member States. Moreover, traders reach consumers across Member States' borders, thus leading to issues that national lawmakers and regulators are ill placed to adequately address in isolation.

In addition, perceptions and realities regarding domestic vs. cross-border infringements can differ. Although there is often a perception that most transactions (and therefore infringements) are domestic, in reality many have a cross-border element.[106]

The problems identified in this IA are widespread and have the same causes across the EU. Any legislative action would occur against the background of existing EU consumer protection rules. The UCPD ensures full harmonisation of information requirements related to unfair commercial practices harming consumers' economic interests. The CRD provides fully harmonised rules concerning pre-contractual information requirements and rights to withdraw for consumer contracts. New legislative action on national level within the scope of these Directives would go against the fully harmonised acquis that is already in place.

The EU-wide character of the problem, requiring adequate enforcement action at EU level, is particularly evident in the case of illegal practices affecting consumers in several EU Member States at the same time. Such widespread infringements of consumer rights have now been legally defined by the revised CPC Regulation,[107] which provides a powerful procedural framework for

[104] Fitness Check Report, page 68.

[105] Wold Trade Organization, International Trade Statistics 2015, available at https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf

[106] See 2015 support study for the IA on the review of the CPC Regulation 2006/2004/EC by Civic Consulting, page 5: https://ec.europa.eu/info/sites/info/files/cpc_review_support_study_1_en.pdf

[107] The revised CPC Regulation defines "widespread infringements" as illegal practices that affect at least three EU Member States, and "widespread infringement with a Union dimension" as practices which harm a large majority of EU consumers, i.e. in two-thirds of Member States or more, and amount to two thirds of the EU population or more.

cooperation between national enforcers in this respect. But, to be fully effective, enforcement across the EU must also be grounded in a common and uniform substantive law framework.[108]

As a complement to the EU-wide public enforcement mechanisms, consumers from all Member States must have effective and deterrent private enforcement and redress opportunities. In light of the increasing cross-border trade and EU-wide commercial strategies, injunction and redress procedures will increasingly have cross-border implications.

However, currently, the impact of the ID on cross-border infringements is still minimal, since qualified entities concentrate on domestic infringements. As demonstrated by the Fitness Check and the Collective Redress Report, collective injunction and redress procedures (in the 19 Member States where available) vary greatly across the EU and are not sufficiently efficient and effective. The lack of collective redress in some Member States further deteriorates the level of protection of European consumers in practice.

The need for EU legislation on collective redress in order to ensure that consumers in the EU are compensated fairly and adequately in particular in mass harm situations has also been dentified by the European Parliament. In its 2012 Resolution on “Towards a Coherent European Approach to Collective Redress", the European Parliament highlighted the need for a horizontal EU approach on collective redress, with particular focus on the infringement of consumers' rights, based on a common set of principles respectful of national legal traditions and providing safeguards to avoid abusive litigation. It underlined the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims. In its 2017 Recommendation to the Council and the Commission following the inquiry into emission measurements in the automotive sector, the European Parliament called on the Commission to put forward a legislative proposal for a harmonised collective redress system for EU consumers, based on best practices within and outside the EU, thus eliminating the current situation where consumers lack protection in many Member States which do not allow them to enforce their rights collectively.

The Member States' action alone to develop collective injunctions and redress procedures is likely to result in further fragmentation of the legal landscape across the EU and even more divergent level of protection of European consumers, in particular in mass harm situations that affect a multitude of consumers across the EU. Moreover, the smooth functioning of the Single Market requires comparable deterrent (injunction) and corrective (redress) actions in all Member States, based on further harmonised EU rules. In their absence, the level of deterrence of illegal practices would remain sub-optimal and the detriment suffered by consumers would not be significantly reduced. This would affect in return consumer trust, with a negative impact on trade including cross-border.

Thus, the objectives of ensuring the effectiveness of the enforcement of consumer rights and redress opportunities across the EU cannot be sufficiently achieved by actions taken exclusively by Member States.

For the digital topics, it does not seem possible to sufficiently address the problems related to the detriment of consumers at national level. Many online marketplaces and providers of digital services act Europe-wide and across borders.

3.3. Subsidiarity: Added value of EU action

The Fitness Check and the CRD evaluation confirmed that the horizontal EU consumer and marketing law acquis has contributed towards a high level of consumer protection across the EU. It

[108] Fitness Check Report, page 71.

has also ensured a better functioning internal market and helped reduce costs for businesses offering products and services cross-border.[109]

According to the business interviews carried out in the context of the Fitness Check, businesses that sell their products and services in other EU countries benefit from the harmonised legislation that facilitates selling cross-border to consumers in other EU countries. The UCPD, in particular, has replaced divergent regulations across the EU by providing for a uniform legal framework in all Member States. Its cross-cutting, principle-based approach provides a useful and flexible framework across the EU, while the introduction of the blacklist helped eliminate some unfair practices on various national markets.[110] Similarly, the CRD has contributed significantly to the functioning of the internal market and ensured a high common level of consumer protection by eliminating differences among national laws relating to B2C contracts. It has increased legal certainty for traders and consumers, especially in the cross-border context.[111] In particular, consumer trust has increased significantly in recent years in the growing market of cross-border e-commerce.[112]

This initiative addresses problems that affect other EU interventions. Addressing problems related to lack of transparency in B2C transactions on online marketplaces and low levels of consumer protection for "free" digital services will notably contribute towards the completion of the DSM. The Justice and Home Affairs Council has invited the Commission to ensure coherence between the Proposal for a Directive on Digital Contracts and the CRD, particularly as concerns the definitions of "digital content" and "digital services".[113] The 2016 Communication on Online Platforms noted that the Commission "will further assess any additional need to update existing consumer protection rules in relation to platforms as part of the regulatory fitness check of EU consumer and marketing law in 2017".[114]

The Fitness Check Report notes that the most important EU added value of EU consumer law is that the common harmonised rules enable national enforcement authorities to address cross-border infringements that harm consumers in several Member States more effectively.[115] Without further EU-level action to ensure that penalties are truly "effective, proportionate and dissuasive", the existing divergent national systems for fines would likely remain insufficiently deterrent to ensure fair competition for compliant traders and would undermine the enforcement co-operation under the revised CPC Regulation.

Establishing fairer competition by approximating national rules on fines would also bring EU consumer law more in line with the penalty frameworks for EU competition and data protection

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[109] Fitness Check Report, page 73

[110] Fitness Check Report, page 74

[111] See results of the evaluation of the Consumer Rights Directive, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

[112] According to the 2017 Consumer Conditions Scoreboard, between 2012 and 2016, the proportion of consumers who feel confident purchasing goods or services via the internet from retailers or service providers in another UE country has increased by 24 percentage points to reach 58%.

[113] Outcome of the 3473rd Council meeting Justice and Home Affairs, Luxembourg, 9 and 10 June 2016, available at: http://data.consilium.europa.eu/doc/document/ST-9979-2016-INIT/en/pdf. It refers to Presidency Note Brussels, 9768/16 of 2 June 2016 which stresses the need for consistency between the Proposed Directive on Digital Content and Directive 2011/83/EU inviting the Commission to assess the application of that Directive, to all types of contracts for the supply of digital content covered by the proposed Directive on Digital Content. The Note is available at: http://data.consilium.europa.eu/doc/document/ST-9768-2016-INIT/en/pdf.

[114] COM(2016) 288 final of 25 May 2016, page 11: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN

[115] Fitness Check Report, page 71.

law. Synergies between these three fields, particularly with regard to the coordination of enforcement activities, have been increasingly acknowledged at the EU level.[116]

Action is also required in the area of improving consumer redress. As concerns UCPD remedies, most Member States have been unable to ensure effective private enforcement of the UCPD since its adoption in 2005. As concerns the ID, the significant disparities identified among Member States as regards the modalities of injunction procedures, their level of use and effectiveness require EU intervention in light of the cross-border implications.[117] The existing national collective compensatory redress mechanisms also vary significantly and 9 Member States still do not provide for any such mechanisms. EU-wide procedural solutions addressing issues related both to domestic procedures and EU cross-border infringements are thus needed to ensure that European consumers are not faced with different enforcement and redress opportunities[118], in particular in case of the same mass harm situation. For example, only common EU rules could provide for the mutual recognition of the legal standing of qualified entities from other Member States or the possibility of a single redress claim introduced by a qualified entity for the protection of consumers from different Member States. The proposed action would respect the legal traditions of Member States since it would not replace the existing national mechanisms. It would instead provide for an alternative solution ensuring that consumers in all Member States have at their disposal at least one collective redress mechanism with the same main procedural modalities, including for cross-border actions.

4 WHAT IS TO BE ACHIEVED?

The general objectives of the policy interventions discussed in this IA are those enshrined in the Treaties and the Charter of Fundamental Rights:

- Contribute to protecting the economic interests of consumers in line with Article 169 of the TFEU and ensure a high level of consumer protection in line with Article 38 of the Charter of Fundamental Rights;
- Promote the smooth functioning of the internal market, for the benefit of both consumers and traders (Article 114 TFEU, 169 TFEU).

The specific objectives are to:

- Improve compliance with EU consumer law;
- Modernise consumer protection and eliminate unnecessary costs for compliant traders.

5 WHAT ARE THE AVAILABLE POLICY OPTIONS?

5.1 Improve compliance with EU consumer law

5.1.1. Overview of the Options

The following options have been identified to ensure better compliance by traders with consumer protection law. Beside the baseline scenario, they consist of different combinations of the measures to improve compliance that were identified in the Fitness Check, CRD Evaluation and Collective

[116] On 14 March 2017 the European Parliament adopted a resolution on 'fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement' which included a call for "closer cooperation and coherence between different regulators and supervisory competition, consumer protection and data protection authorities at national and EU level". The European Data Protection Supervisor proposed the establishment of a Digital Clearinghouse to bring together agencies from the areas of competition, consumer and data protection willing to share information and discuss how best to enforce rules in the interests of the individual. The "clearinghouse" met for the first time on 29 May 2017.

[117] Fitness Check Study, Lot 1, p.223.

[118] As described below under the analysed policy options, an EU wide solution would support parallel coordinated injunction (possibly complemented by redress) actions of qualified entities protecting interests of consumers from their respective Member States in front of their national jurisdictions. It would also enable qualified entities from one Member State to use the injunction order issued in another Member State as a rebuttable presumption of the breach of EU law. Furthermore, it would enable a single action in front of a single forum, for instance in front of the court of the domicile of the trader (or another competent jurisdiction under the EU rules on private international law), for the protection of consumers coming from different Member States.

Redress Report. Please see Section 2.1 and Annex 5 for an overview of the recommendations from these evaluations. The options go from a more limited intervention to full-scale intervention applying all the identified measures:

Option 1: **Improving enforcement to stop and deter infringements.** This option would:

(1) Provide deterrent and proportionate penalties; and
(2) Strengthen injunctions for stopping breaches of EU law (without collective redress).

Option 2: **Improving enforcement and individual consumer redress**. This option would consist of the same measures as option 1, with the addition of providing individual remedies for victims of unfair commercial practices.

Option 3: **Improving enforcement and individual and collective consumer redress**. This option would include the measures in Options 1 and 2 and, in addition, improve mechanisms for collective redress in mass harm situations.

As mentioned, these options address outstanding drivers of lack of compliance that have not already been addressed by initiatives outside of this IA.

5.1.2. Options discarded at an early stage

Industry self-regulation or co-regulation

In the public consultation, stakeholders were asked about their views on different tools to enhance compliance with EU consumer rules. Within one question, they were given the possibility to rate tools such as self-regulation and legislative interventions. 67 of 73 (92%) business associations and 116 of 123 (94%) individual companies supported self-regulation. 21 of 29 (72%) MS authorities and 9 of 27 (33%) consumer associations also indicated that self-regulation could contribute to better compliance. However, Member State authorities and consumer associations showed stronger support (over 85%) for legislative interventions (for UCPD remedies and stronger penalties) than for self-regulation. The latter groups also supported more resources for enforcement authorities (over 90%).

Whilst self-regulatory action may be suitable to address specific issues within a clear set of existing rules (e.g. better presentation of mandatory information to consumers), industry self-regulation and co-regulation do not appear adequate to strengthen the deterrence of penalties for infringements of consumer legislation. This is because this is a matter related to powers of national administrations and courts vis-à-vis infringing traders.

Self- and co-regulation also do not appear useful in the area of individual redress for consumers harmed by unfair commercial practices. A mystery shopping exercise for the Fitness Check indicates that a voluntary approach on this is not likely to provide good results for consumers.[119] It tested whether retailers were willing to offer remedies to consumers they had misled. A majority of retailers did not recognise that their presentation of products had been misleading. Almost half of the traders did not react (48%), more than a quarter denied that the advertising or presentation was misleading (29%) and one in five did not reply to the mystery shoppers' allegations that their practices were misleading (21%). Only 3% of traders recognised that their practice was misleading. 16% of the traders proposed remedies to the consumers, even if they did not acknowledge that they had misled them. Overall, the mystery shoppers evaluated traders' willingness to offer remedies as low: 62% of the retailers were evaluated as (very) unwilling to offer a remedy and only 17% as (very) willing.

More far-reaching options

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[119] Consumer Market Study to support the Fitness Check of EU Consumer and Marketing law (Lot 3), Section 5.5, page 85-87.

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For penalties, it could have been an option to require Member States to ensure that fines can be imposed by administrative authorities. This would have excluded the possibility for Member States to decide that courts should be competent to impose fines. However, this option was discarded from the outset, as it would have been incompatible with the existing institutional set-up in several Member States. Systems where only courts can impose fines are recognised under existing EU consumer law, including in the new CPC Regulation 2017/2394, which expressly leaves it to the Member States to decide whether fines for cross-border infringements should be imposed by the CPC (administrative) authorities or via court procedures.

For compensatory collective redress, it could have been an option to replace existing national collective redress mechanisms with an EU-level instrument, which would set out detailed procedural modalities (e.g. prescribing whether the mechanisms should be judicial or administrative). However, for the purposes of this IA, this option was discarded from the outset, as it would interfere in a disproportionate manner with different legal traditions and existing national collective redress mechanisms.

5.1.3. Option 0: Baseline

Member States will continue to decide how to ensure "effective, proportionate and dissuasive" penalties for breaches of the UCPD, CRD and PID. They will also remain free to provide penalties or not for breaches of the Directives that do not have penalty provisions (CSGD and UCTD).

It will be left to the Member States to determine if and how individual remedies should be available to victims of unfair commercial practices. Consumers will not be empowered to take action to solve problems when traders do not respect their rights under the UCPD.

Member States will continue to decide on procedural modalities for the injunction procedure. Member States will also remain free to decide whether consumers should be provided with a possibility for collective redress. Currently, injunctions are used in just a few Member States. 9 Member States have no specific mechanism for compensatory collective redress.

For information about ongoing and upcoming EU initiatives that are likely to contribute positively to improving compliance with EU law, see section 2.5 "How will problems evolve".

5.1.4. Option 1: Improving enforcement to stop and deter infringements

This option would include measures to improve public and private enforcement of consumer law identified in the Fitness Check. It would strengthen penalties for breaches of consumer law and improve the effectiveness of the injunctions procedure.

As regards deterrence and proportionality, the existing requirement to provide “effective, proportionate and dissuasive” penalties would be extended to four relevant Directives, *i.e.* also for breaches of the UCTD, which currently does not include such a requirement.[120]

To increase consistency in the application of penalties across the EU, a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones) would be introduced. Enforcement authorities would be required to take these criteria into account when deciding whether to impose penalties and on their level. If the penalty to be imposed is a fine, the authority would be required to take into account, when setting the amount of the fine, the infringing trader’s turnover and size as well as any fines imposed for the same or similar infringements in other Member States. In case of “widespread infringements” and “widespread infringements with a Union dimension”, as defined in the revised CPC Regulation, the penalties would have to include fines. The maximum amount of these fines should not be set below a specific threshold, which should be based on a specific percentage of the trader's annual turnover.

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[120] For the CSGD, impact on the progress of the legislative negotiations on the amended proposal COM(2017)637 of 31 October 2017 would need to be taken into account.

There are no viable alternatives to harmonising fines for "widespread infringements" and "widespread infringements with a Union dimension". Establishing common criteria alone cannot achieve the objective of stronger deterrence and proportionality as well as coordination required by the CPC Regulation for these cross-border infringements. Only fines based on the infringing trader's turnover would achieve these objectives. The exact minimum percentage rate should be decided taking into account the existing national consumer law examples, which provide for maximum turnover-based fines of between 1% and 10%, and EU law examples, notably the GDPR and competition law,[121] which provide for maximum turnover-based fines between 2% and 10%. The final choice should, firstly, have to ensure deterrence. Secondly, it should take into account that the initiative does not aim at maximum harmonisation of national penalties. Instead, the objective should be to achieve minimum harmonisation, by requiring Member States to set their maximum amounts for fines at levels not below a specific % of the trader's turnover.

In the public consultation, a large majority of responding public authorities (13, which is 77%) and all consumer organisations (16) supported the idea that fines should be available for breaches of consumer law in all Member States and that there should be common criteria in all Member States for imposing fines. Amongst business organisations, the first of these ideas was supported by 15 (31%) and the second by 20 (44%) of respondents (see Table 8 in Annex 7). There was also some support to both ideas among companies: A majority of SMEs (8 of 15) and of large companies (4 of 6) supported common criteria, 5 of 15 SMEs and 3 of 6 large companies also agreed that fines should be available in all Member States (8 and 3 disagreed, respectively).

In the Fitness Check public consultation, a majority of consumer associations and public authorities agreed that consumer protection should be strengthened by ensuring that non-compliant traders face dissuasive penalties that amount to a significant percentage of their annual turnover. In contrast, the majority of business associations were opposed to this idea. The public consultation for this IA showed a similar trend: Many consumer associations and public authorities supported that the maximum level of fines should be expressed as a percentage of the trader's turnover, whereas only a few business associations and 5 of 15 SMEs agreed. All the 6 responding large companies disagreed with the introduction of such turnover based fines. In contrast, in the SME panel 80% of the respondents considered that the most proportionate, effective and dissuasive way of setting the maximum level of fines would be by expressing them as a percentage of the trader's turnover, possibly combined with an absolute amount, whichever is higher. Only 16% of the respondents were in favour of maximum fines being expressed only as lump-sums.

When deciding about the allocation of revenues from fines, Member States should take into account the general interest of consumers. This means that at least part the revenues from fines should be dedicated to promote consumer protection, such as funding consumer associations. In the public consultation the idea of using penalty revenues to promote consumer protection was supported by all 16 responding consumer organisations and by half (8 of 16) of the respondents from public authorities (consumer enforcement authorities, ministries in charge of consumers, European Consumer Centres, sector specific regulators). In contrast, most business associations were against it (6 in favour, 33 against of total 47 respondents).

The effectiveness of the injunctions procedure under the ID would also be improved with this option. In the Fitness Check public consultation, most consumer associations (80%), consumers (66%) and public authorities (57%) agreed that the ID should be made more effective. 45% of businesses agreed, as did 12% of business associations. In the survey for the 2017 Study on

[121] COM(2017) 142 final, Proposal for a "Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" introduces a legal maximum penalty of no less than 10% due to the fact that, currently, the penalty for the same offence can be much higher in one Member State than another without any objective reason and that the effect of fines differs widely across the EU available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0142. IA for the proposal, SWD(2017) 114 final is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017SC0114.

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collective redress, 67% of all respondents considered that the collective injunction procedure could be improved in their Member State, with most business (60%) and consumer experts (70%) sharing this view.[122]

This intervention would be limited to procedural modalities which are not regulated or not sufficiently regulated by the current ID, and have been identified by the Fitness Check and the 2008 and 2102 Commission Reports on the ID as impediments to an effective injunctions procedure.

It would be left to the Member States to decide if the procedure should be of judicial or administrative nature. The suggested intervention would regulate the scope of application of the procedure, the designation of qualified entities, financial assistance for qualified entities and the length of the procedure. As to effects of the procedure, this option would provide more precise requirements on publication measures, on penalties for non-compliance with injunctions orders and on effects for individual consumers who want to bring follow-on actions to claim damages.

The scope of application of the ID would be extended from the EU instruments listed in its current Annex I to any EU instrument relevant for the protection of collective interests of consumers. In the ID survey, this was supported by national authorities (86.4%) and consumer organisations (100%), while business associations were less supportive (20%). The proposed scope would make the injunction procedure future-proof and responsive to the large spectrum of illegal business practices that could affect consumers. The ID would continue to apply to both domestic and cross-border infringements, with the primary effect of stopping traders from pursuing illegal practices.

The suggested injunctions procedure would ensure that independent public bodies, consumer organisations and business associations can be appointed as qualified entities to bring injunctions to stop infringements. It would be for the Member State to decide who should qualify as qualified entities in each country, either in an ad hoc manner or through pre-designated national lists. This is in line with the 2013 Recommendation on collective redress. All stakeholders support including independent public bodies and consumer organisations in the list of possible qualified entities. The inclusion of business associations in the list enjoyed less support from national authorities (39.5%), consumer organisations (64.3%) and business associations (38.9%).

There would be safeguards to ensure that qualified entities act in the best interest of consumers. This option therefore includes reputability criteria, which was supported by all stakeholders and is in line with the 2013 Recommendation.

The revision of the injunctions procedure would also facilitate access to justice for underfunded qualified entities by tackling financial obstacles that impede them from fully using the procedure. This was supported by national authorities (72.1%) and consumer organisations (87.6%), but by fewer business associations (21%).

Member States would be required to ensure due expediency of procedure, and to enable competent courts and/or administrative authorities to take the specific circumstances of each case into consideration. Following an injunction order, the infringing trader would be obliged to publicise and, where possible, individually inform all concerned consumers about the order. Publicity obligations should be proportionate to the stage of the proceedings and other relevant circumstances, taking due account of the risk of reputational damage and of the respect of business secrecy. While measures to ensure expediency, such as time-limits, were supported by most stakeholders, publication obligations were supported by national authorities (81.8%) and consumer organisations (100%), but by fewer business associations (10.6%).

This option would ensure that injunction decisions with definitive effect could be presented in follow-on redress actions as proof of breaches of EU law before domestic courts and as rebuttable

[122] Question 69 of the survey carried out within the Study supporting EC Assessment of the implementation of the Recommendation on collective redress, not yet published (hereinafter 2017 Study on collective redress).

presumptions of infringements before courts in other Member States. Reliance on injunction decisions for follow-on actions was supported by national authorities (88.6%) and consumer organisations (100%), but less by business associations (31.6%).

Limitation periods for redress actions would be stayed for the time of the injunction procedure. If a trader would fail to comply with procedural obligations, the courts/administrative authorities would be able to impose penalties. This was supported by all stakeholders, including business associations (84.2%), and suggested by the 2013 Recommendation. In order to ensure the effective functioning of the procedure, courts/administrative authorities would have the power to require traders to provide information about the relevant practice. This was supported by national authorities (93.2%), consumer organisations (100%) and by many business associations (42.1%).

The amendments of the injunctions procedure under this option would benefit the application of the ID in both domestic and cross-border situations. Moreover, actions before a court or administrative authority of a single Member State would not be hindered by national rules on admissibility of the case or the legal standing of qualified entities, as suggested by the 2013 Recommendation. This is without prejudice to EU private international law instruments. The Commission would support cooperation between qualified entities from different Member States, which would be enabled to exchange best practices and elaborate common strategies for tackling cross-border infringements.

There are no viable alternatives to revising the injunctions procedure as proposed with this option. The intervention would tackle common problems regarding cost, length and complexity of the current procedure, as identified in the 2008 and 2012 Commission Reports and confirmed by the Fitness Check and stakeholders. These common problems should be addressed through a legislative revision to ensure the effectiveness of the ID. The specific modalities could have alternative approaches and the intervention would therefore be flexible, so that Member States can adapt modalities as appropriate to their national systems.

5.1.5. Option 2: Improving enforcement and individual consumer redress

This option would include the measures of option 1 to strengthen enforcement. It would also introduce a requirement for Member States to ensure that certain specific types of contractual and non-contractual remedies for breaches to the UCPD are available under national law. The introduction of rights to individual remedies in the UCPD would empower victims of unfair commercial practices to take action against traders to solve problems created by these traders.

In the public consultation, a large majority of public authorities (25 of 28), consumer associations (all 27) and consumers (86 of 93) indicated that an EU-wide right to remedies should be introduced to ensure that traders comply better with consumer protection rules. On the other hand, support was low among business associations (35%) and individual companies (31%). This confirms the findings of the public consultation for the Fitness Check, where a large majority of public authorities, consumer associations and consumers agreed that consumer protection against unfair commercial practices should be strengthened by introducing a right to remedies, while 64% of business associations disagreed. Compared to the business associations, individual companies replying to the public consultation were more nuanced in their views, with 45% agreeing that there is a need to introduce such EU-wide right to remedies and 37% disagreeing. See Section 3 of Annex 8 for a detailed breakdown of responses to these questions by respondent category.

In the SME panel consultation, 87% of a total of 263 respondents supported introducing an EU-wide right to UCPD remedies. See Table 14 in Annex 8 for more granular data on this.

This option would require Member States to ensure that consumers harmed by unfair commercial practices have access to both contractual and non-contractual remedies. In particular, the "Dieselgate" situation has shown that non-contractual remedies, such as the extra-contractual right to compensation for damages, can sometimes be more important for consumers than contractual ones. In this case, many consumers have not been able to claim remedies even in Member States which already provide remedies for victims of unfair commercial practices, because the available remedies are only contractual. The remedies can therefore only be applied against the consumers'

contractual counterparts, which in this case are usually the car sellers. By contrast, the national rights to UCPD remedies do not enable consumers to act against the car producer, with whom consumers will usually not have any contract.

Stakeholders' views vary on whether specific remedies to be introduced in the UCPD should be decided at EU level. In the public consultation, over 80% of responding consumer associations and almost 80% of responding citizens supported deciding this at EU level. 60% of business associations supported leaving the choice of remedies to the Member States, whereas individual companies were rather divided on this matter: Of 20 responding companies, 9 (half of which large companies) were in favour of this being decided at EU level and 8 (mainly SMEs) were in favour of leaving this to the Member States). Views were also divided among MS authorities, with 47% in favour of leaving the choice of remedies to the Member States and 41% in favour of this being decided at EU level.[123]

In the CPC/CPN/CMEG survey, 15 Member State authorities indicated that the most frequently used UCPD remedy under national law today is the right to terminate the contract and get a refund of the price paid. 20 of them supported the idea of introducing this remedy in the UCPD, with 15 Member States supporting also the introduction of the right to compensation for damages.

In the public consultation, all consumer associations, 92% of the responding citizens and 75% of the Member State authorities indicated that the right to terminate the contract and get a refund should be introduced in the UCPD. 67% of the responding companies also agreed with this, but only 25% of business associations. In addition, 94% of consumer associations, 82% of citizens and 56% of the Member State authorities indicated that a right to compensation for damages should be introduced, while only 41% of business associations and 39% of responding companies supported this.[124]

Against this background, it is envisaged to require Member States to ensure that, as a minimum, the contractual remedy of a right to contract termination and the non-contractual remedy of a right to compensation for damages are made available under national law. A sub-option could be to limit the proposed introduction of UCPD remedies to a requirement whereby Member States should ensure that contractual and non-contractual remedies are made available for consumers harmed by unfair commercial practices, without specifying any typology of such remedies. This would leave a bigger margin of manoeuvre to the Member States. It would also provide the legal certainty that every EU consumer harmed by an unfair practice would be entitled to at least one type of contractual and one type of non-contractual remedy. However, the preferred alternative, which determines at EU level that Member States must make certain typologies of remedies available, would ensure greater legal certainty for all parties, while still ensuring a proportionate approach. It would ensure that consumers and qualified entities can seek the same type of contractual and non-contractual remedies across the EU. This will reduce the level of discrepancies in mass-harm situations and ensure coherence with the proposed revision of the ID.

5.1.6. Option 3: Improving enforcement and individual and collective consumer redress

This option would include the measures covered by Options 1 and 2. In addition, it would strengthen mechanisms for collective redress in mass harm situations. Qualified entities would be empowered to simultaneously request injunctions and consumer redress from courts and administrative authorities.

In the ID survey, national authorities (88.6%) and consumer organisations (93.8%) strongly supported the addition of mechanisms for redress to the ID. There was support from national authorities from 21 Member States (AT, BE, BG, CY, CZ, EE, FI, EL, HU, IT, LV, LT, LU, MT, PT, RO, SK, SL, ES, SE, UK). Business associations were less supportive (15.8%). Moreover, in the survey for the 2017 Study on collective redress, 79% of all respondents agreed that the

[123] See Section 3 of Annex 8 for a detailed breakdown by respondent category.
[124] Idem.

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collective compensatory procedures in their Member State could be improved, with most business (67%) and consumer experts (75%) sharing this view.

This option would not replace existing national collective redress mechanisms. It would be left to the Member States to decide if the procedure required at EU level should be integrated into the existing national procedures or established as alternative solutions. The suggested EU mechanism would provide for general procedural modalities improving consumers redress opportunities, while providing for relevant safeguards against the risk of abusive litigation. This is in line with the 2013 Recommendation. It would also provide for procedural efficiency by enabling a single procedure for the two main instruments to protect consumers' collective interests, namely, on the one hand, measures to stop infringements of EU law and, on the other, consumer redress measures, including compensation for harm caused by the infringements. This Option would also encourage out-of-court settlements between qualified entities and traders.

Representative actions would be brought by qualified entities for injunctive relief and for redress in two situations: Firstly, if there is an ongoing infringement and, secondly, if the infringement has stopped but there is still a need to eliminate its continuing effects. The choice between making the relevant procedure judicial or administrative would be left to the Member States. Depending on the circumstances of the case, the court/administrative authority would be able to issue, in addition to an injunction decision, a redress order or invite the infringing trader and the qualified entity to start out-of-court redress negotiations. In the ID survey, this was supported by national authorities (79.5%), consumer organisations (80%) and business associations (63.2%). The encouragement of settlements builds on the findings of the Collective Redress Report and the accompanying call for evidence, which show that out-of-court dispute resolution mechanisms are highly effective, as they incentivise efficient resolution of disputes. If negotiations lead to amicable settlements, courts/administrative authorities would have to check the fairness of the settlements and approve them, in order for them to become enforceable, as suggested by the 2013 Recommendation. In the ID survey, the need for such approval was supported by national authorities (68.2%), consumer organisations (86.7%) and to some extent also by business associations (35%). Redress orders and approved settlements would be legally binding only for affected consumers who accept the settlement, according to the procedural modalities under national law. If a redress order would not be considered appropriate in a given case or if negotiations would be unsuccessful, the court/administrative authority would continue the proceedings to provide consumer redress.

Member States which currently do not have collective redress procedures would need to introduce them. As under option 1, there would be obligations to ensure due expediency of procedure, publicity, deterrent penalties for non-compliance and provisions to facilitate cross-border actions also regarding redress. Cross-border recognition of the legal standing for redress actions builds on findings from the Collective Redress Report regarding the lack of express rules on the recognition of foreign representative entities for collective redress actions among the Member States.

There are no viable alternatives to the mechanism for consumer redress under option 3. In order to build redress actions on the existing category of "measures eliminating the continuing effects of the infringements" in the ID, redress actions would need to follow the existing modalities of the injunction procedure, such as the limitation of representative action to qualified entities. No alternative redress models within the ID were suggested in the relevant studies and consultations. In line with the 2013 Recommendation and its assessment Report, the model proposed in option 3 would ensure the balance between improving access to justice and preventing abusive litigation.

5.2. Modernise consumer protection and eliminate unnecessary costs for compliant traders

5.2.1. Overview of the Options

This Chapter presents options to address the problem drivers of:

1. Lack of transparency and legal certainty for B2C transactions on online marketplaces
2. Lack of transparency, consumer protection and legal certainty for "free" digital services

3. Overlapping and outdated information requirements
4. Imbalances in the right to withdraw from distance and off-premises sales

5.2.2. Options discarded at an early stage

Lack of transparency and legal certainty on online marketplaces (driver 1)

A possibility could have been to require online marketplaces to verify whether third party suppliers qualify legally as traders or consumers. This would have gone beyond requiring online marketplaces to inform consumers about whether third parties are traders or not on the basis of self-declaration by the third parties. An online marketplace's knowledge about the frequency and value of transactions on the marketplace may technically be a good basis to assess whether a third party supplier acts for purposes related to their trade, business, craft or profession and thus qualify as traders under EU consumer law. However, such a requirement would seem hardly reconcilable with Article 15(1) of the e-Commerce Directive, which excludes imposing a general obligation on hosting service providers to monitor the information they transmit or store, as well as a general obligation to actively seek facts or circumstances indicating illegal activity. Such a requirement would also put more burden on online marketplaces than seems justified. For these reasons, the option of requiring online marketplaces to verify whether third party suppliers qualify legally as traders or consumers has not been pursued in this IA. In any case, consumer law as it stands sanctions traders that wrongly present themselves as consumers.[125]

Overlapping/outdated requirements, imbalances in the right to withdraw (drivers 3 and 4)

Self and co-regulation are not feasible options for addressing overlapping and obsolete information requirements and rules related to the right of withdrawal that create unjustified burdens for traders. Since the respective requirements are laid down in EU law, the law needs to be changed to address these problems. These options have therefore been discarded from the outset in these two areas.

5.2.3. Lack of transparency and legal certainty on online marketplaces (driver 1)

Option 0: Baseline

Enforcement of EU consumer law for online marketplaces will continue to be stepped up, including through common actions in the framework of the CPC network. Accordingly, where, on a case-by-case basis, the conditions of the transparency requirements in Articles 5(2), 6(1) or 7 of the UCPD are met, national enforcement authorities could require online marketplaces to: 1) ensure that third party suppliers clearly indicate to users whether they act as traders or consumers and 2) inform their users that they will only benefit from EU consumer law protection in relation to third party suppliers who qualify as traders.

The CRD will continue to provide rules on pre-contractual information applicable to B2C contracts. However, it will not provide specific information rules for online marketplaces.

For further information about ongoing or upcoming EU initiatives that are likely to impact on online marketplaces see section 2.5 "How will problems evolve".

Option 1: Promoting self and co-regulation

A non-legislative option could be envisaged to encourage online marketplaces to voluntarily increase transparency for consumers in line with the Commission's recommendations in the revised UCPD guidance.

Option 2: Providing specific transparency requirements for contract conclusion on online marketplaces

[125] No. 22 of Annex I to the UCPD.

This option would introduce requirements in the CRD for online marketplaces to inform consumers, before the conclusion of contracts, about:

(a) Criteria used by the online marketplace for determining the ranking of offers presented to the consumer as a result of his or her search query;

(b) Whether the third party offering the product is a trader or not, on the basis of self-declaration by the third party

(b) Whether consumer rights stemming from EU consumer law apply to the contract

(c) If the contract is concluded with a trader, which trader is responsible for ensuring consumer rights stemming from EU consumer law in relation to the contract. This requirement is without prejudice to the right of the online marketplace to assume responsibility for specific elements of the contract.

Online marketplaces would have to provide this information to consumers in a clear and comprehensible manner, not just in general terms and conditions.

Online marketplaces would be defined on the basis of existing EU definitions, such as Article 4(1)(f) of Regulation (EU) No 524/2013 on Online Dispute Resolution for consumer disputes and Article 4(17) of Directive 2016/1148/EU on security of network and information systems.

In the public consultation, all consumer associations and public authorities, almost all citizens and the vast majority of companies and business associations agreed that consumers buying on online marketplaces should be informed about the identity and status of the supplier[126] and that platform transparency would increase consumer trust.[127]

Also in the SME panel consultation, a vast majority was in favour of informing about the identity and legal status of the contractual partner (82% on identity, 81% on legal status and 84% on applicability of consumer law).[128] Arguably, smaller companies lack the necessary bargaining power against bigger platforms and therefore support more transparency and legal clarity in the operation of online marketplaces. There has also been support for platform transparency from business associations, which also requested that information requirements should be specific and should not duplicate the existing information obligations in the CRD on the existence of the right of withdrawal and the legal guarantee.[129]

84% of the respondents to a behavioural experiment from the Platform Transparency Study agreed that online marketplaces should inform about who is selling the good or service. 83% of the respondents agreed that such an obligation should be set by law.

In a survey of 4800 internet users for this study, 70% of those who remembered the information they had been given about selection criteria for ranking of search results agreed that these criteria were important in their decision to purchase.[130] In the CRD Evaluation, a large majority of national competent authorities, of consumer associations and of ECCs, as well as 45% of trade associations considered introducing requirements to inform consumers about ranking criteria beneficial to consumers. Results were similar in the public consultation for the Fitness Check: A majority of consumer associations, public authorities, consumers and companies (however only a relative

[126] All 16 consumer associations and all 19 public authorities, next to 30 of 31 citizens, 12 of the 16 SMEs respectively, 8 of the 9 large companies respectively and roughly 40 of 48 business associations, as well as all 10 "other" stakeholders.

[127] All 16 consumer associations and 18 of 19 public authorities, next to 28 of 30 citizens, 9 of the 16 SMEs, 6 of the 10 large companies, 32 of 45 business associations and 9 of 10 "other" stakeholders.

[128] Question 6 in section C.2 of the SME panel, see question in Annex 10, subsection 2.

[129] See for example, position papers of the AIM, EuroCommerce and Confederation of Danish Enterprises in the public consultation.

[130] Platform Transparency Study, page 53.

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majority in the case of business associations) agreed that online platform providers should inform consumers about the criteria used for ranking the information presented to consumers.[131]

5.2.4. Insufficient consumer protection and legal certainty for "free" digital services (driver 2)

Option 0: Baseline

"Free" digital services will still be regulated by the Member States, with different levels of consumer protection as regards information requirements and rights of withdrawal. Member States will decide whether any consumer protection should exist for such contracts.

On EU level, the upcoming DCD is likely to introduce remedies for consumers in case of lack of conformity with the contract for both "free" digital content and "free" digital services.

For further information about ongoing or upcoming EU initiatives that are likely to have an impact on "free" digital services, see section 2.5 "How will problems evolve".

Option 1: Promoting self and co-regulation

A non-legislative option could be envisaged to encourage traders to voluntarily provide consumers with the same level of protection for "free" digital services as for similar paid digital services.

Option 2: Extending the CRD to cover "free" digital services

This option would extend the scope of the CRD to contracts for the provision of digital services, whenever concluded through personal data within the meaning of Article 4(1) of the GDPR[132] and with no payment of a monetary price. In line with the current scope of the CRD, this extension would not cover situations that cannot lead to the conclusion of a contract, such as web searches where consumers access websites without providing anything in return.

Traders would be required to provide consumers with pre-contractual information when concluding contracts for "free" digital services. This information would include the main characteristics of the "free" digital service, including its functionality, and relevant interoperability of the service with hardware and software. Consumers would be given a right to cancel the "free" digital service within 14 days from the conclusion of the contract without giving any reason. In the event of contract termination, as concerns the consumer's personal data the trader would be required to comply with his obligations under the GDPR, including refraining from the use of such data. The consumer would have the rights to erasure of personal data and to data portability, i.e. to receive the personal data in a format that allows the data subject to transmit it to another controller. Similar rules would also apply under certain conditions to any content which the consumer uploaded or generated through the use of the digital service and which does not constitute personal data. Therefore, the extension of the CRD to "free" digital services would provide for a general right to cancel the contract within 14 days from its conclusion.[133]

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[131] CRD Staff Working Document, page 56.

[132] Art. 4(1) GDPR: "*'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;*"

[133] The lawfulness of processing of personal data would be regulated under the GDPR, and consumers would benefit of the rights therein, *inter alia* the right to receive information on the collected data in a concise and transparent form, in clear and plain language, the right to access collected personal data, the right to obtain from the data controller without undue delay the rectification of inaccurate personal data, the 'right to be forgotten', i.e. to have personal data erased if they are no longer needed for the purposes for which they were collected and the right to data portability, i.e. the right to receive personal data in a structured format that allows the data subject to transmit it to another controller.

In the CRD evaluation, all stakeholders, except for trade associations, expressed strong support for the extension of both pre-contractual information obligations and the right of withdrawal to "free" digital services.[134]

This was confirmed in the public consultation, where, overall, the majority of stakeholders supported the introduction of pre-contractual information requirements and a right of withdrawal for "free" digital services. While traders supported the extension of pre-contractual information requirements, they expressed more mixed views on the right of withdrawal. Furthermore, business associations disagree with the introduction of a right of withdrawal for "free" digital services as some of them argue that there could be overlaps with EU data protection rules. However, as can be seen from the description of the interplay with the GDPR in subsection 2 of Annex 11, the extension of the right of withdrawal under this option would rather complement than repeat the rights stemming from EU data protection rules.

5.2.5. Overlapping and outdated information requirements (driver 3)

Option 0: Baseline

The UCPD will continue to require traders to provide specific information to consumers at the advertising stage (whenever making "invitations to purchase" – see Article 7 (4) UCPD), and the CRD will require that consumers receive the same information also before concluding the contract.

The current CRD information requirement to display the fax number will continue to apply. As regards e-mail addresses, traders will be able to offer consumers alternative, more modern web-form communication tools, but will still be required to also provide an e-mail address and process the relevant consumer correspondence via this communication tool.

Option 1: Modernising outdated and overlapping B2C information requirements

This option would address overlapping information requirements in the UCPD for the "invitation to purchase" and the CRD for the pre-contractual stage of transactions. It would also address outdated information requirements. On the basis of the consultation results, it would:

1. Remove from Article 7(4) of the UCPD the requirement to inform consumers about the trader's complaint handling policy
2. Remove the requirement to provide fax number (where available) from the list of pre-contractual information requirements for distance and off-premises contracts in the CRD
3. Replace the requirement to inform about the trader’s e-mail address with a technology-neutral reference to means of online communication. This would allow traders to use both e-mail and other online means (such as web-forms and chats), provided that they allow the consumer to retain the record of the communication on a durable medium.

5.2.6. Imbalances in the right to withdraw from distance and off-premises sales (driver 4)

Option 0: baseline

Consumers will keep the right to withdraw from sales contracts concluded at a distance or outside business premises, even after using goods more than necessary to establish their nature, characteristics and functioning (Article 14(2) CRD).

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[134] In particular, the CRD Study asked stakeholders whether pre-contractual information requirements should be introduced for "free" digital services (particularly highlighting social media and cloud storage): 82% of national competent authorities, 80% of consumer associations, 85% of ECCs and 35% of business associations considered this (rather/very) beneficial for consumers. When asked whether a right of withdrawal should be introduced for "free" digital services, 71% of national competent authorities, 77 % of consumer associations, 77% of ECCs considered this (rather/very) beneficial for consumers and 36% of business associations considered it rather beneficial. CRD SWD, p. 52.

Traders will still be required to reimburse consumers, in some circumstances, before they have received returned goods and without the possibility to inspect the goods before reimbursing the consumers (Article 13 CRD).

Option 1: Removing specific obligations for traders related to the right of withdrawal in the CRD

This option would repeal specific CRD obligations for traders related to the right of withdrawal that have been identified by business stakeholders as especially burdensome, in particular:

a. The obligation to accept the return of the goods also when the consumer has used them more than necessary ("unduly tested goods") and to charge the consumer for their diminished value; and
b. The obligation to reimburse the consumer, if the consumer presents proof that the goods have been sent back, before the trader has received them ("early reimbursement").

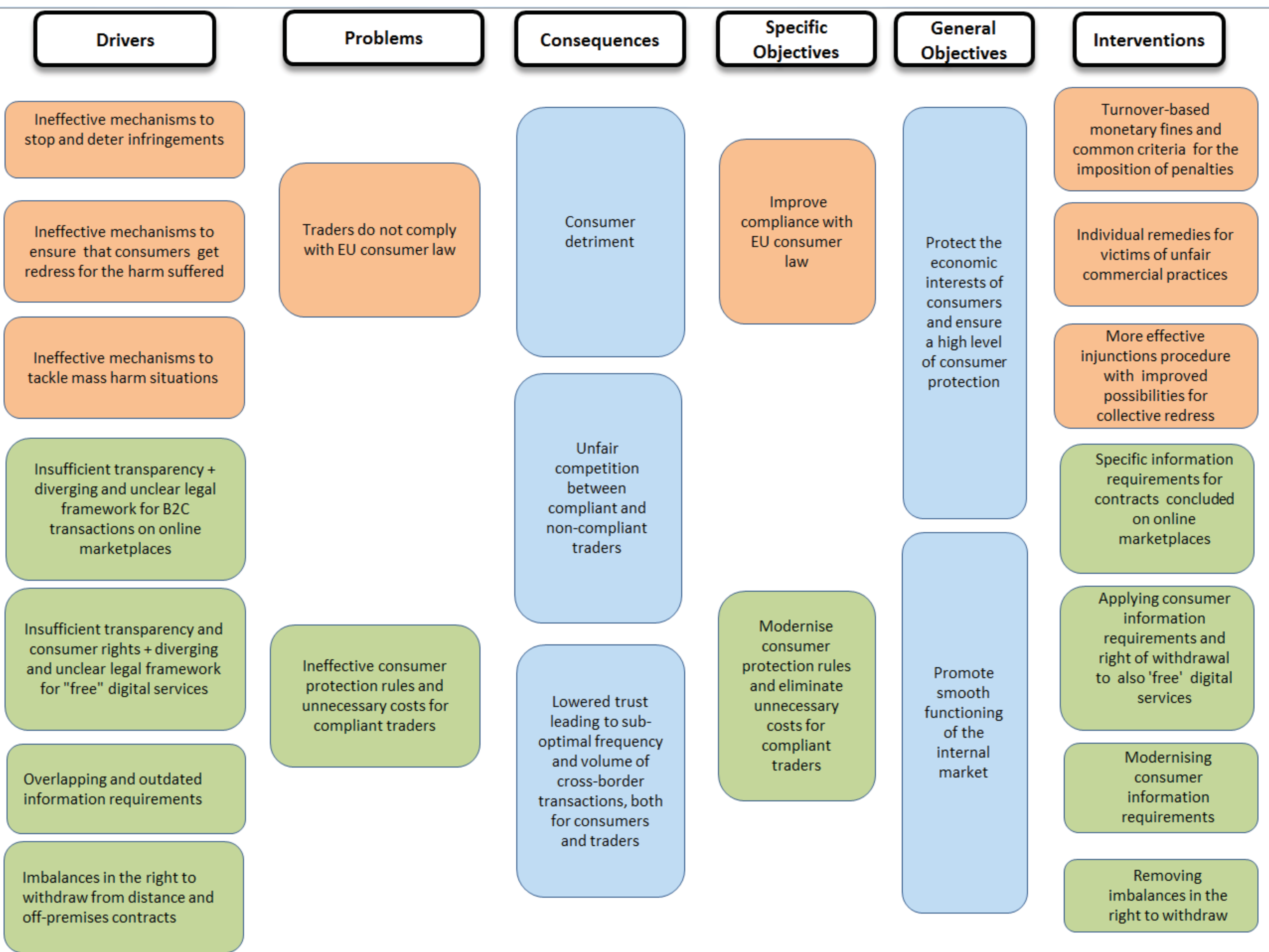
In the public consultation, around 35% of online companies reported significant problems due to these obligations. A majority of business associations[135] confirmed that traders face disproportionate/unnecessary burden resulting from these obligations. In the SME panel, close to half of self-employed, micro and small companies selling to consumers online reported disproportionate burdens.

Consumer associations, Member State authorities and citizens do not support repealing these rights. The majority of respondents in these groups in the public consultation consider these rights important.[136]

[135] 33 of 36 from the obligation to accept the return of goods used more than necessary and 32 of 35 from the obligation to reimburse the consumers before receiving the goods back as soon as the consumer has supplied evidence of having sent them back.
[136] 18 of 26 citizens, 14 of 15 consumer associations, 12 of 16 MS authorities consider important the right of withdrawal for unduly tested goods, whereas 14 of 27 citizens, 14 of 15 consumer associations, 12 of 16 MS authorities consider important the right to early reimbursement.

6 WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

Figure 3: Overview of possible interventions assessed in this IA



6.1 Improve compliance with EU consumer law

6.1.1. Option 1: Improving enforcement to stop and deter infringements

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Improve compliance with EU consumer law
This option would strengthen deterrence and proportionality of penalties for breaches of consumer law and improve the effectiveness of the injunctions procedure. Introducing a list of common, non-exhaustive criteria for assessing the gravity of infringements and criteria for setting the amount of fines would contribute to a more consistent application of fines in different Member States. Where the penalty to be imposed is a fine, Member States would need to take into account the cross-border nature of the infringement and fines imposed by other Member States for the same or similar infringement. The requirement to provide fines for "widespread infringements" and "widespread infringements with a Union dimension" in the framework of coordinated CPC enforcement would provide an additional enforcement tool in many Member States, where fines currently do not exist. This is especially the case for breaches of the UCTD.[137] Turnover-based fines would provide more deterrence and proportionality, as the scale of the trader's activity would be taken into account, including revenues from the products that were the object of the infringement. They would thus ensure a consistent response by national enforcement authorities to widespread infringements of consumer law in the CPC co-operation context. Stronger fines will also stimulate voluntary compliance where national enforcement authorities would encourage traders to amend their practices voluntarily. Faced with the risk of stronger fines, infringing traders would have additional impetus to remedy their practices. However, penalties are only one of the tools to improve compliance with EU consumer law. Strong penalties alone do not guarantee better consumer conditions. This IA therefore does not seek to compare the overall performance of Member States on the sole basis of the level of penalties provided under national law.[138] In the public consultation, a large majority of consumer associations and public authorities, but relatively few business organisations, agreed that stronger rules on penalties would lead to better compliance with consumer protection rules. In contrast, in the SME panel consultation a large majority of respondents agreed that stronger rules on penalties would improve compliance. Some Member States have recently strengthened their rules on penalties or are considering doing so. For example, the UK consumer protection authority has advocated the introduction, in addition to the existing consumer compensation mechanism, of effective, dissuasive and proportionate "civil penalties".[139] Some EU countries have recently moved to turnover-based

[137] For the CSGD, impact on the progress of the legislative negotiations on the amended proposal COM(2017)637 of 31 October 2017 would need to be taken into account, see also fn. 120.

[138] Whilst Poland is among the Member States with the highest possible penalties (up to 10% of turnover) and with the highest fine actually imposed (ca. 6,7 mio €, see Annex 7, Table 5), Poland has the EU's lowest score on the compliance and enforcement composite indicator. On the contrary, Luxembourg, UK and Austria are the Member States with the highest scores on the compliance and enforcement composite indicator, but have relatively low or no financial penalties available to their enforcement authorities. Source: 2017 Consumer Conditions Scoreboard, p. 118-147.

[139] CMA's response of 25 April 2016 to the consultation by the Department for Business, Innovation and Skills (BIS) and "Digital comparison tools market study" of 26 September 2017, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521154/CMA_response_to_BIS_call_for_evidence.pdf and https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf .

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penalty systems. In Latvia, the maximum fine for breaches of the UCPD was set at 10% of turnover in 2015 (although capped at EUR 100 000). It was considered that the previous maximum fine of up to EUR 14 000 was ineffective and not deterrent, especially for large companies. In the Netherlands, a maximum penalty of 1% of the annual turnover (as in the most recent annual report) for breaches of consumer law (or 10% for engaging in the UCPD black-listed practices) was introduced from 1 July 2016, in combination with a maximum absolute penalty of EUR 900 000, whichever is higher. Previously, there was only a maximum absolute penalty of EUR 450 000. The reasons for the reform were to increase the preventive and deterrent effect of penalties and, as a consequence, traders' compliance with the rules.[140]

Revising the ID injunctions procedure would improve its overall effectiveness, reduce the number of infringements and provide incentives for amicable settlements.[141] In the ID survey, 58% of all respondents agreed that revising the injunctions procedure would have a positive impact on increasing deterrence, whereas only 1% predicted a moderate negative impact and 19% predicted no impact. Member States authorities and consumer organisations strongly agreed that there would be increased deterrence (83% and 92.8% respectively), but fewer business associations thought so (25%).

Extending the scope of the ID to all infringements of rights under EU law that may harm the collective interests of consumers would increase the effectiveness of the injunctions procedure. It would become sufficiently future-proof and responsive to different forms of non-compliance in mass harm situations.

Enabling independent public bodies, consumer organisations and business associations to bring injunction actions in all Member States would increase the use of the ID and the likelihood of reaching amicable settlements. This would be the case even before the legal action starts, as the deterrent effect of the ID would increase in most Member States.

By addressing financial obstacles (e.g. court fees, legal aid, financial support), qualified entities with limited financial and human resources would have better possibilities use the injunctions procedure.

By introducing more expedient procedures (e.g. through time-limits), which was supported by all stakeholder groups, lengths of injunction actions would be shortened in most Member States. Without this intervention, infringing traders may continue to breach EU law for the duration of the proceedings, continuing to gain unlawful profits and creating consumer detriment.

By granting courts/authorities the power to request the trader to provide information, the efficiency of the ID would be increased, particularly in those Member States that do not currently provide for such powers.

By introducing publicity requirements covering a broad range of communication channels, there would be increased deterrence, particularly for traders whose depend on their reputation. Publicity would also help compliant traders become more aware of the illegal practices of their non-compliant competitors.

By introducing a requirement in the ID for Member States to ensure effective, proportionate and dissuasive penalties in the form of fines, infringing traders would be more likely to comply with the outcome of the procedure. Findings from the Fitness Check show that systems with clear rules on penalties for non-compliance with injunction orders are more effective than systems where penalties must be obtained through a separate court procedure.

[140] Response of the Latvian and Dutch authorities to the CPC/CPN/CMEG survey.
[141] The 2012 Commission Report on the ID recognised that the mere possibility of an injunction action has a deterrent effect. see p. 8. The Report was unable to express the impact on the level of compliance in quantitative terms, but these findings were confirmed by the qualitative views of the public authorities and consumer organisations.

General objectives
Protect the economic interests of consumers and ensure a high level of consumer protection
Introducing turnover-based fines for widespread infringements and revising the injunctions procedure would increase the effectiveness of the enforcement of consumer law. This would contribute to better compliance by traders. Better compliance should lead to less consumer detriment and contribute to the strong consumer protection objectives enshrined in Article 38 of the Charter of Fundamental Rights and Article 169 of the Treaty on the Functioning of the EU. Better compliance is also likely to lead to increased consumer trust in purchasing. In the public consultation, a majority of consumer associations and public authorities agreed that stronger rules on penalties would lead to greater consumer trust and more effective enforcement of consumer protection rules. Most business organisations did not share these views. A more effective injunctions procedure would contribute to reducing consumer detriment by stopping infringements. In the ID survey, 56% of all respondents agreed that revising the injunctions procedure would reduce consumer detriment, whereas 1% predicted a moderate negative impact on consumer detriment and 22% predicted no impact. Most MS authorities (90.2%) and consumer organisations (73.4%) predicted a positive impact, whereas much fewer business associations (8.3%) shared this view. 59% of all respondents considered that it would also have a positive impact on increasing consumer awareness and empowerment, due to new publicity requirements for traders, whereas 1% predicted a significant negative impact and 19% no impact. Again, most Member States authorities and consumer organisations shared this view, while business associations did not. Injunction orders on their own would have only limited effects on reducing consumer detriment, as additional steps would usually be necessary to ensure redress for consumers. However, by introducing the possibility of using injunction decisions as proof of infringements,[142] consumers would be enabled to take follow-on actions to injunction proceedings more easily. Still, Option 1 would not fully address consumer redress concerns in mass harm situations. While consumer organisations considered that Option 1 would lower consumer costs for obtaining redress through the use of follow-on actions (25% significant cost reduction), the inclusion of collective redress (see Option 3) was viewed much more favourably (57% significant cost reduction).
Promote the smooth functioning of the internal market
The stronger deterrent effect of strengthened rules on penalties and a more effective injunctions procedure would ensure better functioning of the internal market. In the public consultation, all responding consumer associations and a large majority of responding public authorities agreed that stronger rules on penalties would lead to fairer competition to the benefit of compliant traders. Few business organisations shared this view. In contrast, in the SME panel consultation, a majority of respondents agreed that stronger rules on penalties would increase fair competition between traders operating in different Member States and between traders with different economic strength. In the ID survey, 55% of all respondents considered that an improved injunctions procedure would have positive impacts on fair competition. 6% predicted negative impacts and 17% predicted no impact. Member State authorities and consumer organisations shared this prediction (82.9% and 85.7% respectively), whereas business associations did not (8.3%).
ADDITIONAL EFFECTS OF THE OPTIONS
Costs and savings for traders

[142] Such a solution would be inspired by Article 9 of Antitrust Damages Directive 2014/104/EU.

For strengthened rules on penalties and a more effective injunctions procedure, only costs for compliant traders, such as possible ex-ante risk-assessment costs in case of non-compliance, are relevant. Costs for non-compliant traders are not relevant for this IA.

There could be some initial familiarisation costs for traders because of the proposed new rules on penalties. This is particularly the case for traders operating in Member States that do not currently have fines for certain breaches of EU consumer law or do not apply turnover-based fines for wide-spread infringements. In the SME panel consultation, most respondents said that strengthening penalties across the EU would have no impact on their costs or could not reply to this question.

Most of the business associations in the ID survey considered that revising the injunctions procedure could increase insurance premiums for coverage against claims in mass harm situations. In a broader perspective, the revision could lead to increased use of the ID, including an increase in frivolous claims against compliant traders. However, as described in Chapter 8.3.1, this risk is mitigated by control criteria built into the improved procedure, such as reputability criteria for qualified entities.

Costs and savings for authorities

There may be an increase in administrative costs for imposition of fines, especially for infringements that were not previously subject to fines, and to calculate turnover-based fines. The introduction of turnover-based fines will involve additional one-off enforcement costs to adjust existing internal guidelines on the imposition of penalties. There will also be recurrent costs due to the need to gather information about traders' turnover. These costs are not likely to differ depending on whether the turnover-based fine is set at, for example, 1% or 10%. Enforcement bodies will have to do the same data gathering and computation in both cases.

In the public consultation, a majority of the public authorities indicated that costs of administrative and judicial enforcement would increase if rules on fines are strengthened. Fewer respondents agreed that there would be no effect on costs or that costs would decrease (6 %). As regards assessing such costs, 3 respondents (27%) agreed that the cost increase would be reasonable and 2 respondents (18%) that the increase would not be reasonable (see Table 12 in Annex 7). No public authority provided estimates of increased or decreased enforcement costs.

However, possible costs are likely to be off-set by an overall reduction of infringements due to the increased deterrence of strengthened penalties. Furthermore, enforcement authorities will benefit when, in the context of the revised CPC Regulation, authorities in other Member States take effective enforcement actions against cross-border traders. Already today, according to the CPC/CPN/CMEG survey, the trader's turnover is taken into account when determining the level of fines in at least 14 Member States (i.e. not only in those eight countries where the maximum fine under the law is linked to the turnover). Such relatively wide use of the trader's turnover in enforcement activities suggests that it is not very burdensome.

By improving the effectiveness of the ID, economies of scale in the preparation and litigation of collective injunction cases would increase. In the ID survey, 56% of all respondents considered that an improved injunctions procedure would have a positive impact on procedural efficiencies due to the collective resolution of mass claims, whereas only 4% predicted a negative impact and 19% predicted no impact. In particular, Member State authorities shared this view (82.9%).

National authorities responding to the ID survey were divided when assessing costs from revising the injunction procedure. They did not consider implementation costs significant for courts (34.4% predicted moderate increase) or for administrative authorities (45.5% predicted moderate increase). They did also not consider running costs for courts significant (40.6% predicted moderate increase) or for administrative authorities (53.1% predicted moderate increase). Moreover, when taking into account possible benefits for consumers, national authorities (43.9%) considered these costs to be reasonable.

Costs and savings for qualified entities (in the area of injunctions)
Existing costs of bringing actions under the ID would be alleviated by reducing financial obstacles for underfunded qualified entities and by shifting costs of publicity to infringing traders. Qualified entities would also have savings from increased procedural efficiencies. In the hypothetical mass harm case study, the qualified entities responding to the ID survey held mixed views about the impact of revising the injunctions procedure on their legal advice costs (23.3% predicted reduction) and litigation costs (70.9% predicted reduction). The impact of such costs would depend on the financial and legal capacities of the qualified entity in question, as well as the specific circumstances of each case. By supporting cooperation between qualified entities from different Member States, Option 1 would facilitate the exchange of best practices and the development of common strategies for tackling cross-border infringements, and thus reduce costs of bringing actions.
Degree of legal change required in Member States
According to the available information, fines are provided as penalties in between 11 and 20 countries, depending on the Directive in question (see Table 1 in Annex 7). Currently, 8 countries (CY, FR, HU, LT, LV, NL, PL, SE) provide for turnover-based penalties in their legislation, at least for UCPD infringements. However, with the exception of FR, PL and NL, most of these countries also have an absolute cap on the fine, ranging from EUR 8 688 to approximately 6.5 million. Therefore, on top of the requirement for several Member States to introduce fines where they do not exist at all, a vast majority of Member States will need to change their legislation to introduce turnover-based fines or to remove absolute caps. As regards the proposed common criteria for penalties, those related to the cross-border dimension of the infringement are currently recognised in only a few countries (see Tables 3 and 4 in Annex 7). On the other hand, the other proposed common criteria are already applied in between 13 and 23 countries, depending on the criterion (see Table 7 in Annex 7). The revised injunctions procedure would require legal changes in all Member States. The extent of these changes would depend on whether Member States choose to integrate the proposed procedure into existing national schemes or to establish it as a separate, alternative scheme. The proposed extension of the scope of the injunctions procedure would require changes in 16 Member States. Conversely, 12 Member States (CZ, EE, FI, DE, EL, IT, NL, PL, PT, SK, SI, ES) have already extended the scope of application of the injunction procedure to consumer law in general. The requirement to establish at least three categories of qualified entities would require changes in several Member States, since, according to the Study supporting the Fitness Check, in 4 Member States (AT, DE, RO, EL) only consumer and business organisations are qualified entities and in 2 Member States (LV, FI) only public authorities are qualified. Measures regarding mandatory publicity would require changes in 26 Member States, since only 2 Member States (PL, FR) provide for the publication of injunction orders at the traders' expense. The requirement to ensure penalties for non-compliance with injunction orders already exists in all Member States except 3 (SE, HU, EE). However, all Member States would need to ensure the introduction of the specifications on fines. The provisions regarding measures and follow-on actions would require legal changes in the majority of the Member States, since in the area of consumer law only 4 Member States (BE, BG, DK and IT) allow follow-on actions to rely on injunction orders.
Legal coherence
The proposed intervention on penalties will increase legal coherence, as fines will be provided as a mandatory type of penalties for all widespread infringements of all the relevant directives and all Member States will take the same criteria into account when imposing penalties. The obligation for Member States to ensure minimum thresholds for turnover-based fines as a mandatory element of the penalties for widespread infringements and widespread infringements with a Union dimension will also ensure that penalties can be applied in an effective, efficient

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and coordinated manner, as required by Article 21 of the CPC Regulation. Furthermore, as regards the proposed common criteria, Article 9 of the revised CPC Regulation already requires Member States to give due regard to the nature, gravity and duration of the infringement in question when imposing fines.[143] Introducing turnover-based fines will also be more consistent with the rules on penalties in other closely related policy areas – notably data protection and competition – where turnover-based penalties have been or are being introduced (for further information see Annex 7). Especially in the DSM context, breaches often entail intertwined elements of consumer protection, personal data protection and competition. It is therefore important that similar tools are available in these policy areas.
Social impacts
Strengthening the deterrent effect of public enforcement and improving the effectiveness of the injunctive procedure would have positive social impacts. This option will contribute to fewer breaches of EU consumer law, and therefore be particularly beneficial for consumers who would otherwise have lacked the means to seek legal redress if their consumer rights had been violated. Consumer vulnerability patterns are complex (multi-dimensional), have multiple drivers and are highly context-dependent. It is not possible to strictly associate consumer vulnerability with specific groups or socio-demographic characteristics.[144] However, increased compliance by traders with consumer rights effectively improves the situation of vulnerable consumers, because they are more likely than average to report exposure to unfair commercial practices and online shopping problems, and less likely to obtain satisfactory redress.[145] Thus, compliance by traders can help reduce the relative disadvantage that vulnerable consumers face on the market.
Environmental impacts
The Consumer Conditions Scoreboard 2017 reports that consumers' purchase behaviour is slightly less influenced by environmental claims than previously. Yet, consumer trust in these claims has increased by 12.2 percentage points to 65.8%.[146] This would expose them to more detriment in case the environmental claims are misleading. Better compliance with consumer legislation could reduce the number of misleading environmental claims. This could lead consumers to adopt more sustainable consumption patterns and allow compliant traders to benefit from the competitive advantage of valid green claims. Better compliance could also reduce unfair practices (misleading omission or action) regarding planned (built-in) obsolescence of products requiring their replacement earlier than what should normally be the case. As a result, there would be some positive impacts on the environment and positive contribution to the implementation of the Circular Economy Action Plan.

6.1.2. Option 2: Improving enforcement and individual consumer redress[147]

The impacts of option 2 come in addition to the impacts of option 1.

HOW OPTIONS MEET OBJECTIVES

[143] In addition, recital 16 of the revised CPC Regulation expressly refers to the need to strengthen the level of penalties: "*[...] In view of the findings of the Commission's Report of the Fitness Check of consumer and marketing law, it might be considered to be necessary to strengthen the level of penalties for breaches of Union consumer law*".
[144] Study on consumer vulnerability that researched consumer vulnerability in-depth, including through focus groups, expert assessments, surveys and behavioural experiments, https://publications.europa.eu/en/publication-detail/-/publication/d1af2b47-9a83-11e6-9bca-01aa75ed71a1/language-en/, https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/market-studies_en.
[145] Consumer Conditions Scoreboard (2017 edition) pp.63, 81.
[146] Consumer Conditions Scoreboard 2017, p. 36.
[147] In addition to the information in this section, see Annex 8, section 3 for further details about stakeholder views.

Specific objectives
Improve compliance with EU consumer law
By adding individual rights for consumers to seek redress when they have been harmed by unfair commercial practices to the interventions included in option 1, this option would further improve compliance with consumer law. Potential impacts of individual UCPD remedies were studied in a multivariate analysis.[148] Based on data from the Consumer Conditions Scoreboard 2017, this analysis suggests that the introduction of individual remedies in the UCPD is likely to lead to fewer unfair practices. Specifically, it shows that, all other things being equal, the probability for consumers to encounter an unfair commercial practice from domestics retailers is 4 percentage points lower in EU countries with links between remedies and breaches of the UCPD compared to Member States without such links.[149] Results are similar for the probability of experiencing problems when buying or using goods or services. In Member States with links between breaches of the UCPD and remedies, the probability of experiencing a problem with the product/service purchased is lower (by 3.2 percentage points) with respect to other countries, other things being equal. The influence of remedies tends to be magnified (more than four-fold, to 13.6 percentage points) in countries with the highest level of public monitoring. The multivariate analysis also shows that the effect of remedies linked to UCPD breaches on the likelihood of experiencing an unfair commercial practice is strongly amplified in countries imposing a high level of sanctions.[150] Regression estimates show that, in countries where higher penalties for UCPD infringements have been imposed, the introduction of remedies is associated with a decrease of the probability to encounter an unfair commercial practice that is roughly 3 times bigger than in countries with medium or low penalties. This suggests that combining strengthened penalties (Option 1) with UCPD remedies (Option 2) is likely to have positive impacts on improved compliance.
General objectives
Protect the economic interests of consumers and ensure a high level of consumer protection
This option would contribute further to the protection of economic interests of consumers, since it would provide consumers with individual rights to seek redress when their rights under the UCPD have been infringed, in addition to the measures to improve enforcement in Option 1. According to the above-mentioned multivariate analysis, the likelihood of consumers getting a satisfactory outcome when complaining to a retailer/provider for a problem encountered with the good/service purchased seems to be influenced by UCPD remedies. There is a difference of 8.7 percentage points of satisfied consumers between countries having links between breaches of the UCPD and remedies and those not having them. In economic terms, if consumer remedies were linked to unfair commercial practices in all the 28 countries of the EU, the reduction in consumer detriment for the 14 Member States currently not foreseeing any links to UCPD

[148] Source: "An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems "- JRC Technical Report. A general description of the methodology is given in Annex 4 and Annex 14 includes the full JRC report.

[149] Actually, according to the model regression, the probability of encountering a UCP is equal to 50.061% in countries with remedies and equal to 54.056% in countries without remedies. Consequently, the difference between the two groups of countries is equal to – 3.99 percentage points and to -7.39% in relative terms.

[150] For the purposes of this analysis, 15 MS (for which the information on fines actually imposed for the breaches of the UCPD was available) were regrouped into 3 categories according to the level of the fine. It should therefore be considered that the analysis covers only these 15 countries. The same analysis, however, does not show that penalties alone have a marginal effect on the probability of encountering a UCP. Detailed information on how the countries were regrouped in the 3 categories is available in Annex 4.

remedies would be equal to EUR 560 million per year (see Annex 4 for explanations of this estimate). This should be considered very conservative, since it does not take into account likely synergies between remedies and strengthened penalties. As shown by the results of the regression analyses (see section 8.1), the effect of remedies seems to increase strongly when there are also high levels of penalties. Stakeholder views on introducing rights to remedies under the UCPD to contribute to better consumer protection are presented in Section 5.1.5 and Annex 8 Section 3.
Promote the smooth functioning of the internal market
This option would reduce costs for traders because national rules on individual remedies would become less divergent. 25% of the (205) respondent SMEs stated that introducing an EU-wide right to remedies under the UCPD would encourage their enterprise to enter other EU markets. Empowering consumers to take action against traders that infringe their rights under the UCPD is also likely to increase consumer trust. This could lead to more cross-border purchases. In the public consultation, all consumer associations, most Member State authorities and most citizens agreed that introducing such rights would contribute to greater consumer trust. More companies agreed than disagreed with this, whilst more than half of business associations disagreed. Similarly, all consumer associations, most MS authorities and citizens agreed that such new rights would create a more level playing field for compliant traders. Among the companies replying to this question, 9 of 15 SMEs and 4 of 6 large companies agreed. More than half of business associations disagreed. See Section 3 of Annex 8 for a further breakdown of this data.
ADDITIONAL EFFECTS OF THE OPTIONS
Costs and savings for traders
Beside the positive effect on cross-border trade, the introduction of individual UCPD remedies would also lower costs for complaint handling due to a simpler and more uniform legal framework. In addition, there would be increased clarity on possible consequences for non-compliant traders, which would lead to lower and more accurate risk-assessment costs. In the SME panel consultation, SMEs indicated one-off savings of EUR 1 405 on average[151] (median: zero)[152] and annual savings of up to EUR 10 000 (average: EUR 704, median: zero)[153]. The four responding large companies estimated one-off savings of maximum EUR 1 682 (average EUR 250), with no annual regular savings. In terms of turnover, expected savings tend to decrease by company size, e.g. one-off savings ranging between zero and 5.9% for micro-enterprises to close to zero for large companies. There would be initial familiarisation costs for traders. However, these costs are difficult to quantify. Only two traders responded to a question about this in the public consultation. In the same vein, very few stakeholders provided estimates of running costs. The average one-off costs, such as costs for legal advice, assumed by SMEs is EUR 12 293[154](median: EUR 638). Average annual running cost estimates for these businesses is EUR 8

[151] Arithmetic mean.
[152] Estimates ranged between zero to EUR 24 176. Ranges were widest in responses from EL with EUR 0 to 17 000, HU with EUR 500 to 24 176 (3 responses) and ES with 0 to 21 675.
[153] The four highest estimates reported one respondent from HU (outlier with EUR 10 000, the two other HU respondents estimated 0), one from ES (EUR 5 000) and two with each EUR 4 000 from GR and PL.
[154] This figure is strongly influenced by a micro enterprise from DK reporting EUR 572 484 (the mean/median of all 4 responses from this country being EUR 149 734/EUR 13 227). The next highest estimates originate from GR with EUR 160 000 (the mean/median of the 8 responses from GR being EUR 24 375/zero), ES: EUR 101 674 (the mean/median of the 7 responses from ES being EUR 16 052/EUR 1 796) and PT: EUR 25 637 (the mean/median being EUR 3 282/EUR 733). Companies from DE and IT estimated at most EUR 3 000 (no responses received from FR, NL UK).

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484[155] (median: EUR 655). The three responding large companies expect one-off costs between zero and EUR 5 000 (median: EUR 1 703) and annual running costs of zero to EUR 15 000. This IA only addresses compliance costs for compliant traders, including possible ex ante risk-assessment costs in case of non-compliance. It does not address costs for non-compliant traders, such as likely amounts of compensation provided to consumers through UCPD remedies.
Costs and savings for authorities
There would be initial familiarisation costs for national authorities and courts. Costs for public enforcement authorities and courts would include a possible increase in the number of enforcement and court cases. However, these costs are likely to be offset by an overall reduction in breaches of the UCPD due to the deterrent effect of the UCPD remedies. The existence of UCPD remedies could be sufficient to deter wrongdoing or to trigger voluntary redress from traders, without any need to approach courts or enforcement authorities. According to the Consumer Market Study for the Fitness Check, traders are currently unlikely (16%) to voluntarily offer remedies if they have engaged in a misleading commercial practice.[156] Strong civil remedies and the possibility of escalating the complaint to courts and authorities could incentivise traders to settle more complaints on a voluntary basis.
Degree of legal change required in MS
Requiring Member States to ensure that the specific remedies of contract termination and compensation for damages are available for breaches of the UCPD would require amendments of national law in all Member States.[157] Among the 14 Member States that have ensured links between breaches of the UCPD and remedies, only the UK has ensured that the link includes contract termination and damages. However, these remedies are not provided for misleading omissions in the UK. Different degrees of legislative changes would be required in the remaining 13 Member States that have ensured such links, depending on which remedies are currently covered. The 14 Member States that have no links between breaches of the UCPD and remedies would need to amend their legislation both to ensure such links and that the links cover the required remedies. Requiring Member States to ensure that victims of unfair commercial practices have access to non-contractual remedies will require legal change in some Member States. Access to damages is the most practical non-contractual remedy and a reasonable indicator for the degree of legal change required in the different Member States. 10 of the 14 Member States that have remedies linked to breaches of the UCPD have ensured that consumers have the right to seek damages. The remaining 4, as well as the 14 Member States that do not have links to remedies, would probably need to amend their legislation to ensure access to damages and thus to non-contractual remedies.
Legal coherence
Introducing remedies for breaches of the UCPD would not constitute a novelty within the broader framework of EU consumer law. Civil remedies exist in several instruments, such as the Package Travel Directive 2015/2302/EU, the CSGD and in the Commission Proposals (amending and replacing the CSGD) for a Directive on certain aspects concerning contracts for the sales of goods and for a Directive on Digital Content. These Directives harmonise the exact remedies that Member States must ensure.

[155] Also this figure is strongly influenced by the maximum amount estimated by a micro enterprise from DK (the mean/median of all 4 responses from DK being EUR 49 542/EUR 3 835). The next highest estimates originate from PT with EUR 171 551 (the mean/median of the 6 responses from PT is EUR 18 102/EUR 1 609), HU: EUR 88 600 (the mean/median of the 6 responses from HU being EUR 20 504/EUR 500). Companies from DE and IT estimated at most EUR 1 949/EUR 1 402 (no responses received from FR, NL and UK).
[156] Lot 3 Report, p. 246.
[157] An overview of the legal situation in the different Member States is available in Table 8 in Annex 8.

Social impacts
The UCPD (Article 5(3)) aims at ensuring vulnerable consumers, defined as "a clearly identifiable group of consumers who are particularly vulnerable to the practice (…) because of their mental or physical infirmity, age or credulity", a higher level of protection from unfair commercial practices. While the Consumer Conditions Scoreboard 2017 reported a slight decrease in unfair commercial practices,[158] there was an increase in vulnerable consumers that were exposed to such practices. By ensuring a more effective mechanism for consumers to get redress when their rights under the UCPD have been infringed, this measure would empower all consumers to protect themselves better. However, given that the number of vulnerable consumers that become victims of unfair commercial practices is increasing, this could have particularly positive impacts on them. As for option 1, the deterrent effects of option 2, leading to fewer infringements, will be particularly beneficial for consumers who would otherwise have lacked the means to seek legal redress if their consumer rights had been violated.
Environmental impacts
The positive impacts of option 1 would be strengthened by option 2. Individual remedies for breaches of the UCPD would empower consumers to take legal action against traders that engage in unfair commercial practices such as misleading environmental claims and planned (built-in) obsolescence of products. This would increase the deterrence of the UCPD and have positive impact on the environment. In case of non-compliance, consumers would be able to receive redress, which would remove a share of the illegally obtained profits from the infringing traders and encourage sustainable consumption patterns in line with the Circular Economy Package.

6.1.3. Option 3: Improving enforcement and individual and collective consumer redress

The impacts of option 3 come in addition to the impacts of options 1 and 2.

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Improve compliance with EU consumer law
The strengthened mechanisms for collective redress under this option would further improve compliance, in particular concerning businesses that are sensitive to reputational damage. As highlighted in the Study supporting the Collective Redress Report, the possibility of a collective redress claim would incite businesses to comply with the law. In the ID survey, 53% of all respondents considered that collective redress possibilities would increase deterrence of non-compliance, whereas only 4% predicted a negative impact and 14% no impact. Most Member States authorities (81.6%) and all consumer organisations shared this view, while business associations did not (9.1%).
General objective
Protect the economic interests of consumers and ensure a high level of consumer protection
Strengthened mechanisms for collective redress would ensure a higher level of consumer protection in mass harm situations. The Study supporting the Fitness Check suggested that Member States that have introduced redress orders have experienced an increase in the effectiveness of injunction procedures and reduced consumer detriment. The possibility to bring action for damages or redress within the injunctions procedure was viewed by qualified entities

[158] Between 2014 and 2016 consumer exposure to unfair commercial practices by domestic retailers fell by 6.9 percentage points in the EU-28 to 16.8%.

responding to the Fitness Check survey as the most beneficial procedural element to be added to the ID.

A key reason for representative collective redress mechanisms is that consumers may rationally decide to forego individual legal action due to its expected negative balance of costs and benefits. By adding a mechanism for collective redress to the injunctions procedure, obstacles to individual consumer redress would be significantly reduced.

In the ID survey, 50% of all respondents considered that the addition of a collective redress mechanism would have positive impacts on consumer awareness and empowerment, due to publicity requirements for traders. 1% predicted negative impacts and 20% no impact. Most Member State authorities (81.6%) and consumer organisations (91.7%) agreed, while business associations did not (9.1%).

56% of all respondents agreed that the possibility of redress would have positive impacts on reducing consumer detriment. 2% predicted a negative impact and 13% no impact. Most Member State authorities (89.5%) and all consumer organisations shared this view, while business associations did not (9.1%). Furthermore, a majority of consumer organisations considered that added redress mechanisms would significantly reduce consumer costs for seeking redress. In addition, the possibility for out-of-court negotiations for redress, together with the other procedural amendments that would increase the deterrent effect of the ID under options 1 and 3, would lead to increased likelihood of achieving amicable redress outcomes.

Promote the smooth functioning of the internal market

This option would contribute to a better functioning internal market. In the ID survey, 49% of all respondents considered that the addition of collective redress mechanisms would have a positive impact on fair competition between compliant and non-compliant traders. 7% predicted a negative impact and 13% no impact. Most Member State authorities (83.7%) and consumer organisations (90.9%) shared this view, while business associations (9.1%) did not. In the 2017 Study on collective redress, 57.69% of business respondents did not consider collective redress procedures to have any negative impact on their businesses' competitiveness.

ADDITIONAL EFFECTS OF THE OPTIONS

Degree of legal change required

This option would require legal changes in all Member States. The extent of these changes would depend on whether Member States choose to integrate the proposed mechanism into existing national schemes or establish it as a separate alternative scheme.

Introducing a single procedure for injunctions and redress would require changes in at least 19 Member States. According to the Study supporting the Fitness Check, 9 Member States (AT, BG, CZ, DK, HU, LT, PT, ES, UK) have the possibility to provide decisions on injunctions and redress in a single procedure. However, this is often a theoretical possibility governed by general procedural rules and not by specific legislation.

The introduction of redress mechanisms, which may include compensatory relief, would require changes in at least 9 Member States. According to the Study on the 2013 Recommendation on Collective Redress, 19 Member States provide for some form of compensatory collective redress (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK). In AT, there is no specific legal framework but an extension of traditional multiparty litigation devices to mass claims developed in case law. In NL, the available mechanism provides only for an out-of-court settlement approved by the court, but there is no specific judicial compensatory collective redress mechanism. In DE, the existing mechanism is limited to investor claims. Among the different models of compensatory collective redress, representative action models are available in 12 Member States (BE, BG, EL, FI, FR, LT, IT, HU, PL, RO, ES, SE).

Costs and savings for authorities
This option would enable economies of scale in the preparation and litigation of cases and may reduce coordination and transaction costs of bringing consumers together for redress purposes. In most Member States, courts/authorities would benefit from procedural efficiencies if both injunctive relief and redress claims could be assessed within a single procedure. In the ID survey, 53% of all respondents agreed that introducing redress mechanisms within the injunctions procedure would have a positive impact on procedural efficiencies due to the collective resolution of mass claims. 10% predicted a negative impact and 9% no impact. Most Member State authorities (86.8%) predicted a positive impact. National authorities responding to the ID survey were divided when assessing implementation costs of for courts (41% predicted a moderate increase) and administrative authorities (43% predicted a moderate increase), but did not consider these costs significant. They did also not consider running costs for courts (41% predicted a moderate increase) and administrative authorities (43% predicted a moderate increase) significant. Expected costs may be slightly higher under option 3 than option 1, due to the additional procedural redress elements. However, national authorities responding to the ID survey considered that, when taking into account the possible benefits for consumers, these costs are reasonable (40% agreed, 10% disagreed).
Costs and savings for qualified entities
Under this option, qualified entities would experience procedural efficiencies from the possibility of assessing injunctive and redress claims in a single procedure, which would enable them to bear the costs of preparing a single action. In the hypothetical mass harm case study, the qualified entities responding to the ID survey held mixed views about the impact of this option on their legal advice costs (28.5% predicted a reduction of costs, 33% predicted an increase) and litigation costs (23% predicted reduction, 28.5% predicted increase). The precise impact on such costs would depend on the financial and legal capacities of the qualified entity in question, as well as the circumstances of the mass harm case. Qualified entities would benefit from increased possibilities to represent the interests of victims with due fairness safeguards. This was reflected in the 2017 Study on collective redress, where 63% of respondents agreed that collective redress enhances access to justice and 60% considered such actions to be capable of ensuring the fairness of proceedings.
Costs and savings for traders
Option 3 would produce no costs for compliant traders, other than regular costs to ensure that business practices are within the law. Business associations responding to the ID survey considered that insurance premiums for coverage against claims in mass harm situations would increase (91% predicted a significant increase, 9% predicted no impact). The expected insurance figures are higher under option 3 than option 1, due to the possibility of receiving redress claims. Improvements of the effectiveness of the injunctions procedure and strengthened mechanisms for collective redress could lead to increased use of the ID, possibly, but not likely, including an increase in frivolous claims. See Section 8.3.1 for an assessment of risks related to frivolous claims. Overall, costs under option 3 would be insignificant for compliant traders. Costs for cross-border traders would go down due to further harmonisation of national procedures.
Social impacts
Improving collective redress possibilities in mass harm situations could have positive social impacts, particularly concerning protection of vulnerable consumers. As under options 1 and 2, the deterrent effects of option 3, leading to fewer infringements, would also be particularly

beneficial for consumers who would otherwise have lacked the means to seek legal redress if their consumer rights have been violated.
Environmental impacts
Improving collective redress possibilities in mass harm situations would have positive environmental impacts that would come on top of the environmental impacts of options 1 and 2. The combination of effective and deterrent penalties, improved injunctions procedures and strengthened mechanisms for individual and collective redress will ensure powerful tools to address unfair commercial practices, such as misleading environmental claims and planned (built-in) obsolescence of products.

6.2 Modernise consumer protection and eliminate unnecessary costs for compliant traders

6.2.1. Options to address lack of transparency and legal certainty for B2C transactions on online marketplaces (driver 1)

Option 0: Promoting self and co-regulation

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Modernise consumer protection
Self and co-regulation can be effective as a complement to legislation. For instance, the initiative to prevent the sale of counterfeits online is a successful example of complementarity between regulatory and non-regulatory interventions. The "Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet"[159] enhanced cooperation among stakeholders and significantly contributed to preventing offers of counterfeit goods from appearing on online marketplaces. It demonstrated that, together with legislation, voluntary cooperation can contribute to prevent online counterfeiting, meaning that it can improve the enforcement of existing legislation. The Commission has already encouraged businesses, and online marketplaces in particular, to ensure greater transparency for consumers. This was notably done through issuing Commission guidance on the UCPD in May 2016, which calls for transparency on online marketplaces through purposeful application of the general transparency and professional diligence requirements under the UCPD.[160] Although online marketplaces generally did not object to the transparency recommendations in the UCPD guidance, analyses on national level indicate that they have done little to follow-up on the recommendations in practice.[161] Consumer organisations confirm that there has been no improvement of transparency in B2C transactions on online marketplaces[162] and that the application of EU consumer law when online marketplaces enable the conclusion of contracts is still unclear, leading to a low legal standard for ensuring the correctness and validity of information provided.[163] Experience from a multi-stakeholder group on online comparison tools, set up in 2012 by the European Commission, confirms this lack of engagement by online businesses. It brought together industry representatives, operators of comparison tools, NGOs and national authorities

[159] http://ec.europa.eu/DocsRoom/documents/18023/attachments/1/translations/
[160] UCPD Guidance, SWD(2016) 163 final of 25.05.2016.
[161] Platform transparency study.
[162] Position paper of VzBv in the public consultation.
[163] Position paper of BEUC in the public consultation.

to develop principles to help comparison tool operators comply with the UCPD. The principles developed by the group[164] later fed into the UCPD Guidance.[165] However, several leading online platform operators did not take part in the initiative. This was a significant impediment to the possibilities for the agreed principles to create impact on business practices to the benefit of consumers. Moreover, following their adoption, improvements seem to have been limited. Whilst important objectives such as raising awareness among traders and building a common understanding were achieved throughout this initiative, there was limited change on the market regarding. This was confirmed by preliminary results of a 2017 sweep on comparison websites in the travel sector, which identified several irregularities on websites.[166] The reluctance by online traders to implement recommendations on platform transparency from the UCPD Guidance and to engage in the multi-stakeholder group on comparison tools suggest that it is unlikely that further co- or self-regulatory initiatives in this area would be successful to ensure increased transparency for consumers. Furthermore, it is difficult to ensure that voluntary initiatives are adequately representative in highly dynamic markets like the online one, where many new enterprises are not organised in professional associations.
General objectives
Protect the economic interests of consumers and ensure a high level of consumer protection
Since it is unlikely that the online marketplace industry would introduce relevant transparency measures on a voluntary basis, this option would not improve the overall level of consumer protection. Online marketplaces, like other traders, are likely to be attached to their business models. The non-binding character of the UCPD guidance and the principles for online comparison tools seems to lack deterrent effect to persuade them to change their behaviour.
Promote the smooth functioning of the internal market
Member States have different information requirements for online marketplaces. Co- and self-regulation does not seem sufficient to address such divergent rules and reduce related costs. Several businesses associations take the view that the fragmented nature of the EU market for (digital) goods, content and services is a stumbling block for consumers and businesses.[167] Self and co-regulation alone cannot address this fragmentation.
ADDITIONAL EFFECTS OF THE OPTIONS
Costs and savings for traders
Not applicable.
Costs and savings for authorities
Not applicable.
Degree of legal change required in MS
Not applicable.

[164] See the "Principles for better self- and co-regulation" available at: https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf
[165] https://ec.europa.eu/info/live-work-travel-eu/consumers/unfair-treatment/unfair-treatment-policy-information_en
[166] http://europa.eu/rapid/press-release_MEMO-17-845_en.htm
[167] They observe significant differences in Member State implementation of the CRD and the UCPD. While they also consider fully harmonized rules to address this, they prefer adopting further guidelines and recommendations. See position paper of BusinessEurope and EDiMA.

Legal coherence
Not applicable.
Social impacts
No significant effects are foreseen in areas such as employment, health & safety, income distribution and good governance & administration.
Environmental impacts
No significant impacts are foreseen.

Option 1: Providing specific transparency requirements for contracts concluded on online marketplaces

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Modernise consumer protection rules
A behavioural experiment[168] showed that introducing information about the name of the third party supplier on online marketplaces lead 74% of respondents to remember who was selling the product. 72% of these respondents remembered it accurately (see Figure 3 in Annex 10). This is a clear improvement compared to the finding that currently 60% of consumers entering into transactions on platform markets are unsure about who is responsible for the contract.[169] Around 70% of respondents to the behavioural experiment believed that knowing who the seller was made them more confident and trustful towards the online marketplace. Around 68% stated that such information was important in their decision making (see Figure 4 in Annex 10). Oher data suggests that 85% of consumers consider it important that online marketplaces are clear and transparent about who is responsible when something goes wrong and about their rights in case of a problem with price and quality of products and services.[170] Full information about the identity of the supplier and related consumer rights also increases the probability of consumers making a purchase. Compared to a situation where no information about the contractual partner is included (baseline scenario), the probability of a consumer purchase increases by 47%.[171] Information that the contract is concluded with a third party supplier and that consumer rights apply (or do not apply) allows consumers to make an informed choice and increases their trust. Making the implications of choosing a specific contractual partner more prominent on the online marketplace is likely to engage consumers better in this process.[172] In the same vein, if consumers are informed that the ranking of search results is based on a well-known criterion, such as popularity, the probability that they will make a purchase increases 2.15 times (115%).[173] 81% of respondents to the behavioural experiment agreed that information about who is selling the product would make users more confident and trusting in online marketplaces and that this would translate in a better service for users (79%) (see Figure 5 in Annex 10).
General objectives
Protect the economic interests of consumers and ensure a high level of consumer

[168] For the Platform Transparency Study.
[169] Platform Markets Study, Final Report, p. 73.
[170] Platform Markets Study, Final Report p. 77 and 117.
[171] Calculations based on the Platform Transparency Study, p. 36.
[172] Platform Transparency Study, p. 58.
[173] Platform Transparency Study, pages 28-29.

protection
Knowing whom to address in case of problems is a first condition for consumers to seek redress. If they seek redress, it is likely that their detriment decreases.[174] More transparency on online marketplaces would therefore increase consumer protection by reducing consumer detriment. In the public consultation, all consumer associations and public authorities, as well as almost all citizens agreed that this would bring benefits for the consumers. On the business side, roughly two thirds of responding business associations (around 35 of 45) and large companies (around 6 of 9), together with more than two thirds of SMEs (around 9 of 16), agreed too.[175] Transparency about ranking criteria is also important for consumer trust and confidence in the online environment. It increases the likelihood of consumers making purchases on online marketplaces. In a survey, 70% of 4800 internet users that correctly remembered information about selection criteria agreed that this information was important in their decision to make a purchase. 69.9% of those who correctly recalled this information agreed that it made them more confident and trusting.[176]
Promote the smooth functioning of the internal market
Specific EU wide transparency requirements for online marketplaces would ensure fairer competition. On the one hand, it would ensure clearer rules to support better enforcement and, on the other, it would prevent some traders from having unfair competitive advantages. The number of consumers using online marketplaces and the volume of trade on online marketplaces is likely to continue increasing. Whilst the exact impacts of the transparency measures in this option are not easily measurable, initial evidence indicates that transparency should increase consumer trust, and thus have a positive impact on the internal market by increasing the number of consumers using online marketplaces and the volume of trade. The probability of consumers making a transaction is 2.15 times higher (115%) if they are informed that the ranking of search results is based on a well-known criterion, such as popularity. Ensuring such information for consumers could be expected to lead to growth in transactions on online marketplaces, as a result of increased consumer confidence and trust.[177] 35% of respondents in the SME panel consultation agreed that platform transparency would encourage them to enter other EU markets, while 39% did not expect any significant impact on that decision and 22% did not know.
ADDITIONAL EFFECTS OF THE OPTIONS
Costs and savings for traders
There would be initial familiarisation costs. However, these are likely not to be significant since the transparency obligations concern basic information about the contracting parties and, depending on what a third party supplier has declared, standard information about whether consumer rights apply. The online marketplace would not be required to monitor information

[174] Data suggests that financial consumer detriment is reduced by taking redress: Study on measuring consumer detriment in the European Union, European Commission 2017, figure 17.

[175] More precisely, all 16 consumer associations and all 19 public authorities, 31 of 32 citizens, 37 of 45 business associations, 11 of 16 SMEs, 6 of 9 large companies agreed with the benefit of knowing whom to contact in case of a problem. All 16 consumer associations and all 19 public authorities, 30 of 31 citizens, 35 of 45 business associations, 9 of 14 SMEs, 7 of 9 large companies agree with the benefit of understanding who is responsible for the performance of the contract. All 16 consumer associations, 17 of 19 public authorities, 30 of 31 citizens, 28 of 45 business associations, 9 of 16 SMEs, 5 of 8 large companies agreed with the benefit that the consumer understands if consumer protection rules apply in case of a problem. All 16 consumer associations, 18 of 19 public authorities, 28 of 30 citizens, 32 of 45 business associations, 9 of 16 SMEs, 6 of 9 large companies agreed that this information would increase consumer trust.

[176] Platform Transparency Study, page 53.

[177] Platform Transparency Study, pages 28-29.

provided by suppliers. Major running costs for online marketplaces are therefore not likely.

Only few respondents to the targeted and public consultations provided quantitative cost estimates. Of the four online marketplaces responding to the question on costs, two found that costs for complying with new information requirements (one-off and running costs) would be reasonable, one did not find them reasonable and one did not know.[178] In the SME panel, SMEs estimated one-off costs of EUR 2 179 on average (median: EUR 50)[179] and annual regular/running costs of EUR 3 887 (median: zero).[180]

Consequences for online marketplaces of not making it sufficiently clear to consumers that they enter into a contract with a third party supplier vary between Member States (see Table 2 in Annex 10). Uniform transparency obligations would provide clarity on who the contractual partner is and thus eliminate risks of online marketplaces being held liable for the performance of contracts. Transparency requirements should also reduce costs for online marketplaces due to the need to clarify the situation to consumers when problems arise. When consumers know who their contractual partner is and that they need to contact him/her in case of a problem, there should be fewer queries to be handled by online marketplaces.

Some major online marketplaces replying to the targeted consultations took the view that fully harmonised information obligations would bring some cost reduction. Others did not know. SMEs in the SME panel consultation anticipated one-off savings of EUR 214 on average[181], while annual savings reported would amount to EUR 391 on average.[182] In terms of turnover, one-off savings would represent up to 32 %, annual savings up to 38% for micro enterprises.

Costs and savings for authorities

There could be a reduction of enforcement costs, as there would be more clarity about the identity and legal status of contractual partners, which is currently often difficult to establish. Given that consumers will find it easier to address their contractual partners directly, they would probably turn to authorities for help less frequently. In cases where consumer law does not apply, because the third party supplier is a consumer, information about this fact will increase awareness. This can reduce the number of unsubstantiated claims to consumer authorities.

Degree of legal change required in MS

To the extent that Member States do not already require the relevant information (see Table 1 in Annex 10), they would have to add an additional provision in their laws transposing the CRD.

Legal coherence

Transparency requirements for online marketplaces would be complementary to the Commission Platform-to-Business (P2B) initiative, which aims to fight unfair trading practices. The two initiatives pursue the same overarching goals of enhanced transparency and fairness of transactions on online platforms.

However, contrary to the B2B area, EU consumer law applies to all traders, including on-line platforms which qualify as traders, and protects consumers who use these platforms.[183] Therefore, this IA deals only with specific problems identified within this otherwise well-functioning body of EU law. The first is that consumers often do not know who their contractual

[178] Question 77 in the public consultation, see the question in Annex 10, subsection 2.
[179] Estimates ranged from zero to EUR 48 000. Notable is that the maximum amount was reported by the (only) respondent from DK, a micro enterprise. The next highest value reported the (only) respondent from SK (EUR 7 933).
[180] Based on around 30 replies. Estimates ranged from zero to EUR 84 301. The three respondents from PT estimated costs of zero, EUR 5 782 and EUR 84 301, the 2nd highest estimate (EUR 20 000) originates from a self-employed, the (only) respondent from DK, the 3rd highest from PL (EUR 10 000).
[181] Estimates ranged from zero to EUR 3 192 with median of 0.
[182] Estimates ranged from zero to EUR 3 830 with median of 0.
[183] See in particular Chapter 5.2 of the revised Guidance on the UCPD of 25.05.2016.

partner is and what their rights are when they shop through online marketplaces. The suggested new transparency rules would only apply to "online marketplaces", which are already defined and subject to specific consumer information requirements in EU law. Like the CRD Evaluation, studies for the P2B initiative identified a case for enhancing the transparency of ranking criteria for offers on online marketplaces. The two initiatives both address this issue and are complementary, with this IA assessing what could be done to ensure transparency in the presentation of search results in B2C settings and the P2B initiative approaching the topic from a B2B angle. The proposed obligation for online marketplaces to ensure that third party traders self-declare their status is supported by the UCPD prohibition (No. 22 of Annex I) for traders to falsely claim not to be acting as traders. This prohibition will be the legal tool for enforcement authorities to handle situations where traders do not truthfully report their legal status to online marketplaces. The envisaged transparency requirements would also be complementary to the recently published Commission Guidance to facilitate the effective removal of illegal content, increased transparency and the protection of fundamental rights online.[184]
Social impacts
No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration. Consumers acting as suppliers on online marketplaces will be confronted with fewer complaints related to consumer law (not applicable to their transactions), thus facilitating their activity on the marketplaces.
Environmental impacts
The introduction of transparency obligations could have some environmental impacts due to a likely increase in transport and the use of energy for the purposes of delivering tangible goods, which would result from the expected increase in cross-border trade. Increased transparency could also make sellers and online marketplaces more aware of their responsibilities in case of selling faulty products, thus serving as an incentive to increase the number of goods that will not be returned, and ultimately reducing the overall transport of goods.

6.2.2. Options to address lack of transparency, consumer protection and legal certainty for "free" digital services (driver 2)

Option 0: Promoting self and co-regulation

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Modernise consumer protection rules
Self-regulatory initiatives by "free" digital service providers could alleviate consumer detriment, but only to the extent that providers decide to abide by self-regulatory principles. Self and c-regulation can be effective as complements to binding legislation, facilitating enforcement and contributing to achieve its objectives. This was the case for the initiative to prevent the sale of counterfeits online. The "Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet"[185] significantly contributed to preventing offers of counterfeit goods from appearing on online marketplaces. It demonstrated that, together with legislation, voluntary cooperation can contribute to prevent online counterfeiting.

[184] Communication on "Tackling Illegal Content Online" of 28 September 2017, COM(2017) 555 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0555&rid=1
[185] http://ec.europa.eu/DocsRoom/documents/18023/attachments/1/translations/

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However, for "free" digital services it would first be necessary to establish a clear and coherent legal framework to increase consumer protection. In the public consultation, business associations expressed resistance to extending protections, particularly as regards the right of withdrawal. Such reluctance suggests that industry will also find it difficult to agree and implement such improvements on a self- or co-regulatory basis. The likely lack of participation of major providers of "free" digital services in a voluntary initiative would significantly impair its effectiveness, since representativeness is one of the key factors in order for "soft" policy instruments to be successful.[186] The existing voluntary initiatives in the online area, such as the principles developed by the multi-stakeholder group on comparison tools, show the difficulty of bringing together major online traders.[187] It is also difficult to ensure that voluntary initiatives are adequately representative in highly dynamic markets like the online one, where many new enterprises are not organised in industry associations.
Eliminate unnecessary costs for compliant traders
Replies to the targeted consultations indicate that traders already face unnecessary costs linked to the need to check and comply with possible national rules on pre-contractual information and right of withdrawal for "free" digital services. At least in three Member States "free" digital services are regulated and discussions are ongoing in other Member States about introducing new rules. Self and co-regulation will not be able to remove this legal fragmentation and reduce related costs.
General objective
Protect the economic interests of consumers and ensure a high level of consumer protection
Since it is unlikely that the industry would extend the CRD scope to "free" digital services, or at least the right of withdrawal, on a voluntary basis, this option will not be likely to improve the overall level of consumer protection.
Promote the smooth functioning of the internal market
At least in three Member States "free" digital services are regulated and discussions are ongoing in other Member States about introducing new rules. Self and co-regulation cannot remove this legal fragmentation.
ADDITIONAL EFFECTS OF THE OPTIONS
Costs and savings for traders
Not applicable.
Costs and savings for authorities
Not applicable.
Degree of legal change required in MS
Not applicable.
Legal coherence
The non-legislative option would fail to address incoherencies with the upcoming DCD, as only

[186] See the "Principles for better self- and co-regulation" available at: https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf
[187] https://ec.europa.eu/info/live-work-travel-eu/consumers/unfair-treatment/unfair-treatment-policy-information_en

a legislative intervention would ensure that the objectives of the intervention are met.
Social impacts
No significant effects are foreseen in areas such as employment, health & safety, income distribution and good governance & administration.
Environmental impacts
Not applicable due to the digital nature of the services, e.g. no increased use of transport and energy.

Option 2: Extending the CRD to cover "free" digital services

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Modernise consumer protection rules
Extending the CRD to "free" digital services would address current realities of digital transactions for consumers through content neutral and future-proof rules. Filling this gap in consumer protection would reduce consumer detriment by ensuring clearer rules, which would complement EU data protection rules, particularly in the Member States where such rights do not yet exist. When asked about the key reasons for introducing pre-contractual information obligations and a right of withdrawal for "free" digital services, a strong majority of individuals, consumer organisations and MS authorities highlighted improved protection of consumers of digital services with similar functionalities. 38.9% of traders, 26.9% of business associations highlighted such reason for pre-contractual information requirements, and 35.3% of traders and 19.65 of business associations stressed this for the right of withdrawal.[188] In its response to the targeted consultation, one large provider of "free" digital services highlighted possible complications for consumers as a result of these new rules. It mentioned a risk of "over-notification and a bad user experience" if consumers are prompted to provide their consent or acknowledgement. Yet, as indicated by the strong support from other stakeholders, the possible consumer benefits are likely to outweigh this concern. Furthermore, these rules already apply to "free" digital content, and no such concerns were identified in the CRD evaluation. Increasing consumer protection for "free" digital services and the resulting reduction of detriment is likely to increase consumer trust in those services. As a consequence, the use of "free" digital services is likely to further increase, supporting the completion of the DSM.
Eliminate unnecessary costs for compliant traders
By providing a clearer legal framework for "free" digital services across the EU, traders would face reduced costs related to diverging or uncertain information requirements and incoherent rules for digital content products. It would particularly help alleviate the perceived barriers to online cross-border trade, which include differences in national contract law (38.1%) and national consumer protection law (37.4%).[189] It would reduce unnecessary costs of compliant traders of checking and complying with possible national rules on pre-contractual information

[188] For more details on questions and responses, see subsection 3 of Annex 11.
[189] Consumer Conditions Scoreboard 2017, p. 113.

and right of withdrawal for "free" digital services. Existing costs were considered unreasonable by 7 of 10 business associations in the public consultation.[190]

This option would also ensure fairer competition between traders that compete in the market for similar services, for instance between traders offering "free" digital content and "free" digital services, and between traders that offer paid digital services and "free" digital services. This was highlighted in the context of the DCD proposal: *"In the digital economy, digital content is often supplied without the payment of a price and suppliers use the consumer's personal data they have access to in the context of the supply of the digital content or digital service. Those specific business models apply in different forms in a considerable part of the market. A level playing field should be ensured"*.[191]

In the public consultation, 85.2% of individuals, 52.9% of traders, and all responding national authorities and consumer organisations highlighted the level playing field between paid and "free" digital products as a key reason to introduce pre-contractual information obligations. Similarly, 82.2% of individuals, 47.1% of traders, 31% of business associations, 75.1% of national authorities and all responding consumer organisations considered the same benefit for introducing the right of withdrawal. Business associations were less supportive, with 38.1% and 31% considering the level playing field between paid and "free" digital products as a key reason respectively for the introduction of pre-contractual information obligations and the right of withdrawal.

Furthermore, barriers to cross-border e-commerce require action due to the strong growth potential of "free" digital services. Taking no action at EU level entails the risk that legal fragmentation and barriers will increase, as three Member States have already regulated "free" digital services in national law, others are in the process of doing so and yet others are expected to follow if no EU action is taken. Addressing new market developments, regulatory gaps and inconsistencies in EU consumer law in an uncoordinated manner is likely to generate further fragmentation and exacerbate the problems.

General objective

Protect the economic interests of consumers and ensure a high level of consumer protection

Providing EU-wide consumer protection for "free" digital services would have a positive impact on the fulfilment of the right to a high level of consumer protection, enshrined in Article 38 of the Charter, Article 169 of the Treaty on the Functioning of the EU and Article 1 CRD, particularly as it would raise the level of consumer protection in most Member States, where such rights are currently lacking.

Promote the smooth functioning of the internal market

Introducing a consistent legal framework for "free" digital services would contribute to fairer competition for businesses. Whilst this is not measurable in quantitative terms, the increase in consumer protection is likely to enhance consumer trust in "free" services, which may lead to more digital transactions.

Amending the existing framework in the CRD would ensure consumers in all Member States the same consumer protection in contracts for "free" digital services, as they already do in contracts for "free" digital content. As a consequence, there will be increased legal clarity for users and providers of such services.

ADDITIONAL EFFECTS OF THE OPTIONS

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[190] Question 3 in section C.3 of the SME panel consultation, see question and summary of responses in Annex 11, subsection 3.
[191] DCD Council general approach.

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Costs and savings for traders

The extension of the CRD to "free" digital services represents a legislative clarification that would entail moderate costs on companies due to adjustments of their website/online interface. Regarding potential yearly costs, in the SME panel, SMEs estimated on average EUR 8 367 (median: EUR 33)[192] for new pre-contractual information requirements and EUR 9 119 (median EUR 50) for right of withdrawal.[193]

There would be savings for cross-border traders, due to more legal certainty and harmonised rules. In the SME panel, SMEs expected yearly savings of EUR 622 and EUR 396 on average, for pre-contractual information and right of withdrawal respectively.[194]

In the public consultation, 7 of 10 business associations considered current costs due to diverging national requirements unreasonable. These costs are likely to increase over time if more Member States decide to regulate "free" digital services individually. 9 of 12 business associations also estimated future implementation costs as unreasonable.

In the SME panel, SMEs gave estimates regarding current one-off cost of on average EUR 2 485 (median: zero)[195] for both suggested new rights. The average estimate for annual regular/running costs due to diverging national requirements was EUR 1 392 (median: zero).[196] SMEs also indicated that both current and potential future costs related to rules on "free" digital services have no impact on their decision to enter other EU markets. However, whilst current costs are likely to increase over time if more MS decide to regulate "free" digital services, future implementation costs would decrease due to familiarisation with the new rules and would be at least partially offset by the benefits of greater legal certainty and harmonised rules.

Costs and savings for authorities

There would be initial familiarisation costs for public enforcement authorities and courts. Such costs would not be significant, since the extension of the CRD involves existing rules, with which the enforcers are already familiar and that already apply to the similar category of contracts for "free" digital content. Enforcement costs and costs for complaint handling would go down with the introduction of clearer and more consistent rules.

Degree of legal change required in MS

Member States would be required to amend their laws transposing the CRD.

Legal coherence

This option would extend the scope of the CRD to "free" digital services, ensuring a coherent regulatory framework for digital content and digital services in line with the DCD. The introduction of a general right to terminate contracts for “free” digital services within 14 days would complement and increase the protection already provided under EU data protection rules, ensuring, together with the DCD proposal, a consistent legal framework and EU-wide enhanced protection for consumers (see subsection 2 on the interplay of the CRD with the GDPR in Annex 11).

In the public consultation, when asked about the key reasons for introducing pre-contractual

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[192] Estimates ranged from zero to EUR 168 602. The maximum estimate was provided by a small enterprise in PT, 2nd highest estimate (EUR 20 000) came from a self-employed in DK.

[193] Estimates ranged from zero to EUR 168 602. The maximum estimate was provided by a small enterprise in PT, 2nd highest estimate (EUR 20 000) came from a self-employed in DK.

[194] Estimates ranged from zero to EUR 5 242 and zero to EUR 3 932 for pre-contractual information and right of withdrawal, respectively. Maximum estimate reported by a Polish micro enterprise.

[195] Estimates ranged from zero and EUR 48 000. The highest estimate was provided by the (only) respondent from DK. The next highest value reported is from SK (EUR 7 933).

[196] Estimates ranged from zero to EUR 20 000. The maximum estimate was reported by the (only) respondent from DK. The next highest value reported is from PT (EUR 5 782).

information obligations for "free" digital services, 83% of individuals, all responding consumer organisations and 65% of national authorities highlighted better synergies between EU consumer law and EU data protection rules. 78.5% of individuals, all responding consumer organisations and 69% of national authorities stressed this benefit from introducing the right of withdrawal. 28% of traders and 17% of business associations highlighted such synergies as key reasons for introducing pre-contractual information requirements, and 28% of traders and 17% of business associations considered the same benefit for introducing the right of withdrawal.
Social impacts
No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration. Enhancing consumer protection in the digital area might be more effective for vulnerable consumers that are more likely to experience problems when using "free" digital services.
Environmental impacts
Due to the digital nature of the services, the extension of the CRD to "free" digital services would not produce significant environmental impacts related to the increase in cross-border trade, such as increased use of transport and energy.

6.2.3. Options to address overlapping and outdated B2C information requirements (driver 3)

Option 1 (single option): targeted changes to UCPD and CRD to modernise B2C information requirements

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Eliminate unnecessary costs for compliant traders
For overlapping information requirements in advertising (qualifying as "invitation to purchase") and pre-contractual stages of transactions, most business associations (30 of 48) agreed in the public consultation that the removal of the requirement to inform consumers at the advertising stage about complaint handling procedures would give some or significant savings for companies. Very few replies quantified estimated savings. Removing the obligation to display a fax number is primarily a "house-cleaning" measure to remove an obsolete EU rule that will not change the situation on the ground for a vast majority of traders. This is because the obligation to display the fax number applies, according to the CRD, "where available", i.e., it is mandatory only for those traders that still use fax in communication with consumers. In contrast, enabling traders to use more modern online communication tools, such as web-forms or chat as alternative to e-mail, should enable traders to make efficiency gains. The fact that a large number of traders already offer these alternative means of online communication to consumers (in parallel with e-mail address) suggests that they do generate efficiency gains compared to the use of e-mail and that the obligation to maintain a parallel e-mail communication channel may constitute some burden. However, no estimates of these gains are available. Under the proposed amendment, business will be able to provide their e-mail address and e-mail is likely to remain an important means of online communication with consumers. However, business will be able to use either e-mail or any other, more technically advanced and efficient means of online communication with consumers – provided they ensure the same functionality for consumers, i.e. allow them to keep a record of the communication.
General objective
Protect the economic interests of consumers and ensure a high level of consumer protection

Business stakeholders and most national authorities considered that information about complaint handling procedures is not needed at the advertising stage. In contrast, consumer associations were almost unanimous (15 out of 16) in considering that such information should still be included in the advertisement even if repeated as pre-contractual information. This contrasts with the opinion of consumers responding to the Fitness Check behavioural experiment and consumer survey, where a majority of respondents did not consider this information relevant at the advertising stage.

This minimal reduction of the current level of consumer protection would not lead to noticeable negative consequences. It is reasonable to assume that, when seeing product advertising, the consumer's attention is focused on other, more material elements and that information about dispute resolution procedures will only become relevant in case of a subsequent problem. In that case it is likely that the consumer will not remember the advertisement, but rather look for this information in the contract confirmation or check other sources, such as the trader's website.

The suggested removal of the requirement to indicate fax number would not lead to any practical changes, since this means of communication is already largely outdated and rarely used.

The consumers should also not suffer any detriment from removing e-mail as a mandatory means of online communication, since this change would be accompanied with a requirement for traders to ensure, for any online means of communication, that the consumers retain the same functionalities that when using e-mail, namely to keep record of the communication on a durable medium.

Promote the smooth functioning of the internal market

Although the exact amount of cost savings cannot be estimated, the potential cost reduction for traders following these simplification measures could lead to price reductions and increase of consumer sales, including cross-border.

ADDITIONAL EFFECTS OF THE OPTION

Costs and savings for traders

No costs for traders; potential savings due to efficiency gains in communication with the consumers and due to fewer information requirements (no estimates available).

Costs and savings for authorities

None.

Degree of legal change required in MS

Since the relevant requirements are laid out in UCPD and CRD, all Member States will have to make minor adjustments in their national laws.

Legal coherence

The reduction of overlapping information requirements will enhance the consistency between the UCPD and CRD. Changing CRD rules on means of communication will be technology neutral and therefore future-proof, as reference will be made to other means of online communication that enables the consumer to retain the content of the communication rather than to specific technology.

Social impacts

No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration or for vulnerable consumers particularly.

Environmental impacts

Not applicable.

6.2.4. Options to address imbalances in the right to withdraw from distance and off-premises sales (driver 4)

Option 1 (single option): Removing specific obligations for traders related to the right of withdrawal in the CRD

HOW OPTIONS MEET OBJECTIVES
Specific objectives
Eliminate unnecessary costs for compliant traders
Losses due to the CRD obligations (Article 14(2)) for traders to accept the return of goods that have been used during the right of withdrawal period more than authorised by the CRD ("unduly tested goods") and to reimburse consumers before having had the possibility to inspect the returned goods (Article 13) ("early reimbursement"), were investigated in the SME panel. SMEs reported annual losses on average of EUR 2 223 (median: EUR 100)[197] caused by the obligation to accept the return of "unduly tested goods". Four respondents estimated their losses to be on average EUR 1 212 (median: 0)[198] due to the "early reimbursement" obligation. The losses reported by the two responding large enterprises were EUR 1 000 and EUR 500 000 for the return of "unduly tested goods" and EUR 1 000 due to the "early reimbursement" obligation (1 response).[199] This burden is likely to increase due to growing e-commerce and increasing consumer awareness about their withdrawal rights, as attested by the Consumer Conditions Scoreboard 2017. Whilst it is not possible to quantify the exact amount of costs savings, repeal of these obligations would reduce costs for traders.
General objective
Protect the economic interests of consumers and ensure a high level of consumer protection
The proposed changes would formally represent a reduction of consumer protection. In the public consultation, most consumer associations (14 of 15 respondents) and Member State authorities (12 of 16 respondents) considered the right of withdrawal for "unduly tested goods" and the right to early reimbursement as ”rather” or “very important”. However, this reduction of the protection would reduce the burden experienced by the SMEs, which was also recognised by a significant number of respondents from consumer associations and public authorities (see results of the SMS panel and public consultation in Chapter 2.4.5.). The removal of the “right to early reimbursement” is only relevant for consumers who would take the extra trouble of separately sending to the trader the proof that they have sent the returned goods back to the trader (rather than simply sending the goods back and waiting for the trader to receive them). Among these consumers, the removal of this right will only affect those that notify the trader of their withdrawal early in the 14-day withdrawal period, but then delay the sending of the good and of the proof of dispatch to the trader (according to the CRD, the consumer has to send the good back to the trader within 14 days from notifying the withdrawal). Only in these cases, since the CRD requires traders to reimburse the consumer within 14 days

[197] Estimates ranged between zero and EUR 13 500. The highest estimate gave a micro enterprise from DK. The next highest estimates stemmed from a respondent in ES (EUR 12 000) and RO (EUR 10 000).
[198] Estimates ranged from zero to EUR 10 000.
[199] Question 1b in section C.1 of the SME panel consultation, see question in Annex 11, subsection 2.

from the notification of the consumer's withdrawal, the trader may currently need to reimburse the consumer before actually receiving the returned goods. All other categories of consumers that exercise the right of withdrawal will not be affected by this proposed change. Repeal of the obligation to accept the return of unduly tested goods would also have the positive effect of eliminating disputes regarding the diminished value of the good and the resulting consumer's liability, which can go up to 100% of the value where the good cannot be resold. The removal of the right to return such goods would not affect the burden of proof as to whether the good has been unduly tested. This aspect is not regulated in the CRD. Under current rules, the burden of proof is relevant in: 1) deciding whether the good has been unduly used and 2) assessing the "diminished value" due to such a use. The removal of the consumer's right to return unduly tested good (in exchange for the obligation to pay for the diminished value) would eliminate disputes as to the diminished value, but would not affect the application of the burden of proof as to whether the good has been unduly used. As is the case already now, in the event of a dispute on this issue, consumers will have all the available redress opportunities (e.g. ADR, ODR, small claims procedure).
Promote the smooth functioning of the internal market
Although the exact amount of costs savings cannot be estimated, the potential cost reduction for traders could lead to price reductions and increase of consumer sales, including cross-border. The CRD evaluation concluded that, if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, this affects the competitiveness of companies and leads to higher prices for consumers.
ADDITIONAL EFFECTS OF THE OPTIONS
Costs and savings for traders
See above.
Costs for authorities
Costs for dispute resolution bodies and public authorities are likely to diminish, since there will not be disputes about the calculation of the diminished value of returned goods.
Degree of legal change required in MS
All Member States will have to change their national law by removing the two relevant obligations on traders.
Legal coherence
The removal of the right to return unduly tested goods would increase legal clarity for consumers who currently may only discover their liability for the diminished value after exercising the right of withdrawal and returning the unduly tested goods (liability that may go up to 100% of the good's value).
Social impacts
No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration.
Environmental impacts
The removal of the right to return unduly tested goods could contribute to more sustainable consumption patterns and reduce waste, since in many cases the unduly tested goods cannot be re-sold and have to be disposed of.

6.3 Expected impacts on SMEs

6.3.1. Interventions to improve compliance with EU consumer law

Companies (almost all SMEs from 18 Member States) responding to the SME panel consultations showed support for stronger penalties and UCPD remedies. This is often in contrast to the critical views expressed by business associations in the public consultation and in general. It is also noteworthy that the views expressed by individual companies (from 15 Member States, most of which are SMEs and around 23% are large companies) responding to the public consultation were sometimes different from those expressed by business associations, with individual companies (around 23% of which are large companies) being usually less sceptical than business associations, although the difference is less striking there. A similar discrepancy had already been observed when assessing the replies from business associations and individual companies to the 2016 public consultation for the Fitness Check. Furthermore, SME panel's support for stronger penalties does not seem surprising in light of the finding of this IA that the current penalty systems, which are in most cases based on absolute maximum amounts, treat large and small companies in a highly disproportionate manner, to the disadvantage of the smaller ones.[200] This is also confirmed by the results of the SME panel indicating that only 20% to 25% of the SMEs considered the current level of fines as proportionate (p. 16, Chapter 2.3.3) and that around 80% of the SMEs support a turnover-based system (and only 16% prefer the maximum fine as a lump sum). It is also important to note some differences in the process of the consultations (public and SME panel): while public consultations are, in principle, purely self-selective, in the SME panel, Enterprise Europe Network partner organisations select the relevant companies that are best suited to respond to a given consultation from their region, based on the subject of the consultation. EEN partner's understanding of the topic of consultation, the ability to establish the relevance of the consultation for individual companies and the ability to convince those companies to respond are essential drivers for collecting replies. See further details on the SME panel process in Annex 2 point 4.3, and information on the respondents (profile, geographical coverage, size of companies) to consultations (OPC and SME panel) in Annex 2. points 4.2 and 4.3 respectively.

Based on the findings of the SME Panel, between 65% and 76%of (208) SMEs agree that stronger rules on **penalties** would contribute to a more level playing field.[201]

No less than 86% of (216) SMEs support introducing EU-wide rights to **remedies** under the UCPD.[202] 25% stated that the introduction of such EU-wide rights would encourage them to enter other EU markets, as it would eliminate current national regulatory fragmentation[203]. Indeed, when asked to assess the level of savings they could benefit of, if a new EU-wide rule would be introduced, Yearly savings of zero up to EUR 10 000, up to 40% in terms of turnover, are expected.[204] When asked to quantify costs linked to the resources they would need SMEs estimated on average yearly running costs, such as costs for legal advice, of EUR 8 484 (median: EUR 655) on average.[205,206]

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[200] See section 2.3.3.
[201] Question 3 in section B.2 of the SME Panel, see question in Annex 7, subsection 2.
[202] See Table 14 in Annex 8, subsection 2.
[203] Question 4 in section B.1 of the SME panel consultation, for information on the question see Annex 8, subsection 2.
[204] The highest percentage corresponded to a response from PL (absolute amount: EUR 4 000), the 2nd highest share 19.2% corresponded to EUR 1 915, estimated by a respondent from DE. Question 6 in section B.1 in the SME panel consultation, for information on question and responses see Annex 8, subsection 2.
[205] Estimates ranged from zero to EUR 190 497. Highest amount by a self-employed from DK. The 2nd highest value reported a small Portuguese enterprise (EUR 171 551). Also this value is considered as outlier. The average of the 12 estimates from this country amounts to EUR 18 102, the median is EUR 1 609.
[206] Values are based on responses to question 5 of section B.1 of the SME panel consultation see question and summary of responses in Annex 8, subsection 2.

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Whilst no SME panel consultation has been conducted to specifically assess the impacts of strengthened **injunctions** for stopping breaches of EU consumer law, it is reasonable to assume that this measure would not lead to increased costs for compliant traders.

6.3.2 Interventions to modernise consumer protection rules and eliminate unnecessary costs for compliant traders

A majority of SMEs replying to the SME panel agrees that consumers should be informed about the identity (82% in favour) and legal status (81% in favour) of their contractual partner when buying on **online marketplaces**.[207] 84% agree that consumers buying on online marketplaces should be informed about whether EU consumer rights apply to their transaction. 35% of SMEs stated that introducing transparency requirements for online market places would encourage them to enter other EU markets, while 40% did not expect any significant impact on that decision and 22% did not know. Regarding yearly costs stemming from the possible introduction of such new transparency requirements, data show that the average and the median of estimates provided by the SMEs is, respectively, EUR 3 887 and EUR 0. Regarding the yearly savings, the average is EUR 391, with the median of such estimated savings being zero.[208]

In relation to "**free" digital services**, between 40% and 60% of SMEs replying to the SME panel said that the possible extension of the CRD rules to such services would have no impact on their decision to enter other EU markets, with between 8% and 13% stating that such harmonised rules would encourage them to enter other EU markets, whilst between 6% and 33% stated that this new regime would actually discourage them from doing so. Regarding yearly costs stemming from the possible extension of the CRD to free digital services, data show that the average of the estimates provided by the SMEs is EUR 8 367 for pre-contractual information and EUR 9 119 for the right of withdrawal, with the median of such estimates being EUR 33 (pre-contractual information) and EUR 50 (right of withdrawal)[209] Regarding the yearly savings, the averages are EUR 622 (pre-contractual information) and EUR 396 (right of withdrawal), with the median of such estimated savings being EUR 0 in both cases.[210] Such quantitative data, to be interpreted cautiously in light of their significant variance, nonetheless point to a reasonable cost-benefit balance emerging from the possible extension of CRD rights to the provision of free digital services too.

When it comes to the possible simplification of the rules on the **right to withdraw**, SMEs reported annual losses on average of EUR 2 223 (median: EUR 100)[211] caused by the obligation to accept the return of "unduly tested goods". Four respondents estimated their losses to be on average EUR 1 212 (median: 0)[212] due to the "early reimbursement" obligation. 50% of SMEs selling to consumers online (46 out of the 92 respondents) stated that they face disproportionate burdens at least 'sometimes' or 'rarely' due to their obligations related "unduly tested goods" and 40% (36 out of 90 respondents) stated that they face disproportionate burdens at least 'sometimes' or 'rarely' due to their obligation related to the "early reimbursement". This means that the possible removal of such imbalances would lead to corresponding yearly savings.

As regards **overlapping and outdated information requirements**, there was no SME panel consultation on these issues. In the public consultation, 9 of 15 SMEs agreed that information about the geographical address is necessary already at advertising stage but only 2 found so for the

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[207] Question 6 in section C.2 of the SME panel consultation, see question in Annex 8, subsection 2.

[208] Yearly costs estimates ranged from to EUR 84 300 (the maximum estimate stemmed from a small enterprise from PT, the other two estimates from that country amounted to zero and EUR 5 782), savings from zero to EUR 3 830.

[209] Indeed, SMEs estimates ranged from EUR 0 to 168 602 and such very diverging outcome appears to be strongly influenced by the very high maximum value estimated by a small enterprise from PT.

[210] Indeed, SMEs estimates ranged from EUR 0 to 5 242 for pre-contractual information and EUR 3 932 for right of withdrawal. When it comes to one-off savings, mainly linked to adjustments of the websites, SMEs estimated them, to amount to EUR 0 up to EUR 655, both for pre-contractual information and right of withdrawal.

[211] Estimates ranged between zero and EUR 13 500. The highest estimate gave a micro enterprise from DK. The next highest estimates stemmed from a respondent in ES (EUR 12 000) and RO (EUR 10 000).

[212] Estimates ranged from zero to EUR 10 000.

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information about the complaint handling. However, the proposed removal of the obligation for traders to display the fax number will remove an obsolete EU rule that is unlikely to change the situation on the ground. By contrast, introducing the possibility for traders to use more modern communication tools, such as web-forms instead of e-mail address, should enable traders to make efficiency gains in their communication with consumers. However, no estimates of these gains are available.

7 COMPARISON OF THE OPTIONS

7.1. Improve compliance with EU consumer law

Option 1 would address problem drivers 1 (ineffective mechanisms to stop and deter infringements) and 3 (ineffective mechanisms to tackle mass harm situations). Ensuring well-functioning enforcement mechanisms is key to improve compliance with EU consumer law.

Option 2 would address the same problem drivers as package 1. In addition, it would also partially address problem driver 2 (ineffective mechanisms to ensure that consumers get redress for the harm suffered).

Option 3 would address all three problem drivers, by also ensuring strengthened mechanisms for collective redress in mass harm situations..

As option 1 only addresses some of the drivers behind the problem of lack of compliance it cannot provide a full solution to this problem. It would contribute to improving compliance by strengthening enforcement, but it would not facilitate neither individual nor collective consumer redress, which could be another important incentive for traders to comply with consumer law.

Option 2 builds on option 1 and would ensure the synergetic effects of combining dissuasive penalties with UCPD remedies. Data shows that in Member States with higher penalties for UCPD infringements, introducing UCPD remedies make it roughly 3 times less likely to become a victim of unfair commercial practice than in countries with medium or low penalties.[213]

Option 3 builds on options 1 and 2. In addition, it includes strengthened mechanisms for collective redress. It would therefore provide stronger incentives for traders to comply with EU consumer law than options 1 and 2. The deterrent effect of remedies for victims of unfair commercial practices will be stronger with option 3 than with option 2: The 2017 Consumer Conditions Scoreboard[214] confirmed that consumers would be more likely to use UCPD remedies if they are also given access to a practical collective mechanism for a qualified entity to handle their case on their behalf.

The same reasoning applies if the aim is to reach the general objectives of **protecting the economic interests of consumers and ensuring a high level of consumer protection**. They would be best met by option 3, since this option would have the strongest impact in terms of improving compliance with EU consumer law. Stronger penalties, more effective injunctions procedures and better individual and collective redress possibilities are all ingredients for improving compliance with consumer law. For example, as the current situation shows, the existence of strong penalties alone does not guarantee better consumer conditions. Acting in all these areas is most likely to improve compliance and hence the overall level of consumer protection.

As concerns the general objective of promoting the **smooth functioning of the internal market**, all three options would contribute to fairer competition by not creating an unfair advantage for non-compliant traders versus compliant ones. However, the best overall results for compliant traders

[213] See Section 6.1.2.on impacts of Option 2.

[214] The 2017 Scoreboard found that the main reasons for consumers not to act in case of problems are: excessive length of the procedures (for 32.5% of those who didn't take action); perceived unlikelihood of obtaining redress (19.6%); previous experience of complaining unsuccessfully (16.3%); uncertainty about consumer rights (15.5%); not knowing where or how to complain (15.1%); psychological reluctance (13.3%).

would be achieved by option 3, since the introduction of strengthened mechanisms for collective redress would further contribute to fair competition to the benefit of compliant traders.

Other positive effects can also be expected from option 3. This option would ensure more effective mechanisms for consumers to get redress when their rights under the UCPD have been infringed, both through individual and collective actions. This would be specifically helpful to vulnerable consumers and to deter misleading environmental claims, which would encourage sustainable consumption patterns in line with the Circular Economy Action Plan. Option 2 would also include positive impacts of UCPD remedies, but to a lesser extent since it does not include a strengthened mechanism for collective redress.

As concerns **efficiency,** all 3 options could lead to initial familiarisation costs, but also to savings for compliant traders. Data on costs and savings were gathered via the consultations for this IA. Overall, relatively few respondents provided quantitative estimates. For option 1, most respondents said that strengthening penalties will have no impact on their costs or could not reply to this question. Most business associations considered that the revision of the injunctions procedure (option 1) could increase the insurance premiums for coverage against claims in mass harm situations and could lead to increased use of the ID.[215] Option 2 includes the costs of option 1 and in addition those related to new rules on individual UCPD remedies. The median of the one-off costs, such as costs for legal advice assumed by SMEs for such remedies is EUR 638. The median of the annual running costs estimates is EUR 655. 9 of 15 MS authorities think the costs of administrative and judicial enforcement would increase to some extent.[216] Option 3 includes the costs of options 1 and 2, and also costs related to collective redress. National authorities were divided in their assessment of the implementation and running costs for courts and administrative authorities, but did not consider such costs significant. Qualified entities held mixed views, similar shares predicted increased and decreased costs. For compliant traders, the costs of introducing Option 3 would be insignificant and lowered for traders engaging in cross-border trade due to further harmonisation among the national procedures.[217]

Given that option 3 is the broadest, it also entails more costs than the other options. On the other hand, under all options there would be savings for traders when trading cross-border due to increased harmonisation of the rules. In particular, there would be increased clarity on the possible consequences for traders in case of non-compliance, which would lead to lower and more accurate risk-assessment costs. These savings would be bigger under option 3, as it has a wider scope than the other options. Costs for public enforcement authorities and courts under all options would include a possible increase in the number of enforcement and court cases. However, these costs are likely to be off-set by an overall reduction of breaches of EU consumer law and by the streamlining effects and procedural efficiencies introduced by all options. Such savings would be higher under option 3 due to its broader scope and greater deterrent effect.

As concerns **proportionality and subsidiarity**, all three options would require legal changes in Member States. Under option 1, a majority of Member States will need to change their legislation to introduce turnover-based penalties or to remove absolute caps where they exist, and to change their legislation transposing the ID to introduce improved procedural features for injunctive relief. This could be sensitive in some of these Member States. Options 2 and 3 would require all Member States to adjust their legislation. Firstly, requiring Member States to ensure that the specific remedies of contract termination and refund, as well as compensation for damages are available for breaches of the UCPD (options 2 and 3) would require amendments of national law in all Member States. Secondly, strengthening collective redress (option 3) would also require a degree of legal change in certain Member States, particularly in the nine Member States that do not have any

[215] See detailed data in Section 6.1.1.
[216] See detailed data in Section 6.1.2.
[217] See detailed data in Section 6.1.3.

collective redress mechanisms. These EU interventions are likely to be sensitive in some Member States. Under option 2, legal changes to ensure collective redress mechanisms will not be required. EU action can therefore be expected to be less sensitive than with option 3, although the introduction of UCPD remedies could still raise concerns in some Member States.

The measures included in the different options also enjoy **different levels of support from stakeholders**. The public consultation showed that many consumer associations and public authorities support expressing the maximum level of fines as a percentage of the trader's turnover, whereas only a few business associations agreed. In contrast, in the SME panel, no less than 80% of the respondents considered that the most proportionate, effective and dissuasive way of setting the maximum level of fines is by expressing it as a percentage of the trader's turnover, possibly combined with an absolute amount, whichever is higher.[218]

In the public consultation for the Fitness Check, most consumer associations, consumers and public authorities agreed that the ID should be made more effective. 45% of businesses agreed, compared to 12% of business associations.[219]

In the public consultation for this IA, a large majority of responding public authorities, consumer associations and consumers indicated that an EU-wide right to UCPD remedies should be introduced to ensure that traders comply better with consumer protection rules. On the other hand, support was low among business associations (35%) and individual companies (31%). In the SME panel consultation, 87% of respondents supported introducing an EU-wide right to UCPD remedies.[220]

In the ID survey, national authorities (88.6%) and consumer organisations (93.8%) strongly supported the addition of collective redress to the ID, whereas business associations were less supportive (15.8%).[221]

Table 1: **Comparison of the Options**

Comparison criteria	**Detailed comparison criteria**	**Option 1**	**Option 2**	**Option 3**
Effectiveness	**Specific objective: improve compliance**	+	++	+++
	General objective: High level of consumer protection	+	++	+++
	General objective: Smooth functioning of the internal market	+	++	+++
	Social impacts (vulnerable consumers)	0/+	+	++
	Impact on the environment	0/+	+	++
Efficiency[222]	Costs	0/-	0/-	-
	Savings	0/+	0/+	+
Proportionality and	Legal change required in	-	--	---

[218] See further data in Section 5.1.4.
[219] Idem.
[220] See further data in Section 5.1.5.
[221] See further data in Section 5.1.6.
[222] Data on costs and savings gathered via SME panel and targeted and public consultation. Relatively few respondents provided quantitative estimates.

subsidiarity	MS			
	Sensitivity in Member States	--	--	---
Stakeholders' views:	Consumer associations	+	+	+
	Citizens	+	+	+
	Public authorities	-+	-+	-+
	Business associations	-	-	-
	SMEs	+	+	+
	Large companies	-	-	-

The comparison shows that option 3 scores best in terms of effectiveness. This applies to both the specific and general objectives. Consequently, if the objective is to improve compliance with EU consumer law, option 3 should be the preferred option. This package has the highest costs, but these are likely to be off-set by savings. Overall, costs are not likely to be significant. However, option 3 would require the highest level of legal change in the Member States and will probably raise most political sensitivity.

Our consultations show that most business associations do not support any of the proposed measures, and hence do not support any of the options. In contrast, consumer associations and public authorities are generally supportive of all the options. Many SMEs support the measures on which they were expressly consulted, i.e. turnover-based penalties and individual remedies, which are both included in options 2 and 3 (no SME panel consultation was performed for the revision of the ID).

7.2. Modernise consumer protection and eliminate unnecessary costs for compliant traders

Four problem drivers have been identified in this area. For two drivers (overlapping or obsolete information requirements and imbalances in the right of withdrawal) only single options have been identified and analysed.

For the two other problem drivers (lack of transparency and legal certainty for B2C transactions on online marketplaces, lack of transparency, consumer protection and legal certainty for "free" digital services) there are two alternative options, of which one is promoting self- and co-regulation. Self- and co-regulation is not likely to achieve the objectives of modernising consumer protection rules and eliminating unnecessary costs for compliant traders. Options involving regulatory intervention are more likely to achieve these objectives.

Each of these options addresses problem drivers that other options do not address. They are therefore not mutually substitutable. The options could nevertheless be combined in different ways, such as for example by acting only on problem driver 2 and 4 or only on driver 3. However, acting only on some of the drivers would fail to address the other drivers, which would lead to keeping ineffective consumer protection rules and/or unnecessary costs for compliant traders. As an example, extending the CRD to cover "free" digital services will not help increase transparency on online marketplaces. It will also not, for example, remove imbalances in the right of withdrawal.

As a consequence, if the aim is to modernise consumer protection rules and eliminate unnecessary costs for compliant traders to the greatest extent possible, the best approach would be a package including all the relevant options, i.e.:

1. Providing transparency requirements for contract conclusion on online marketplaces.
2. Extending the CRD to cover “free” digital services.
3. Modernising overlapping and outdated B2C information requirements.
4. Removing specific obligations for traders related to the right of withdrawal in the CRD.

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This package would contribute to a high level of consumer protection. It would strengthen consumer protection in B2C transactions on online marketplaces and in contracts for "free" digital services. It would also remove one specific information requirement that most consumers do not consider relevant before the pre-contractual stage of the transaction and would enable traders to use more efficient means of online communication with consumers. It would also remove obligations on traders to accept the return of unduly tested goods and to reimburse the consumer on the basis of a mere proof of sending the returned goods (early reimbursement).

Although some of these changes constitute a formal reduction of the level of consumer protection, the removal of the right for consumers to return unduly tested goods would have the positive effect of eliminating disputes regarding the diminished value of the goods. The removal of the "right to early reimbursement" is only relevant for those consumers who would take the extra trouble of separately sending to the trader the proof that they have sent the returned goods back. Among these consumers, the removal of this right will only affect those that notify the trader of their withdrawal early in the 14-day right of withdrawal period but then delay the sending of the good and proof of dispatch to the trader.

This package would also simplify EU consumer rules and thereby reduce unnecessary costs for compliant traders. The proposed interventions for online marketplaces and "free" digital services would ensure greater legal clarity in B2C relations and reduce costs for traders stemming from legal differences between Member States. Eliminating overlapping and outdated information requirements and removing specific obligations related to the right of withdrawal would reduce costs for traders due to current imbalanced rules.

Many stakeholders support new transparency requirements for contract conclusion on online marketplaces. Consumer associations and public authorities, citizens and the vast majority of companies and business associations agree that consumers buying on online marketplaces should be informed about the identity and status of the supplier. They also agree that platform transparency would increase consumer trust. Also a vast majority of SMEs is in favour of informing about the identity and legal status of the contractual partner. There is also support for platform transparency from business associations.[223] Some major online marketplaces report that the suggested new rules would bring some cost reduction, whilst others do not know. SMEs anticipated one-off savings of EUR 214 on average, while annual savings reported would amount on average to EUR 391. Of the four online marketplaces responding to a question on costs, two found that the costs for complying with new information requirements (one-off and running costs) were reasonable, one did not find them reasonable and one did not know. SMEs reported one-off costs of EUR 50 (median), and annual regular/running costs of EUR 0 (median).[224]

Most stakeholders support extending the CRD to cover "free" digital services. Traders support introducing information requirements, but are divided on the right of withdrawal. Business associations do not support the introduction of a right of withdrawal. SMEs estimated annual costs for new rules on "free" digital services at EUR 33 (median) for pre-contractual information and EUR 50 (median) for the right of withdrawal, yearly savings on average of EUR 622 for pre-contractual information requirements and EUR 396 for rules on the right of withdrawal. SMEs indicate that potential future costs related to rules on "free" digital services would have no impact on their decision to enter other EU markets. Business associations estimated future implementation costs as unreasonable.[225]

Business associations support the deletion of overlapping B2C information requirements from the UCPD. Consumer associations are against this proposed intervention. Most of the public authorities

[223] See Section 5.2.3 for detailed breakdowns of this data.
[224] See further data in Section 6.2.1.
[225] See further data in Section 6.2.2.

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consider that information about the trader's address is important also at the advertising stage and should therefore be kept in the UCPD, but that information about complaint handling is not important at that stage.[226] Stakeholders largely support replacing the current requirement for e-mail address with a technologically neutral reference to means of online communication and removing the requirement to provide a fax number. No costs are foreseeable for traders. Most business associations agree that the removal of the requirement to inform consumer already at the advertising stage about complaint handling procedures would give savings for companies. However, very few replies quantified the estimated savings.[227]

35% of online companies report significant problems due to specific obligations for traders related to the right of withdrawal. A majority of business associations confirmed that traders face disproportionate/unnecessary burden resulting from these obligations. In the SME panel, close to half of self-employed, micro, small companies selling to consumers online reported disproportionate burdens. However, the majority of consumer associations, MS authorities and citizens do not support removing these trader obligations. SMEs report annual losses on average of EUR 2 223 caused by the legal obligation to accept the return of "unduly tested goods". Four SMEs estimated on average losses of EUR 1 212 due to the "early reimbursement" obligation. Losses estimated by the two responding large enterprises were EUR 1 000 and EUR 500 000 respectively for the return of unduly tested goods" and EUR 1 000 due to the "early reimbursement" obligation.[228]

Table 2: **Comparison of the Options**

Comparison criteria	**Detailed comparison criteria**	**Transparency on online marketplaces**		**Free digital services**		**Overlapping and outdated information requirements**	**Imbalances in the right of withdrawal**
		Option 1	Option 2	Option 1	Option 2	Option 1	Option 1
Effectiveness	Specific objective: Modernise consumer protection	0	+++	0	+++	+	0
	Specific objective: eliminate unnecessary costs for compliant traders	0	+	0	+	+	+++
	General objective: High level of consumer protection	0	+++	0	+++	0	0/-
	General objective: Smooth functioning of the internal market	0	+++	0	+	+	++
	Social impacts (vulnerable consumers)	0	+	0	+	0	0
	Impact on the environment	0	+	0	0	0	+

[226] See further data in Section 2.4.4.
[227] See further data in Section 6.2.3.
[228] See further data in Sections 5.2.6 and 6.2.4.

Efficiency[229]	Costs	0	0/-	0	0/-	0	0
	Savings	0	0/+	0	0/+	+	+++
Proportionality and subsidiarity	Legal change required in MS	0	-	0	-	0/-	-
	Sensitivity in Member States	0	0	0	0	0	0/-
Stakeholders' views	Consumer associations	0	++	0	++	0	--
	Citizens	0	+	0	+	0	-
	Public authorities	0	+	0	+	+	0
	Business associations	+	+	+	-	+	++
	SMEs	+	+	+	0	+	++
	Large companies	+	+	+	0	+	++

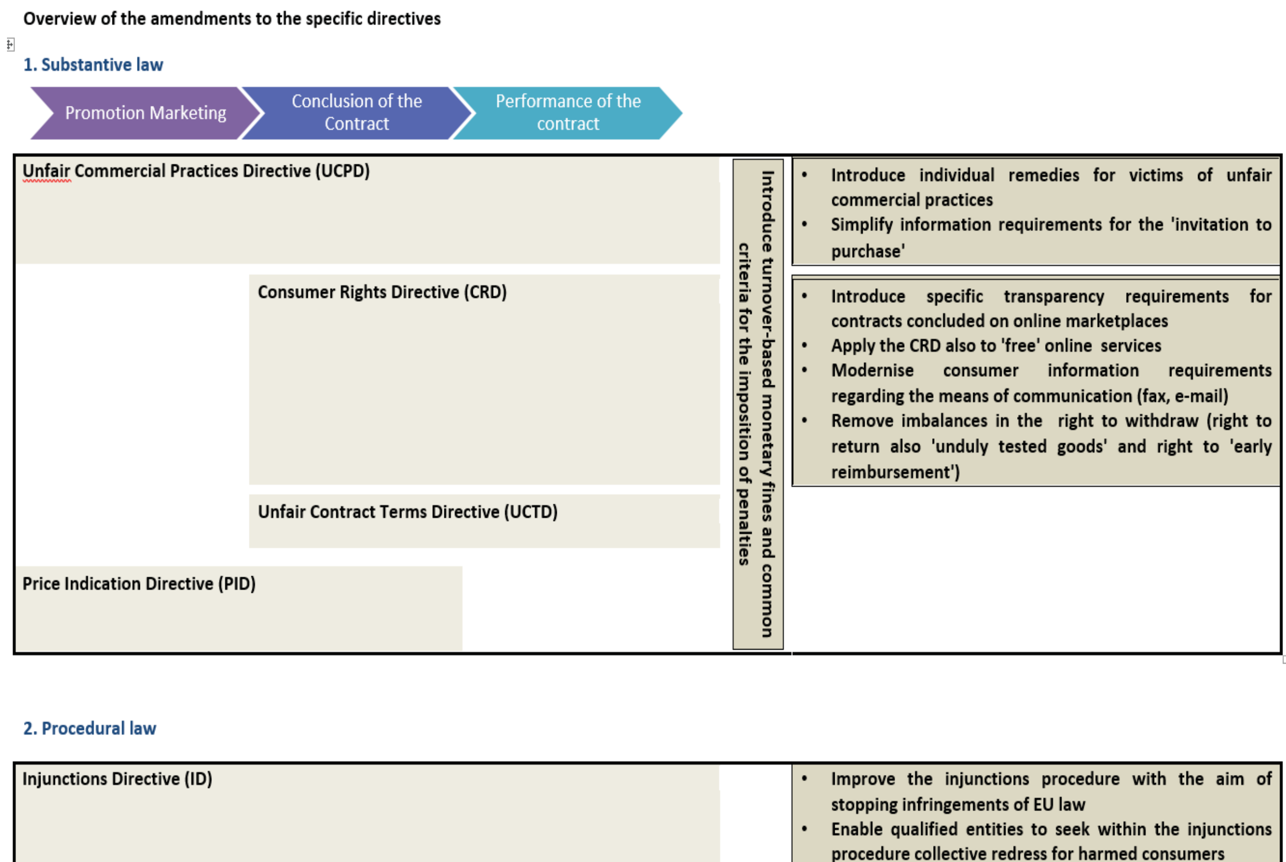
[229] Data on costs and savings gathered via SME panel and targeted and public consultation. Relatively few respondents provided quantitative estimates.

7.3 Preferred package of Options

Having compared the options, the preferred package would include:

1. To improve compliance with EU consumer law:
   Option 3 (improving enforcement and individual and collective consumer redress).
2. To modernise consumer protection rules and eliminate unnecessary costs for compliant traders:
   A package including all the relevant interventions (providing specific transparency requirements for contract conclusion on online marketplaces, extending the CRD to cover "free" digital services, modernising outdated and overlapping B2C information requirements and removing specific obligations for traders related to the right of withdrawal in the CRD).

Figure 4. Overview of proposed amendments to specific directives[230]



8 PREFERRED PACKAGE OF OPTIONS AND OVERALL IMPACTS

8.1 Brief overview of the impacts of the preferred packages of Options

In the area ensuring better compliance with consumer legislation the preferred Option 3 should lead to a reduction of consumer detriment and greater consumer trust. There should also be a positive impact on the protection of vulnerable consumers and on the environment. As regards traders, it will promote fairer competition to the benefit of compliant traders. Certain costs are expected for both traders and authorities to familiarise with the new rules and to implement them. Legal changes will be required in national laws but these should result in better legal coherence both among the consumer law instruments at stake and with other relevant EU law.

[230] For the CSGD, impact on the progress of the legislative negotiations on the amended proposal COM(2017)637 of 31 October 2017 would need to be taken into account.

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In the area of modernising consumer protection rules and eliminating unnecessary costs for compliant traders, the package of preferred options should lead to better consumer protection when using online marketplaces and free digital services. For traders, it will eliminate costs related to diverging requirements but also raise some implementation costs in area of online marketplaces and "free" digital services. The modernisation and simplification of information requirements will provide some savings for businesses without reducing the level of consumer protection in practice. The intervention regarding the right of withdrawal is important to alleviate the unjustified burden on businesses, in particular SMEs. It entails a formal reduction in the level of protection but its impacts are limited and it also has some positive effects such as reduction of disputes. In general this reform is needed to instil more balance in the right of withdrawal now that the levels of eCommerce have significantly increased and consumers are more aware about their withdrawal rights. Some legal changes will required in national laws but these should result in better legal coherence both among the consumer law instruments at stake and with other relevant EU law.

8.2. Synergies of the proposed interventions

In addition, the combined package of preferred Options in both areas of better compliance and modernisation/burden reduction are expected to lead to strong synergies.

To illustrate the synergies of this combined package, both the suggested new rules on transparency for contract conclusion on online marketplaces and for "free" digital services would introduce new specific requirements for online traders to provide information to consumers. The suggested new rules on enforcement and redress would give traders strong new incentives to avoid breaching these information requirements. Firstly, in case of a widespread infringement, the trader would be subject to deterrent and proportionate turnover-based fines for breaches of the new information rules. Secondly, in addition to breaching the specific new information requirements the trader could omit "material" information required by the UCPD (Article 7(5) UCPD). With the suggested new rights to UCPD remedies, consumers could then take individual action against the trader to ensure effective redress.[231] Thirdly, if several consumers have been affected by the breach of the new information requirements, the revision of the ID would create an effective tool to enforce their rights collectively by stopping breaches and ensuring redress for the victims.

The combined package of Options would also lead to greater awareness about consumer rights, which is a major factor for their effective exercise. For instance, greater transparency when using online marketplaces would ensure that consumers are informed about the important differences between consumer rights and rights in consumer-to-consumer contracts. Stronger rules on public enforcement and consumer redress would mean that consumer rights infringements could attract more media attention With the proposed new rules on the injunction procedure, traders would be obliged to inform, at their expense, the affected consumers about the breach as established by a definitive injunction order, the legal consequences of the breach and redress opportunities under the collective redress order or approved collective settlement. Such publicity would likewise improve consumer redress and contribute to greater awareness among consumers and traders about their rights and obligations.

Strengthened penalties and more effective redress opportunities for consumers would also be essential for enforcement co-operation in cross-border cases under the revised CPC Regulation. Specifically, the implementation of all the measures contained in the preferred package of Options that relate to improving compliance would increase deterrence for traders that could otherwise breach consumer law in several Member States. With this package, they would get incentives to offer voluntary commitments to settle infringement cases in the context of coordinated CPC enforcement actions.

[231] If it can be established – on a case-by-case basis – that the trader has committed an unfair commercial practice by omitting this information.

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A multivariate analysis has been conducted on data from the Consumer Conditions Scoreboard 2017 regarding UCPD remedies.[232] It suggests that the effect of remedies is positively correlated with the effectiveness of public monitoring (enforcement).[233] For countries showing the highest level of public monitoring, the estimated effect of linking remedies to breaches of the UCPD corresponds to a reduction of 21.4 percentage points in the probability of experiencing an unfair commercial practice, i.e. more than five-fold the estimated unconditional effect of remedies.[234] Equally, the effect of remedies linked to UCPD breaches on the likelihood to have experienced an unfair practice is strongly amplified in countries imposing a high level of sanctions for such breaches. This indicates that when combined with effective enforcement and/or dissuasive sanctions, redress can be a powerful driver for better compliance with the UCPD.

There are also strong synergies between rights to UCPD remedies and collective injunctions and redress. Since consumers are generally reluctant to initiate individual redress actions, more consumers would be likely to use new rights to remedies under the UCPD if they also have access to a mechanism where a qualified entity can handle their case on their behalf.

8.3. Potential risks, unintended consequences and trade-offs under the Preferred Options

8.3.1 Improve compliance with EU consumer law

As described in Section 2.5, these proposed interventions aim at aspects of the problem that many traders do not comply with EU law that cannot be adequately addressed through non-legislative interventions. This preferred Option is intended to complement other actions that are or have been taken to meet the needs identified in the Fitness Check, CRD Evaluation and Collective Redress Report to ensure better knowledge about EU consumer law, strengthened enforcement and easier possibilities for consumer redress. Accordingly, there could be a risk that this preferred Option will not achieve its full potential if other interventions that form part of the same puzzle, such as awareness raising activities and stepped-up enforcement through common actions by national enforcers under the revised CPC Regulation, are not ensured. However, as described in Sections 2.1 and 2.2, a number of measures have been undertaken to ensure that these initiatives will deliver successfully.

There is also a risk that the potential of this preferred Option may not be fully reached if Member States fail to allocate enough resources to ensure their adequate implementation. This is notably the case for the proposed new rules for penalties. If Member States do not ensure that the competent authorities have sufficient capacity to deal with infringements, the deterrent effect of stronger penalties will not be achieved.

Some stakeholders have also expressed concerns that approximating rules on penalties could take some flexibility away from competent national authorities and make it more difficult for them to apply the most adequate penalty. These concerns are addressed by requiring the existence of fines and harmonising their level only for the most important cross-border infringements of EU consumer rules, which are subject to coordinated action by national authorities through the CPC network. Even in these cases, Member States may go beyond the proposed minimum rules if they consider that even stronger penalties are appropriate. For all other infringements, the preferred option only envisages common criteria for the imposition of penalties, stressing the cross-border aspect, without, however, harmonising the level or type of penalties.

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[232] Source: JRC Technical Report An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems“. A general description of the methodology is provided in Annex 4 and the full JRC report is included in Annex 14.

[233] Measured through the following indicator from the CCS2017: "% of retailers who agree that public authorities actively monitor and ensure compliance with consumer legislation in their sector".

[234] The unrounded figure is -21.4358.

As concerns the suggested new rules for collective consumer redress, some stakeholders have argued that strengthened mechanisms for private redress could lead to increased costs for traders because of abusive litigation (frivolous claims). The 2017 Study on collective redress found that stakeholders' views were split when it came to possible risks of abusive litigation associated with collective redress, with 51% of respondents agreeing and 49% disagreeing that there are such risks. However, when asked about the actual materialisation of such risks, 77% of all respondents reported that they had never experienced any instance of abusive litigation. This suggests that these concerns are rather hypothetical. The Fitness Check did also not find evidence to suggest that qualified entities have displayed any form of frivolous action in the context of the ID or that they would risk their status as qualified entities to bring such claims. Any such risks under the suggested new rules would also be mitigated by proposed safeguards against abusive litigation, notably specific criteria for the designation of qualified entities and requirements for qualified entities to be transparent about the origin of the funds used to support litigation. In redress cases, the court/authority would also scrutinize the merits and extent of the mass harm alleged by the qualified entity.

It has also been argued that the envisaged wide scope of the revised ID could involve a risk of decreased legal certainty for traders, as it could be unclear how to identify which provisions of EU law could be enforced through the revised injunctions procedure and strengthened mechanisms for collective redress. However, this risk is mitigated by the fact that the ID would not create any substantive rights or obligations. It would only provide procedural mechanisms for the protection of the collective interests of consumers. It would only be possible to bring representative actions for redress under the ID where EU or national law provides for such substantive rights. As a consequence, the revised ID would not decrease legal certainty when it comes to which obligations traders need to respect vis-à-vis consumers or which infringements could trigger litigation.

Some stakeholders have raised concerns that strengthened mechanisms for individual and collective consumer redress could lead to increased costs for Member States due to more consumers taking their cases to court. However, such costs are likely to be mitigated by fewer infringements following the increased deterrent effect of the Preferred Option in the area of better compliance, which would improve enforcement and individual and collective consumer redress. The proposed procedural mechanisms would also lead to judicial and administrative efficiency, by ensuring a single procedure for measures to stop infringements and eliminate their continuing effects.

8.3.2 Modernise consumer protection and eliminate unnecessary costs for compliant traders

As regards online marketplaces, stakeholders such as consumer associations and some public authorities have argued that there is a need to go beyond the suggested new rules on transparency and also introduce rules on liability for online marketplaces for the performance of contracts concluded by consumers with third party suppliers. However, such liability is not considered in this IA, as it could be incompatible with the approach laid down in Article 15(1) of the e-Commerce Directive.

The suggested rules for online marketplaces could possibly bring a risk of disproportionate costs for smaller platforms. Notably, changing the interfaces to enable third party traders to self-declare whether they act as traders or not could be relatively more costly for small marketplaces, which would not benefit from the same economies of scale as bigger companies. Similarly, small traders which sell on platforms might face relatively higher costs when complying with the new rules. These risks will be mitigated by a transition period until full application of the new requirements, during which small online marketplaces and traders can adapt their business models.

There is a risk that introducing requirements for specific sales-channels, such as online marketplaces, could be less future-proof than requirements that are completely technology neutral. In this case, this risk would be outweighed by the benefits of the proposed transparency requirements. Online marketplaces are central actors in the current economy and there is ample evidence that both consumers and traders suffer from lack of transparency when concluding

contracts on such marketplaces. There is therefore a clear case for a legal intervention on this technology-specific topic.

Some business associations consider extending CRD rights to pre-contractual information and to withdraw from contracts to "free" digital services as over-regulation, since consumers do not pay for such services with money and there would be some costs for traders. However, these concerns would be outweighed by the added value of ensuring users of "free" digital services these key consumer rights, and by added legal clarity from coherent rules for digital services with or without payment and for digital content under the CRD and the future Digital Contracts Directive.

Some business associations also claim that a right of withdrawal for contracts for "free" digital services under the CRD is not necessary, since it overlaps with EU data protection rules. However, as can be seen from the description of the interplay with the GDPR in subsection 2 of Annex 11, the extension of the CRD right of withdrawal proposed in this IA would rather complement than duplicate the rights stemming from EU data protection rules. Furthermore, not granting consumers with an EU right of withdrawal would entail the risk that barriers will increase, as it would be left to the Member States to determine whether any consumer protection should exist on this aspect. Consumers would not be as protected as they are for similar products concerning the right to change their mind and withdraw from the contract. Without EU intervention on the right of withdrawal for "free" digital services, the legal framework would become even more fragmented, with EU harmonised rules on pre-contractual information - identical to those applicable to similar products such as paid services and digital content and differing rules regulating only one aspect of "free" digital services.

As concerns reducing burdens for traders, some consumer associations and Member States will be critical to changing the right of withdrawal, particularly as regards the right to return unduly used goods. Although there is a trade-off between consumer protection and reduction of burdens for traders on this point, the changes will affect only those consumers who are not diligent or even abuse the withdrawal right by not exercising the required level of care. Many consumer associations (7 of the 16 responding to a question about this in the public consultation) acknowledge that the current right of withdrawal for unduly tested goods creates disproportionate burdens for traders. This revision will also be in line with the original purpose of this consumer right, which is, as clarified in Recital 37 of the CRD, that there should be a right to withdraw from distance sales because "the consumer is not able to see the goods before concluding the contract" and from off-premises contracts because of "the potential surprise element and/or psychological pressure". By adjusting the right to return goods that consumers have tested more than necessary, this intervention would lead to a better balance between the obligations of traders and rights of consumers.

8.4. REFIT (simplification and improved efficiency)

REFIT Cost Savings – Preferred Option(s)		
Description	***Amount***	***Comments***
More dissuasive and proportionate **penalties**		No quantified data on efficiency gains are available but in the SME Panel consultation, an overwhelming majority of respondents (between 66% and 76 %) agreed that stronger rules on penalties would increase the level playing field between traders.
Require MS to ensure **remedies** for victims of unfair commercial practices	Average of estimated one-off savings: EUR 1 405 (range: 0 - EUR 24 176) for SMEs; EUR 250 (range: 0 - EUR 1 000) for large enterprises Average of estimated annual savings: EUR 704 (range: 0 - EUR 10 000) for	Estimated one-off and annual savings for traders, based on responses to the SME panel consultation.

	SMEs; 0 for large enterprises.	
Strengthened **collective injunctions and redress**		No quantified data on efficiency gains are available. In the ID survey, 53% of all respondents considered that the introduction of Option 4b would have a positive impact on procedural efficiencies; 49% of all respondents considered that Option 4b would have a positive impact on creating a more level playing field.
Increase transparency on **online marketplaces**	Average of estimated one-off savings: EUR 214 (range: 0 – EUR 3 192) for SMEs.[235] Average of estimated annual savings: EUR 391 (range: 0 – EUR 3 830) for SMEs.[236]	Estimated one-off and annual savings for traders, based on responses to the SME panel consultation.
Improve fair competition and consumer protection for **"free" digital services**	Average of estimated one-off savings: EUR 109 for pre-contractual information, EUR 74 for right of withdrawal (range: 0 – EUR 655, both for pre-contractual information/right of withdrawal), for SMEs.[237] Average of estimated annual savings: EUR 622 (range: 0 - EUR 5 242) for pre-contractual information, EUR 396 (range:0 - 3 932) for right of withdrawal, for SMEs.[238]	Estimated one-off and annual savings for traders, based on responses to the SME panel consultation.
Modernise some B2C information requirements – removal of trader's obligation to provide **information about complaint handling** at the advertising stage		Very limited quantitative data available, however views expressed by business associations suggest some to significant savings for companies.
Modernise some B2C information requirements – removal of trader's **obligation to display the fax number** and enable **more modern means of communication** (such as web-form) instead of email address		Very limited quantitative data available, however the fact that a large number of traders already offer these modern means of communication to consumers (in parallel with e-mail address) suggests that they do generate efficiency gains compared to the use of e-mail. Removal of the obligation to display fax number may have no effects on costs as currently it is mandatory information only for those – rather few – traders that might still use fax in their communication with consumers.
Remove some	Average of estimated annual losses due to	Estimated annual losses for traders, based

[235] No estimates received from large enterprises.
[236] No estimates received from large enterprises.
[237] No estimates received from large enterprises.
[238] No estimates received from large enterprises.

imbalances in the right of withdrawal – removal of trader's **obligation to accept the return of the goods under the right of withdrawal even when the consumer has used such goods more than permitted**	this obligation: EUR 2 223 (range: 0 – EUR 13 500, median: EUR 100) for SMEs.[239]	on responses to the SME panel consultation. Besides the limited number of cost savings estimates, views from business associations and companies also suggest that traders and in particular SMEs will benefit from a reduction of the burden.
Remove some imbalances in the right of withdrawal - removal of trader's **obligation to reimburse consumers before having had the possibility to inspect the returned goods**	Average of estimated annual losses due to this obligation: EUR 1 212 (range: 0 – EUR 10 000, median: 0) for SMEs.[240]	Estimated annual losses for traders, based on responses to the SME panel consultation. Besides the limited number of cost savings estimates, views from business associations and companies also suggest that traders and in particular SMEs will benefit from a reduction of the burden.

9 MONITORING AND EVALUATION

The Commission will evaluate the effectiveness, efficiency, relevance, coherence and EU added value of this intervention. In order to monitor and evaluate the progress made towards the objectives of this initiative, core progress indicators have been identified and are listed in the below Table. These indicators can serve as the basis for the evaluation that should be presented no sooner than 5 years after the entry into application, to ensure that enough data is available after full implementation in all Member States.

Comprehensive statistics on online trade in the EU and more precisely retail online trade are available in the Eurostat database. These could be used as primary sources of data for the evaluation. This will be completed by representative surveys with consumers and retailers in the EU carried out regularly for the Consumer Scoreboards that are published bi-annually[241]. These surveys investigate experiences and perceptions, which are both important factors influencing the behaviour of consumers and businesses in the Single Market. The monitoring will also include a public consultation and targeted surveys as indicated in the Table below with specific groups of stakeholders (consumers, qualified entities, online marketplaces, traders providing "free" digital services). Concerning specifically the business perspective, it will be covered through the retailer survey carried out regularly for the Consumer Conditions Scoreboard as well as targeted surveys to be carried out among online marketplaces and providers of 'free' digital services.

The costs of this monitoring should be borne by DG JUST within their operational expenditure. This data collection will also feed into Commission's reporting on the transposition and implementation. In addition, the Commission will remain in close contact with the Member States and with all relevant stakeholders to monitor the effects of the possible legislative act. To limit the additional administrative burden on Member States and the private sector due to the collection of information used for monitoring, the proposed indicators on the table below rely on existing data sources whenever possible.

Data collection will aim to identify more precisely the extent to which changes in the indicators could be ascribed to the proposal. For example, while giving consumers the same rights throughout

[239] Only two large enterprises provided estimates: EUR 1 000 and EUR 500 000, the outlier stemming from an estimate of a large enterprise in EE (both the other two responding SMEs from that country estimated zero losses).
[240] The only large responding enterprise from EE estimated EUR 1 000.
[241] Their methodology was statistically audited and developed with scientific support from the JRC, leading to robust indicators that correlate well with other relevant economic indicators.

the EU should be expected to make them more confident in asserting their rights in cross-border transactions and thus help to reduce consumer detriment, the share of consumers who receive effective remedies will also be influenced by other factors. Such relevant factors are described above under the problem descriptions. The surveys carried out for the Consumer Scoreboards have time series on most indicators, allowing in principle (through statistical analysis) to discern the impact of a particular policy initiative from broader trends.

The following Table 2 provides an overview of the monitoring indicators, sources of data and targets. The date indicated for target indicators is "5 years after entry into application" to enable data processing and preparation of the evaluation 5 years after entry into application, as indicated above.

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Table 2: monitoring of general and specific objectives

Objectives		Monitoring indicators	Sources of data and/or collection methods	Baseline
General	Promote the smooth functioning of the internal market	% of retailers thinking that **differences in national consumer protection rules constitute an obstacle** to the development of online sales to other EU countries	Consumer Conditions Scoreboard; Bi-annual retailers survey (Q3.a2 in 2016)	37.4% (2016)
		% of consumers **feeling confident purchasing goods or services** via the Internet from retailers or service providers in other EU country	Consumer Conditions Scoreboard; Bi-annual consumer survey (Q17 in 2016)	57.8% (2016)
Specific	Improve compliance with EU consumer law	% of consumers having **experienced any problem** when buying or using any goods or service (where they thought they had a legitimate cause for complaint)	Consumer Conditions Scoreboard; Bi-annual EU-wide Consumer survey (Q9 in 2016)	20.1% (2016)
		% of retailers who agree that **competitors comply with consumer legislation** in the their country	Consumer Conditions Scoreboard; Bi-annual retailers survey (Q10 in 2016)	67.1%(2016)
		Number of consumers **taking action to solve their UCPD-related problems**	Consumer survey 4 years after entry into application (similar to the consumer survey for the Fitness Check)	27%(2016)
		Number of consumers who **could not solve their UCPD-related problems** (did not get remedies)	Consumer survey 4 years after entry into application (similar to the consumer survey for the Fitness Check)	18% (2016)
		Number of **actions** brought by qualified entities under the revised ID	Survey of qualified entities 4 years after entry into application According to the Recommendation on collective redress MS should collect statistics on annual basis	29 qualified entities from 21 MS brought 5 763 actions under the ID in the five year period since June 2011. These cases included amicable settlements.
Specific	Modernise consumer protection rules and eliminate unnecessary costs for compliant traders	Number of consumers understanding who their contractual partner is and what their rights are when using online marketplaces	Survey 4 years after entry into application	Almost 60% of consumers using online platforms are not sure who is responsible when something goes wrong

Objectives		Monitoring indicators	Sources of data and/or collection methods	Baseline
		Number of online marketplaces reporting costs due to diverging national requirements regarding identity and legal status of third party suppliers and the applicability of consumer law	Survey 4 years after entry into application	Around a third of online marketplaces report costs due to diverging information requirements
		Number of consumers experiencing problems when using **"free" digital services**	Consumer survey 4 years after entry into application	48% (CRD study 2016); 30% (Digital Content Study, 2015)
		Costs for traders due to diverging rules on information requirements and right of withdrawal for **"free" digital services**	Survey 4 years after entry into application	60% of business associations stated that companies incur such costs (2017)

Brussels, 11.4.2018
SWD(2018) 96 final

PART 2/3

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

Proposals for

DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

(1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of the EU consumer protection rules

and

(2) on representative actions for teh protection of the collective interests of consumers, and repealing Directive 2009/22/EC

{COM(2018) 184 final} - {SWD(2018) 98 final}

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Table of contents

Annex 1: Procedural information concerning the process to prepare the IA report and the related initiative. 2

Annex 2: Stakeholder consultation 7

1. Key outline of the consultation strategy 7
2. Summary of the main results from the consultations 7
3. Use of the results of the consultations 13
4. Overview of the consultation activities 13

Annex 3. Who is affected by the initiative and how? 18

Annex 4. Analytical methods used in preparing the IA 24

Annex 5. Results of the Fitness Check, the CRD Evaluation and the Assessment of the Recommendation on collective redress 28

Annex 6. Mechanisms to enforce EU consumer law 36

Annex 7. Additional data regarding penalties 38

1. Detailed problem description 38
2. Stakeholder views 45
3. Additional data 50

Annex 8: Additional data on redress for victims of unfair commercial practices 55

1. Detailed problem description 55
2. Additional data 60
3. Stakeholder views 74

Annex 9: Additional data on the Injunctions Directive 77

1. Detailed problem description 77
2. Legal mapping of the national transposition of the ID 83
3. Outtakes from the qualified entities survey conducted for the Study supporting the Fitness Check of EU consumer and marketing law 86
4. Outtakes from the survey conducted for the Study supporting the assessment of the implementation of the 2013 Commission Recommendation on collective redress 90
5. Outtakes from the ID survey conducted for this Impact Assessment 92
3. Stakeholder views 99

Annex 10: Additional data on transparency of online marketplaces 109

1. Detailed problem description 109
2. Additional data 117

Annex 1: Procedural information concerning the process to prepare the IA report and the related initiative.

Lead DG: European Commission Directorate-General Justice and Consumers, DG JUST

The **IIA on targeted revision of EU consumer law directives**[1] was published on 30 June 2017 and the **IIA on the revision of the Injunctions Directive**[2] on 31 October 2017, along with the corresponding consultation strategies.[3] The IIAs set out the context, scope and aim of the exercise. They presented the intervention logic and questions to be addressed.

The Inter-service Steering Group (ISSG) that had been set up in October 2015 for the Fitness Check continued supporting DG JUST for this IA. In addition to the Secretariat General and Legal Service, 10 Directorates-General were invited and designated their representatives to the ISSG: ECFIN, GROW, CNECT, ENV, ENER, MOVE, FISMA, EMPL, COMP, TRADE. The ISSG was consulted on the draft IIAs and consultation strategies, draft questionnaire of the public consultation and the drafts of this IA report. The ISSG met five times to discuss the preparatory documents and the draft IA report.

Consultation of the Regulatory Scrutiny Board

The meeting of the Regulatory Scrutiny Board (RSB) took place on 10 January 2018. It issued a negative opinion with comments on 12 January. Following a thorough revision of the initial draft IA, the RSB issued a positive opinion with further comments on 9 February 2018. The comments of the RSB have been addressed as follows:

Opinion of 12 January 2018:

(1) Chapter 1 (Introduction) and Chapter 2 (Problem definition) were revised by adding more detailed information on the conclusions of the Fitness Check of consumer and marketing law, the CRD evaluation and the Report on the implementation of the Recommendation on Collective Redress. Specifically, it was explained in detail how the concrete conclusions of these evaluations were followed up by this initiative. Furthermore, these two Chapters were extended with information explaining the links and synergies between this initiative and the broader policy context, such as the recently accomplished review of the CPC and the evaluation of the Recommendation on collective redress in the context of ensuring better compliance with consumer law, and with the Commission's pending work on fairness in platform-to-business (P2B) relations, the Digital Content Directive and GDPR in the context of the proposals of initiative aimed at modernisation of consumer protection rules. Analysis of the interplay with these instruments was also added in the "Coherence" sections of different options in Chapter 6 (Impacts of policy options). Furthermore, more details were provided regarding the relation between the initiative covered by this IA and the other follow-up actions to the recent above-mentioned evaluations, such as awareness raising activities and provision of additional guidance documents on consumer law directives. To improve readability, additional figures were added, i.e. a complete intervention logic including also options has been inserted in Chapter 6 and an overview of the directives and their respective amendments has been inserted in Chapter 7.3.

(2) The entire report was reviewed to present stakeholders' views in different consultations by category of respondent, i.e. the results were presented separately for respondents from public authorities, consumer associations, business associations, individual businesses and consumers. In this way, the stakeholder opinions on problems, their drivers and consequences as well as on impacts of the solutions are explained in a more granular way and the possible dissenting opinions

[1] http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3287178_en
[2] http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969_en
[3] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

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were made readily visible. The consultation results were also presented separately for SME respondents and large companies when there were differences in their opinions.

(3) Chapter 5 (What are the available policy options) was revised describing further details of the policy options, in particular regarding penalties for breaches of consumer law, remedies, injunctions and collective redress. Where a relevant detail of the option could not be established at that stage, such as the exact % rate for turnover-based fines for breaches of consumer legislation, Chapter 5 additionally explained the parameters that would be used when deciding on such details at a later stage of the decision-making process and Chapter 6 (Impacts of policy options) included an explanation what the different variants of such a detail entails in terms of impacts.

Furthermore, Chapter 5 and Chapter 6 were significantly restructured. As regards main Problem 1 (still many traders do not comply with EU consumer law), the revised report presented several Options (political choices) consisting of measures to improve the rules on penalties, injunctions, consumer remedies and collective redress. These options implied less or more intervention that would achieve, to a lesser or greater extent, the first objective of this initiative to improve compliance with consumer law. They ranged from intervention only tackling public and private enforcement, to intervention additionally improving also consumer redress and, finally, a full scale intervention addressing also consumer collective redress. The revised Chapter 6 assessed the impacts of these options consisting of different measures.

As regards main problem 2 (Ineffective consumer protection rules and unnecessary costs for compliant traders), the revised report included additional options of promoting self- and co-regulation in the areas of transparency of online marketplaces and "free" digital services and explained why no viable alternative options (besides baseline scenario) could be presented to address overlapping and outdated consumer information requirements and imbalances in the right of withdrawal.

Sections concerning "social impacts" in Chapter 6 were extended with information about impacts on vulnerable consumers. The "cost" sections in Chapter 6 were enriched with further available data (such as regarding "free" digital services") and with explanation of the applicable costs (such as costs arising to enforcement authorities in relation to turnover-based fines). Chapter 7 (Comparison of the options) was extended with additional data on stakeholder views per category and comparative table of options was provided regarding the area of modernisation and burden reduction.

Further Changes were made also in Chapters 3, 8 and 9 as well as in annexes.

Opinion of 9 February 2018:

(1) Chapters 3, 5 and 6 were revised to better demonstrate the need for legislative action at EU level on collective redress. Section 3.2 "Subsidiarity: Necessity of EU action" was complemented with reference to (1) the 2012 Resolution on "Towards a Coherent European Approach to Collective Redress", where the European Parliament highlighted the need for a horizontal EU approach on collective redress, with particular focus on infringements of consumers' rights, and (2) the 2017 Recommendation following the inquiry into emission measurements in the automotive sector, where the European Parliament called on the Commission to put forward a legislative proposal for a harmonised collective redress system for EU consumers. In Section 5.1.6 "Option 3: Improving enforcement and individual and collective consumer redress", information was added about the number of Member States (21) that strongly supported the addition of mechanisms for redress to the ID in the ID survey. Descriptions of the degree of legal change required in Member States were further developed in Sections 6.1.1. (impacts of option 1: Improving enforcement to

stop and deter infringements) and 6.1.3 (impacts of option 3: Improving enforcement and individual and collective consumer redress).

(2) A new Chapter 8.3 was added to address potential risks, unintended consequences and trade-offs associated with the preferred package options.

(3) Chapter 6 was updated to better explain why self-and co-regulation have been discarded as approaches for online marketplaces and "free" digital services. Section 2.1 "Options to address lack of transparency and legal certainty for B2C transactions on online marketplaces", "Option 0: Promoting self and co-regulation" was further developed by adding information about experience from previous initiatives to ensure increased transparency in the online environment through self-regulation. Chapter 6.2.2 "Options to address lack of transparency, consumer protection and legal certainty for "free" digital services", "Option 0: Promoting self and co-regulation" was similarly updated.

(4) Efforts were made to make the report more reader-friendly and the language less technical. The report was streamlined, in particular Chapters 5 ("What are the available policy options?"), 6 ("What are the impacts of the policy options?") and 7 ("Comparison of the options").

Timeline:

Date	Event/Step
25 October 2016	Publication of the CWP 2017 (which includes follow-up to the Fitness Check as one of the REFIT items)
23 May 2017	Fitness Check adopted + Reports forwarded to Council
29 May 2017	Presentation by Commissioner at the COMPET Council + Press release: publication of results from Fitness Check and CRD evaluation
1 June 2017	Political validation by CSSR Jourova & 1st VP Timmermans of Agenda Planning Fiche *[Substantive rules]*
2 June 2017	Draft online public consultation (OPC) questionnaire sent to CAB; IIA, consultation strategy and questionnaire sent to ISSG *[Substantive rules]*
6 June 2017	5th meeting of the Stakeholder Consultation Group
8 June 2017	1st ISSG meeting – Discussion of draft IIA, consultation strategy and OPC questionnaire *[Substantive rules]*
22 June 2017	Approval by CAB of 1st VP to launch the initiative (IIA+ OPC) *[Substantive rules]*
26 June 2017	Revised documents forwarded to ISSG (IIA, questionnaire, consultation strategy, web page) for information
30 June 2017	Publication of IIA *[Substantive rules]*
28 July 2017	Deadline for feedback on the IIA: 12 replies received from stakeholders

30 June - 8 October 2017	Public consultation *[Substantive rules]* *(14 weeks in EN, shorter for other languages which were added as translations became available from DGT)*
19 July - 15 September 2017	Targeted consultations with MS through DG JUST networks (CPN, CPC, ECCG, CMEG) *[Substantive rules]*
19 July - 18 September 2017	Targeted consultations with traders (1) offering "free" digital services and (2) offering goods or services through online marketplaces
27 July- 25 September 2017	SME panel consultation *[Substantive rules]*
4 September 2017	6th Meeting of the Stakeholder Consultation Group
14 September 2017	2nd ISSG meeting: discuss feedback to the IIA and status of consultation activities + first discussion on the draft IA *[substantive rules]*
25 September	End of the SME panel consultation *[Substantive rules]*
27 September 2017	End of targeted consultations *[Substantive rules]*
2 October 2017	7th meeting of the Stakeholder Consultation Group (*self-regulatory initiative on pre-contractual information and T&Cs)*
9 October 2017	End of the Public Consultation *[Substantive rules]*
12 October 2017 (DDL: 19 October)	Consulting the ISSG on the IIA, Consultation Strategy and Targeted Questionnaires *[Injunctions]*
17 October 2017	3rd ISSG meeting *[Injunctions]*
24 October 2017	Publication of the CWP 2018
30-31 October 2017	Injunctions: • Publication of the IIA • Publication of Public Consultation Strategy • Sending Consultation questionnaires to stakeholder networks (deadline for replies 16 November)
September – November 2017	Drafting IA [covering both Substantive rules and Injunctions]
6 November 2017	8th Meeting of the REFIT Stakeholder Consultation Group (*self-regulatory initiative on pre-contractual information and T&Cs)*
9 November 2017	Technical meeting with RSB
15 November 2017	Draft IA sent to ISSG for second discussion.
16 November 2017	Close of targeted consultation for injunctions
17 November 2017	4th ISSG meeting to discuss the draft IA
29 November 2017	Draft IA (including input from consultation on injunctions) sent to ISSG
30 November 2017	Presentation of the Consumer Manifesto and "Consumer Breakfast" at the margins of the COMPET Council

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1 December 2017 (am)	5th ISSG meeting; sending draft minutes for comments
1 December 2017 17h00	Deadline for written comments from all ISSG members
4-7 December 2017	Finalising the draft IA and the ISSG meeting minutes
8 December 2017	Submission of the draft IA to the RSB
December 2017 – January 2018	Drafting the legislative proposal
12 December 2017	9th Meeting of the REFIT Stakeholder Consultation Group *(update on Legislative Proposals & self-regulatory initiative on pre-contractual information and T&Cs)*
25 January 2018	Publication of the Report on the implementation of the 2013 Commission Recommendation on Collective Redress (Collective Redress Report)
10 January 2018	RSB meeting
12 January 2018	RSB opinion
29 January 2018	Re-submission of the revised IA to the RSB
9 February 2018	6th ISSG meeting: First discussion of draft legislative Proposals
9 February 2018	RSB opinion
5 March 2018	Inter-service consultation
11 April 2018	Adoption of legislative proposals

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Annex 2: Stakeholder consultation

1. Key outline of the consultation strategy

This IA was supported, as outlined in the consultation strategies[4], by the following consultation activities: feedback on the Inception IAs; a public consultation (hereinafter OPC for online public consultation); a targeted SME panel consultation; targeted consultations with Member States (MS) and other stakeholders including through surveys for DG JUST networks; structured discussions in meetings with Member State authorities and experts; consultation with consumer and business stakeholders via the REFIT Stakeholder Consultation Group.

The objective of the consultations was to collect qualitative and quantitative evidence on all key elements of the IAs, from relevant stakeholder groups (consumers, consumer associations, businesses, business associations, Member States authorities, legal practitioners) and the general public. It was challenging to reach specific type of businesses, such as online marketplaces and free digital service providers. The consultations were publicised via Twitter, Facebook, emails to existing networks, via regular meetings (see the expert groups and networks described further below) and speeches delivered by the Commissioner and high-level Commission officials.

The IA also builds on the consultation activities that were carried out in the context of the Fitness Check and CRD evaluation[5]. Regarding the Injunctions Directive, the IA builds on the extensive consultation work already carried out for the Fitness Check and on the 2017 call for evidence on collective redress in addition to the targeted consultations of relevant networks of legal practitioners, consumer associations and business associations which replaced the public consultation due to the highly technical nature of the envisaged amendments.

2. Summary of the main results from the consultations

In the following summary, "**consumer associations"** means national and EU-level consumer associations, "**business associations"** includes national and EU-level business associations, "**MS authorities"** includes national consumer enforcement authorities, European Consumer Centres, government authorities (ministries) in charge of consumer policy, national public enforcement authorities in a specific area. Other stakeholders include other public bodies/institutions including few ministries, employers' associations, NGOs, regional associations and other categories of respondents in the OPC.

Transparency on online marketplaces: Stakeholders' replies to the OPC, CPC/CPN/CMEG and ECCG consultation, indicate that consumers experience problems due to lack of transparency. Over half of business associations in the public consultation agreed that consumer face situations of lack of transparency on online marketplaces[6], but many either see no harm or indicate not knowing whether consumers suffer harm due to certain problems connected to transparency.[7] In the same consultation, companies expressed mixed views on whether consumers face situations of lack of

[4] Available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

[5] For more information on these consultation activities carried out for the Fitness check and the CRD evaluation, see the Annexes to the Report on the Fitness check of consumer and marketing law and Annexes to the Commission staff working document on the CRD, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

[6] Of the 58 Business associations replying to this specific question, 34 replied that consumers are often or sometimes not sure whether they bought from the online marketplace itself or from someone else, 11 indicated that consumer do not face such situation and 13 did not know. 30 indicated that consumers often or sometimes (+ 3 replied "once") are not sure which rights they have because it was unclear if the person they bought from was bound by EU consumer rules or not, 11 think this does not happen and 14 do not know.

[7] To the question whether consumers experience harm due to fact that they were denied the right of withdrawal, 25 replied no, 21 did not know and 8 replied yes (4 said a few times, 2 said often and 2 once). To a similar question whether consumers experience harm because they were denied a repair of replacement of a faulty product, 22 replied no, 23 did not know and 8 replied yes (6 a few times and 2 once). Similarly, 17 thought that consumers do not experience harm because they do not know to whom to direct their claims, 22 did not know and 16 replied yes they experience harm a few times (8), often (6) and once (2).

transparency and sceptical views whether they experience consumer harm: with almost half or over half indicating no consumer harm. Diverging rules on information obligations exist amongst Member States, as confirmed by MS authorities and consumer associations. In addition, respondents to the targeted consultation with online marketplaces showed diverging views on the applicable legislation. In the OPC, the SME panel and the targeted consultation with online marketplaces, majority of different stakeholder groups agree that consumers buying on online marketplaces throughout the EU should be informed about: Whether they buy from the online marketplace itself or from someone else; whether the contracting party declares to be a trader or not and whether EU consumer rights apply to their transaction. Business associations expressed mixed views[8] on the last point (applicability of EU consumer rights). Stakeholder largely agreed also that such transparency would have the following benefits for the consumers: to know whom to contact in case of a problem; to understand who is responsible for the performance of the contract; to understand if consumer protection rules apply in case of a problem and to increase consumer trust. As for views on business costs: Some online marketplaces[9], including larger ones, stated that, due to the varying national requirements, they incur compliance costs to some extent. This is confirmed by companies and business associations in general.[10] Some large online marketplaces[11] took the view that harmonised information obligations would lead to some costs reductions whilst others did not know. Two out of the four online marketplaces found that costs of complying with possible new information requirements would be reasonable, one disagreed and one did not know. Five business associations found also that such potential costs would be reasonable for online marketplaces, three disagreed and the majority did not know.

"Free" digital services: extension of 1) the right to pre-contractual information and 2) the right of withdrawal (RoW) under the CRD: Replies from most stakeholder groups to the OPC, CPC/CPN/CMEG and ECCG survey, show that consumers using "free" digital services suffer harm, including when using these services cross-border, due to the lack of these rights, and this to a certain extent discourages them from using such services. In the OPC, more than half of business associations did not agree that consumer suffer harm cross-border, and companies expressed mixed views with similar shares agreeing and disagreeing.[12] The majority of stakeholders agreed that the lack of these rights disrupts the level playing field for businesses, companies and business associations were divided on this. The majority of stakeholders in the OPC supported extending these rights to "free" digital services; however traders expressed mixed views regarding RoW with only seven out of 18 being in favour of this, while business associations were not supportive (24 out of 44 disagree and 11 agree, rest do not know) as some stressed that overlaps with existing legislation (in particular GDPR) should be avoided and therefore advised against extending the CRD to RoW (while agreeing to extension regarding pre-contractual information). This IA, in particular in the sections on problem definition and on options, takes this aspect into account with the conclusion that the proposed rules would complement and enhance rather than overlap with the GDPR. Regarding pre-contractual information, business associations showed more support (OPC: 19 out of 45 agree and 15 disagree, rest do not know). In the same consultation, 12 of 18 companies agree with the extension of the pre-contractual information requirement. The other categories of

[8] Out of 48 business associations replying to this question: 20 agree, 21 disagree and 7 do not know.

[9] 2 out of 5 in the targeted consultation, 3 out of 5 in the public consultation and 2 out of five in the SME panel consultation.

[10] Data from the public consultation. When asked whether they incur compliance costs when trading cross-border due to different national laws, 9 out of 23 companies and 10 out of 42 business associations report that this is the case for the obligation to state whether the contract is concluded with the online marketplace or with the third party supplier. 9 out of 22 companies and 9 out of 42 business associations report costs stemming from requirements to indicate whether a third party supplier is acting as a trader or not. The obligation to indicate the applicability of consumer law to contracts created costs for 11 out of 21 companies and 15 out of 43 business associations.

[11] In the targeted consultation for online marketplaces

[12] Business associations: 32 of 62 disagreed regarding pre-contractual information and 32 of 57 disagreed regarding right of withdrawal. Companies: due to lack of pre-contractual information: 16 agreed, 18 disagreed, 20 do not know; companies on cross-border consumer harm due to lack of right to withdraw: 17 agreed, 18 disagreed, 18 did not know.

stakeholders were supportive regarding the extension of both rights. A European business association claimed that the CRD scope should not be extended to gratuitous contracts for digital services, where consumers do not provide their personal data; this was also supported by a Member State.[13] This IA addressed this by clarifying that the rules should be applicable when there is a contractual agreement between the "free" service provider and the consumer.

As for business costs, 10 out of 17 business associations stated that companies incur costs due to diverging national rules on 1) and 2) for "free" digital services and for 7 out of 10 these costs are not reasonable. As for potential future costs due to the proposed measure, over 40%[14] SMEs replying to this question in the SME panel stated that such costs would not have significant impact on their decision to enter other EU markets. Nine out of 12 business associations, in the public consultation, do not consider these costs reasonable.

UCPD remedies: Based on replies to the OPC, a majority of stakeholders agree that differences between national rules on UCPD remedies cause harm to consumers. Half of the companies (28) agree as well, however only 14% (10) of the business associations agrees. A majority also think that these differences cause costs for traders engaging in cross-border trade. However, only 39% (29) of business associations agree with this. There is general support (including by SMEs) for introducing an EU-wide right to claim remedies from the trader. However a few MS[15] and over 60% (30) of business associations disagree. A majority (except business associations) also agreed that such a right would increase consumer trust, lead to better compliance and a more level playing field for compliant traders. 52% (65) of respondents in the public consultation said that it should be decided at EU level which remedies should be made available, and 38% (48) of respondents said that the choice of remedies should be left to Member States: 13 consumer associations supported defining UCPD remedies on EU level, while 3 said it should be left to the Member States; Seven MS authorities would prefer the EU to define the types of remedies and eight would leave this to the Member States; 6 business associations supported harmonising the type of remedies on EU level, while 20 supported leaving this to the national level. As for the type of remedies, an EU-wide right to terminate the contract and get a refund would have added value, according to most MS authorities,[16] followed by a right to compensation for damages. The same rights in the same order were also favoured in the public consultation, where 73% (83) of respondents to this question chose the right to contract termination and 65% (74) selected the right to receive compensation for damage.[17]

Nine of 15 MS authorities think the costs of administrative and judicial enforcement would increase to some extent due to possible new EU-wide rights to UCPD remedies, 3 think it would increase to a significant extent. As for business costs, ten of the 12 cross-border traders replying to this specific question reported facing costs (to significant or some extent) due to a need to adapt to current diverging national rules and two did not know. 18 of 34 business associations also indicated that companies face such costs to some or significant extent. Furthermore, eight of 19 companies said that these costs are a reason for them not to sell to other Member States (six said this is not the case and five did not know). More than half of companies and 40% of business associations considered that compliance costs due to a possible new EU-wide right to remedies would not be reasonable. 23% (45) of SMEs selling to consumers stated that costs related to national rules discourage them from entering other EU markets and25% (51) of SMEs stated that a new EU-wide right to remedies would encourage them to enter other EU markets. However, a majority stated that these current or potential new costs (would) have no impact on their decision to enter other EU-markets.

[13] Germany
[14] This was the answer given by highest number of respondents to these questions regarding both potential new rights.
[15] Germany, Czech Republic and Finland.
[16] Based on replies to the CPC/CPN/CMEG consultation.
[17] It was a multiple-choice question, i.e. respondents could choose several options form the alternatives.

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Penalties for consumer law breaches: National consumer protection authorities reported on the maximum fines available under national law for the breaches of consumer law, the criteria applied in the imposition of the fines, the level of fines actually imposed in the past year and the fines that could be imposed in hypothetical cases. The replies to the survey show significant divergences on all of these points. For instance, the maximum absolute fine for the infringement ranges from EUR 8 688 in Lithuania to EUR 5 million in Italy. A minority of countries use turnover based fines. Very few respondents indicated that the cross-border nature of the infringement is taken into account in the assessment of the fine. The results of the hypothetical case studies also show major differences in the level of the fine that could be applied for one and the same infringement in different countries. For instance, the estimated fine for a large company for the breach of the UCPD ranges from EUR 3 900 to EUR 600 000. The majority of consumer associations think that current penalties are not sufficiently proportionate, effective and dissuasive. SMEs express mixed views on this[18] with only between 20% and 25%of respondents considering the current level of fines as proportionate. Majority of stakeholders agree that differences in the nature and level of penalties for the same or similar breaches of EU consumer laws lead to insufficient compliance and insufficient deterrence especially for breaches that took place in more than one Member State. Over 40%[19] of SMEs agree as well, large companies are divided (five agree and five disagree, six do not know) and business associations do not agree (with only 17% and 23% agreeing to insufficient compliance and deterrence respectively).

13 of 17 MS authorities and all 16 consumer organisations supported the idea that fines should be available as penalties for breaches of consumer law in all Member States and that there should be common criteria in all Member States for imposing fines. Amongst business organisations, these ideas were supported, respectively, by 15 (31%) and 20 (44%) respondents. Furthermore, 8 of 15 SMEs as well as four of six large companies supported introducing common criteria and five of the 15 SMEs and three of the six large companies also agreed that fines should be available as penalties in all Member States.

14 of 16 consumer associations are in favour of a turnover-based fine and seven of 15 MS authorities favour setting the maximum fine as a percentage of the trader's turnover or as an absolute amount or a percentage of the trader's turnover whichever is higher. Most business associations and companies did not agree with any of the proposed EU-level measures; however seven of 15 SMEs and one large company would agree to a maximum fine expressed as an absolute amount. In the SME panel consultation, highest share of SMEs (49%) considered that the most proportionate, effective and dissuasive way of setting the maximum level of fines is by expressing it as a percentage of the trader's turnover.[20]

A majority of consumer associations and MS authorities agreed that stronger EU rules on penalties would lead to greater consumer trust and more effective enforcement of consumer protection rules. Between 62% and 73% of SMEs agreed also that stronger rules on penalties would have a positive

[18] Share of responses are very similar across the five Directives: highest share of respondents do not know, some say fines are proportionate, some say they are not proportionate either because fines for stronger companies are too low or because fines for weaker companies are too high.

[19] 46% of 41 SMEs agree regarding both, while 42% disagree, 12% do not know regarding insufficient compliance and 34% disagree and 20% do not know regarding insufficient deterrence.

[20] In the SME panel consultation this was a single choice question i.e. respondents could choose one option from alternative options. Other ways to set fines were favoured by 30% (Maximum level of fines is expressed as an absolute amount or a percentage of the trader's turnover whichever is higher), 16% (Maximum level of fines is expressed as an absolute lump-sum amount) and 5% of the responding SMEs (Other). In the public consultation it was designed as a matrix question whereby the respondent could express agreement or disagreement (with the usual scale of answer options: strongly agree, tend to agree, tend to disagree, strongly disagree and do not know) to each option listed.

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impact on the compliance by traders with consumer protection rules, on levelling the playing field between traders[21] and on consumer trust.

Reducing burden for businesses regarding the right of withdrawal: in the OPC, around 35%[22] of online companies reported significant problems due to their current obligation to accept the return of "used" goods and to reimburse consumers without having the possibility to inspect the returned goods, while majority said they did not know. Over 90% of business associations[23] indicated that traders face disproportionate/unnecessary burden due these obligations. In the SME panel, the majority of respondents declared never facing disproportionate burden. However, when looking at the smallest companies (self-employed, micro, small) selling to consumers online, close to half report disproportionate burdens. According to a majority of other stakeholders (consumer associations, MS authorities, citizens and others), these consumer rights are important. However, seven of 16 consumer associations and 10 of 16 MS authorities also acknowledged that traders may face burden due to these rights.

As for the concrete problems, a clear majority of both online companies and of business associations indicated that traders face costs and practical difficulties with the following: determining the diminished value, recovering this diminished value from the consumer, reselling the goods as second-hand goods and disposing these goods as waste. Most of them also said that charging the costs for diminished value is difficult also from a customer relations' viewpoint.[24]

Amending information requirements: In the public consultation, a majority of citizens, of consumer associations and of other categories considered the information about the trader's geographical address and complaint handling mechanisms to be necessary in the advertising stage, even though consumers will receive the same information at a later stage. Most MS authorities agreed that the geographical address is necessary at the advertising stage, but not the complaint handling. Companies were divided in their views regarding the geographical address and did not regard the complaint handling as necessary information at advertising stage. Business associations disagreed regarding both and considered that the removal of these requirements at advertising stage would result in some or significant savings for companies.

Modernisation of rules on the means of communication with the consumer: In the public consultation email and web-based contact form were regarded as relevant by most respondents (126 and 93 respectively). 44 respondents considered social media account as relevant and 15 respondents (companies, citizens, consumer associations, government authorities) considered fax as relevant.

Revision of Injunctions Directive: Stakeholders, except for business associations which overall disagreed, showed overall support for the improvements proposed to enhance the effectiveness of the injunction procedure, including the extension of the ID's scope to all EU law relevant for the protection of the collective interests of consumers, the designation of independent public bodies and consumer associations as qualified entities subject to reputability criteria, a facilitated access to justice for qualified entities, under objective criteria, maximum time limits for all procedural steps, and the power for courts/authorities to require the trader to provide information and to publicise the outcomes of the procedure. There were mixed views on the possible role of business associations as

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[21] Including: level playing field to the benefit of compliant traders, level playing field between the traders operating in different EU Member States, level playing field between traders of different economic strength.

[22] Obligation to accept return of goods bought online which consumers have used more than what they could have done in a brick and mortar shop: 34 (36,1%) reported having experienced significant problems often, few times of once. Obligation to reimburse the consumer without having the possibility to inspect the returned goods as soon as the consumer has supplied evidence of having sent them back: 31 (34,1%) reported having experienced significant problems often, few times of once.

[23] 33 of 36 regarding the obligation to accept the return of goods used more than necessary and 32 of 35 regarding the obligation to reimburse the consumers before receiving the goods back as soon as the consumer has supplied evidence of having sent them back.

[24] For each of these five difficulties, at least 70% and mostly over 80% of the 18 online companies and of the 33 business associations whose members sell online agreed.

qualified entities, with 38% of stakeholders agreeing and 38% disagreeing (48.8% of Member States' authorities, 21.4% of consumer associations and 55.6% of business associations). Stakeholders also agreed that a final injunction decision could be relied on as proof of the breach of EU law for follow-on redress actions, including in the form of collective redress actions. 65% of all respondents agreed that qualified entities should be able to seek injunctions and consumer redress within a single procedure. All stakeholders strongly support the introduction of effective, proportionate and dissuasive penalties for traders who do not comply with the outcomes of the procedure. A majority of stakeholders indicated that the proposed elements would have a positive impact on increasing the deterrence of non-compliance and reducing consumer detriment. 86.8% of Member States' authorities and 84.6% of consumer associations considered in particular that there would be a positive impact on the procedural efficiencies due to the collective resolution of mass claims, whereas business associations overall disagreed (54.5% stating that there would be no impact and 36.4% considering that there would be a significant negative impact). A majority of business associations also considered that the initiative could increase the insurance premiums for coverage against claims in mass harm situations, in particular if it would address collective redress (90.9% of respondents).

In their feedback to the IIA, responding business representatives and public authorities favour focusing on the enforcement of substantive EU consumer law and possibly on improvements of the injunction procedure as such. These respondents are however overall opposed to the introduction at EU level of redress opportunities for consumers in mass harm situations, referring mainly to the risk of abusive litigation, additional costs and burdens as well as undue interference with existing national mechanisms. On the other hand, consumer associations, academic/research institutions and citizens expressed overall support for a single procedure at EU level enabling qualified entities representing the collective interests of consumers to simultaneously ask the courts and/or administrative authorities to stop the breach of any EU law relevant for the protection of the collective interests of consumers and ensure redress for the victims, which is seen as filling a current gap in consumer protection. A majority of respondents concur that any action at EU level should respect the legal traditions of EU Member States and provide safeguards against possible risks of abuse. Several elements should be clearly regulated, including the criteria for the designation of the qualified entities to ensure independence and absence of any conflict of interest, the funding, and the information of affected consumers.

Other issues: Some business and consumer associations enquired about the envisaged legislative technique and expressed concerns about possible opening up of the substantial law directives for other amendments than the ones suggested in the IA. The Commission explained that it aims to introduce only targeted amendments and not a complete revision of the directives as the current rules are generally fit for purpose.

Companies and business associations regarded self-regulation as an appropriate tool to improve compliance: in the public consultation over 90% of them agreed that EU and MS should stimulate self-regulation. In the same question, these groups expressed more sceptical (sometimes mixed) views on other (incl. legislative) ways to improve compliance. 21 of 29 MS authorities and nine of 27 consumer associations also indicated that self-regulation could contribute to better compliance. However, these latter groups showed stronger support (over 85%) for legislative interventions (for UCPD remedies and stronger penalties) and for providing more resources to enforcement authorities (over 90%). Some MS advised against maximum harmonisation arguing that it leaves too little margin of manoeuvre for the MS and could lead to a lower level of consumer protection and to a rigidity of the legal framework that is less responsive to new market practices.

Some traders, business associations and a few national ministries/governments called for further reduction of burdens for businesses related to issues such as off-premises contracts under the CRD and the right to withdraw from contracts concluded on online auction platforms, contracts for heating oil, e-vignette and architecture contracts. Some of these stakeholders argued that other than aiming to reduce burdens no new regulation is needed. BEUC suggests updating the UCPD

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blacklist to include 1) banning marketing of unhealthy food to children and 2) certain organised resale practices to improve EU law regarding secondary ticket selling.

3. Use of the results of the consultations

The results from the consultation activities have been incorporated throughout the IA from problem definition to possible options and their impacts. For example, results of the OPC and several of the targeted consultations were used in section 2 (problem definition), results from the ID survey and CPC/CPN/CMEG survey were taken into account in the section on options, results from SME panel, OPC, ID survey, ECCG survey were used in section 6 on Impacts of the policy options and results specifically from the SME panel were taken into account in the subsection dedicated to expected impacts on SMEs. The Annexes on each topic (Annexes 7 – 13) contain further data from the consultations.

4. Overview of the consultation activities[25]

4.1 Feedback on the inception IAs (IIA)

IIA on targeted revision of EU consumer law directives[26] (30 June to 28 July 2017): 12 submissions received via the online feedback option directly on the webpage where the initiative was published: several **European and national business associations**[27], an **EU-level consumer association** (BEUC), a **public authority** (the Austrian Federal Ministry for Science, Research and Economy), an **NGO** (National Energy Ombudsmen Network (NEON)) and a **company** (anonymous, Netherlands).

IIA on the revision of the Injunctions Directive[28] (31 October to 28 November 2017): The IIA was publicised via Twitter and in stakeholder meetings. 23 feedbacks[29] received from: **European and national business associations** (Law Society of England & Wales, ECTAA, German industry association BDI, German Insurance Association, EMOTA, Austrian Federal Economic Chamber, BusinessEurope, EuroCommerce, AGFW e.V. from Germany, European Justice Forum from Belgium, China Chamber of international Commerce EU Office) **consumer associations** (BEUC, DECO), **public authority** (Austrian Federal Ministry of Science, Research and Economy), **academic/research institutions** (Universities of Oxford and KU Leuven and an anonymous institution from Italy), **NGOs** (NEON, Better Finance), **company** (anonymous, Czech Republic), the **Financial Services User Group** (FSUG)[30], three **citizens** (from Ireland, USA, Germany).

4.2 Public consultation[31]

The **public consultation** (30 June to 8 October 2017) collected views from all stakeholder groups on all topics of this IA except injunctions.[32] It fully respected the general rules on consultation set

[25] For all eight (a public and seven targeted) consultations via questionnaire described below, the Commission's EUsurvey tool was used. In addition, some respondents replied via email. Public consultation: MS authorities from France, Austria, UK, Portugal; EU-level business associations; national consumer associations from Portugal, Austria; German Federal Bar, a company. Targeted consultation on online marketplaces: European association representing online traders. Targeted consultation on free digital services: A large internet company. It is important to note, that the consultations are not statistically representative of the target population.

[26] All feedbacks are publicly available at: http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3287178/feedback_en

[27] Independent Retail Europe, European Technology & Travel Services Association, Branchevereniging Organisatie voor Erkende Verhuizers, Bundesverband Möbelspedition und Logistik (AMÖ) e.V., Austrian Federal Economic Chamber, World Federation of Advertisers (WFA), The Federation of European Movers Associations (FEDEMAC), Confederation of Danish Enterprise

[28] All feedbacks provided via relevant Webpage are publicly available at: http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969/feedback_en

[29] In addition, the Dutch Ministry of Justice sent their feedback by email.

[30] https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-reforms-and-their-progress/regulatory-process-financial-services/expert-groups-comitology-and-other-committees/financial-services-user-group-fsug_en

[31] Information and the questionnaire are available at: https://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives_en.

out in COM(2002) 704. The consultation was publicised by regular tweets on the Commission services' Twitter account and in meetings with stakeholders.

In total, 414 responses were received via the online questionnaire on EUsurvey[33]. Of these, 94 were from individual **citizens**, 133 from **companies**, 80 from European-level and national **business associations**, 30 from European-level and national **consumer associations**, 31 from **Member state (MS) authorities**[34] (national consumer enforcement authorities, European Consumer Centre, government authorities (ministries) in charge of consumer policy, national public enforcement authorities in a specific area) and 46 from other public bodies/institutions, professional consultancies/law firms, regional associations and others). A number of respondents also submitted position papers, either via the EUsurvey tool or by email.[35] Responses were received from 26 EU Member states (no response received from Ireland and Lithuania) and 5 replies came from USA and Norway. The highest number of responses with 165 (40%) came from Germany, in particular 103 of the responding 133 companies (77%) are established in Germany. The second highest share were from Belgium (46, most of which from EU-level associations), followed by UK (40).

Out of the 133 companies, 5% are self-employed, 35% are micro companies (1-9 employees), 26% are small companies (10-49 employees), 11% are medium-sized (50-249 employees) and 23% are large companies (more than 249 employees).

The questionnaire consisted of two parts: (1) a short part collected views on problems stakeholders face today in the areas under assessment. At the end of the short part, respondents could choose to continue to a (2) full questionnaire with more detailed questions, including on possible options for the interventions and their costs and benefits. 244 respondents continued to the full questionnaire, of which 35 individual citizens, 20 consumer associations, 94 companies, 56 business associations, 22 MS authorities and 17 other type of respondents. However many respondents did not answer all the questions and "sub-questions", e.g. out of 94 companies that continued to the full questionnaire, only between 15-20 gave a actual responses (including "do not know") to most of the subsequent questions. Furthermore, across all topics, the level of replies on the quantification/estimation of (both current and potential future) costs and benefits was very low.

Among the replies a campaign involving around 70 respondents could be identified: the German association representing small and medium-sized heating oil retailers, UNITI, appears to have called on its members to participate in the consultation with suggested responses. The participants, retailers and mostly SMEs on the German heating oil market, followed the same line (almost verbatim) in their replies: They describe their concern about the application of the CRD right of withdrawal to distance selling of heating oil as confirmed by the German Federal Supreme Court[36] and its impact on SMEs. They call for action in order to exempt the distance sale of heating oil from the scope of the CRD right of withdrawal.

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[32] As the public consultation and the SME panel consultation covered more topics and targeted more respondent categories compared to the targeted questionnaires, the analysis of the responses was carried out based on the number of actual respondents to each individual question, therefore the sample varies by question and sub-questions. "Sub-questions" are part of matrix question with an overarching question and different statements with a scale of answer options to each statement.

[33] In addition, three email submissions were received within the consultation period from a company, a national consumer association and a Member state authority, outside the EUsurvey tool. Some stakeholders submitted their position by email outside the consultation period and outside EUsurvey tool. The positions expressed in these submissions were reviewed but were not taken into account in the statistical analysis of the closed questions of the EUsurvey questionnaire.

[34] It includes one reply from a consumer enforcement authority in Norway.

[35] Majority of position papers was a paper by UNITI, as part of a campaign, see below. Other position papers came from businesses, business associations and MS authorities.

[36] German Federal Supreme Court has determined that consumers have a right of withdrawal from distance sales contracts for heating oil: Bundesgerichtshof (Federal Court), BGH, 17 June 2015 - VIII ZR 249/14, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=71692&pos=0&anz=1

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4.3 Targeted consultations with specific stakeholders

The **targeted SME panel consultation** (27 July to 2 October 2017) aimed to gather SMEs' views as well as quantification of costs and benefits of the options in the following topics of the IA: transparency of online marketplaces, free digital services, UCPD remedies, penalties, simplification of rules on right of withdrawal. In total, 291[37] responses were received from 18 Member States, 247 of which confirmed selling to consumers. 133 sell to consumers online, 84 sell to consumers through online marketplaces and 23 offer consumers "free" online services. 137 sell to other EU countries. The main activity of 47% is the sale of goods, 31% is providing services, 16% manufacturing, and 2% each for online marketplace, digital content and other. As for the size of the companies: 61% are self-employed & micro companies, 24% are small, 11% are medium, 2% are large and 2% did not indicate their size.

The highest share of responses came for Poland with 79 of the 291 (27%) responses, followed by Italy (36) and Portugal (31).

In some cases, depending on the topic, only a specific group of the replies to a question were taken into account, for example replies from companies selling to consumers online, or the replies by the few large companies and those that gave no indication of size were excluded. However, in most cases there was no significant difference in the percentage of different views with or without the few large companies.

SME panel consultations help gather qualitative information from SMEs and allow Commission departments to reach out to SMEs in a targeted way. To that end, the Commission prepares a dedicated questionnaire. The Enterprise Europe Network (EEN) assists the Commission in carrying out SME panel consultations. Thanks to the good geographic coverage and the high density of EEN network partners, this method of consulting provides substantial results.

The EEN partner's role in carrying out an SME panel consultation is to select the relevant companies from their region, to contact them, and to assist them in replying to a questionnaire. The EEN partners collect the SMEs replies, translate them into English and report them back to the Commission. EEN partner organisations are responsible for selecting companies best suited to respond to a given consultation. The selection requires expertise, bringing in fluency in EU policies and drawing on individual relationships with businesses. EEN partner's understanding of the topic of consultation, the ability to establish the relevance of the consultation for individual companies and the ability to convince those companies to respond are essential drivers for collecting replies. The pool of consulted companies varies for each SME panel. Companies are selected depending on the subject of the consultation. The degree of how actively EEN partners solicit a business' participation is left to the EEN member organisations and usually reflects their broader commercial relationship. The level of assistance provided to companies varies on case-by-case basis.

SME panel consultations are not economic surveys. There is no guarantee for minimum number of replies. The results are usually not statistically representative. SME panel consultations do not ensure an even geographical balance among the respondents. Despite these limitations, they are unique in the way they rapidly provide direct inputs from SMEs into European policy-making processes. The minimum duration of the consultation period is set at 8-10 weeks.

Targeted questionnaire for Member States authorities: Consumer Protection Co-operation Network (CPC, national consumer law enforcement authorities),[38] Consumer Policy Network (CPN, national ministries),[39] and Consumer Market Expert Group (CMEG, experts nominated by

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[37]Including from 5 large companies.
[38] More information on CPC: https://ec.europa.eu/info/consumers/consumer-protection-cooperation-regulation_en
[39] More information on the CPN: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=861&NewSearch=1&NewSearch=1

Member States to advise the Commission on matters related to the Consumer Scoreboards, market and behavioural studies). [40] 36 responses were received, from 25 EU Member States and Norway.

Targeted questionnaire for members of the European Consumer Consultative Group, ECCG[41]: 10 ECCG members replied (AT, BE, HR, DK, FR, DE, LU, NO, PT, SV).

The two latter consultations ran from 19 July to 1 October 2017 and were intended to shed light on technical issues, such as relevant national legislation and complaint handling regarding the following topics: penalties, UCPD remedies, transparency of online marketplaces, free digital services. The questionnaires were disseminated by emails to the CPC, CPN and CMEG authorities and to the ECCG members respectively and members were reminded during the regular network meetings.

Targeted consultations with online traders: offering goods or services through online marketplaces on one hand, and offering "free digital services" on the other. These targeted online consultations served to obtain detailed data from these types of businesses. They ran from 19 July until 2 October 2017 (period of consultation was extended several times). The consultations were disseminated by email to 166 online businesses and business associations encouraging them to share the links to these targeted questionnaires with other relevant traders that the Commission has not identified through its networks. Despite repeated dissemination and communication efforts (via twitter, Facebook, meetings with stakeholder), only seven responses were received to the **consultation of online marketplaces**: five companies (one of which is not an online markeplace), and a national business association replied via the EUsurvey tool. Additionally, an EU-level association representing online platforms companies submitted a position paper outside the survey tool. Only two responses were received to the **consultation on "free" digital services**: one from an association whose members offer digital games via EUsurvey, and one from a large internet company by email.

ID survey (Targeted consultation on the revision of the Injunctions Directive): Targeted consultation (in the form of a web survey) of the following networks took place **in November 2017**: Qualified entities as listed in the Official Journal of the EU, under article 4 of the Injunctions Directive; CPN; CPC; ECCG; CMEG; European Consumer Centres (ECCs); European Judicial Network (EJN); Group of contact persons on national justice systems (Commission expert group); Financial Service Users Group (FSUG); Expert Group on the Implementation of Directive 2008/48/EC on Consumer Credit (CCD); European Network of Councils for the Judiciary (ENCJ); Network of the Presidents of the Supreme Judicial Courts (NPSJC); Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA-Europe); Council of Bars and Law Societies of Europe (CCBE); Enterprise Europe Network (EEN); several business networks and associations (Cooperatives Europe, Cecop Cicopa Europe, European Small Business Alliance (ESBA), European Association of Development Agencies (EURADA), EUROCHAMBRES, EuroCommerce, European Association of Craft, Small and Medium-sized Enterprises (UEAPME), BusinessEurope, European Confederation of Young Entrepreneurs (YES), Zentralverband des Deutschen Handwerks (ZDH), European Confederation of Junior Enterprises (JADE), European Council of the Liberal Professions (CEPLIS), European Family Businesses European Start-up Network); and REFIT Stakeholder Consultation Group. **90 replies were received in total**: 48 MS authorities (nation consumer protection authorities, European consumer centres, national ministries, national competition authorities), 21 business associations (nation and EU-wide), 16 consumer associations (nation and EU-wide), 5 Other (chamber of commerce, legal practitioners); from 25

[40] More information on CMEG: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2387

[41] The ECCG consists of one representative of national consumer organisations per country, one member from each European consumer organisation (BEUC and ANEC), two associate members (EUROCOOP and COFACE) and two EEA observers (Iceland and Norway). More information on ECCG http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=849&NewSearch=1&NewSearch=1

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Member States (no replies from FR, HR[42]), from ten EU-wide organisations and from three "Other" countries: Iceland, Norway and USA.

4.4 Consultations via meetings with DG JUST networks, expert groups

Meetings of the Refit Stakeholder expert group (the Group): For this IA the Commission services continued to consult the Group established in 2016 for the Fitness Check of consumer and marketing law. The Group consists of EU level and national organisations representing consumers and/or civil society and EU level and national business organisations representing retailers, service providers and manufacturers, including SMEs. Member organisations were selected through a call for application in 2016 requiring applicants to be registered in the Commission's Transparency Register.[43] The Group is registered as a DG JUST expert group in the Register of Commission expert groups and other similar entities ('the Register of expert groups').[44] At the meetings of 6 June, 4 September, 2 October, 6 November, 12 December 2017 and 29 January 2018, the proposed follow-up actions to the Fitness Check and the CRD evaluation were discussed. Following discussions during the meeting of 6 June, the Commission took into account the comments received on the draft questionnaire for the public consultation, notably it redrafted some questions in a less complex manner and added explanations to specific terminology as suggested by the Members. Following the announcement, at the meeting of 2 October 2017, of the planned revision of the Injunctions Directive, members informed that they would respond to the relevant targeted consultation and IIA.

Regular meetings with the CPC network: At the meetings of 15 June and 19 October 2017, the members discussed the updates presented by the Commission on the work done for this IA. For more information on CPC see: https://ec.europa.eu/info/consumers/consumer-protection-cooperation-regulation_en

Regular meetings with the ECCG: At the meetings of 14 June and 12 October, the members discussed the updates presented by the Commission on the work done for this IA. For more information on ECCG see: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=849&NewSearch=1&NewSearch=1 .

Regular meetings with the CPN: At the meeting of 24 January 2018, the members discussed the updates presented by the Commission on the work done for this IA. For more information on CPN see: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=861&NewSearch=1&NewSearch=1

[42] In addition, the Dutch Ministry of Justice replied outside of the survey tool.
[43] http://ec.europa.eu/transparencyregister/public/homePage.do
[44] For more information on the activity of the Group, please see: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3423

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Annex 3. Who is affected by the initiative and how?

The preferred Option would affect the following stakeholders: consumers, traders (including SMEs), representative organisations (including 'qualified entities' under the ID), national authorities (courts, administrative authorities, sector-specific regulators, ministries) and the network of the European Consumers Centres.

I. Overview of Benefits (total for all provisions) – Preferred Option		
Description	***Amount***	***Comments***
	Direct benefits	
Improve compliance with EU consumer law	The preferred package of Options will increase deterrence, which ultimately will result in higher compliance rates among traders.	This package focuses on outstanding drivers of the lack of compliance that have not already been addressed by other initiatives.
	The preferred package of Options will support the effective functioning of the revised CPC Regulation.	By strengthening penalties, providing direct civil law consequences for breaches of EU consumer law and by strengthening injunctions procedure by redress effect this package will increase deterrence and also provide an incentive for infringing traders to offer voluntary commitments to settle infringement cases, including in the context of coordinated CPC enforcement actions.
	Probability for consumers to encounter unfair commercial practices from domestic retailers is 4 percentage points lower in MS with links between remedies and breaches of the UCPD. Similarly, in MS with links between remedies and breaches of the UCPD the probability of experiencing a problem with the product/service purchased is lower (by 3.2 percentage points). The effect of remedies linked to UCPD breaches on the likelihood to have experienced a UCP is strongly amplified in countries imposing a high level of sanctions and in countries with the highest level of public monitoring of compliance with consumer legislation.	This indicates that ensuring remedies for victims of unfair commercial practices improves compliance with EU consumer law by traders
	Likelihood of consumers to get satisfactory outcome when complaining is influenced by UCPD remedies: 8.7 percentage points difference in satisfied consumers between MS with links to UCPD remedies and other MS.	This indicates that ensuring remedies for victims of unfair commercial practices helps consumers solve problems when their rights have not been respected.
	53% of the respondents to the ID survey predicted an increase of deterrence, 56% - a reduction of consumer	With improved collective injunctive relief and redress, there will be an increase of compliance with EU consumer law, particularly for businesses

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	detriment, 53% - procedural efficiencies.	that are sensitive to reputational damage from collective actions.
Modernise consumer protection rules and eliminate unnecessary costs for compliant traders	Following pre-contractual information on online marketplaces, 72% of consumers correctly remembered who their contractual partner is.	Providing for more transparency on online marketplaces will reduce consumer detriment and increase consumer trust
	Instead of differing and unclear requirements in Member States, transparency obligations for online marketplaces will be harmonised.	This brings simplification for cross-border transactions in the internal market.
	In reply to the public consultation, around 80% of consumer associations reported that consumers would use "free" digital services even more often, if they had the right to pre-contractual information and to withdraw.	Ensuring consumer protection in "free" digital services will reduce consumer detriment and increase consumer trust, also leading to possible uptake of the volume of transactions.
	60% of business associations replying to the public consultation stated that companies incur unnecessary costs due to diverging rules on information requirements and right of withdrawal for "free" digital services	Extending the scope of the CRD to "free" digital services would reduce current unnecessary costs of compliant traders linked to the need to check and comply with possible national mandatory rules on pre-contractual information and right of withdrawal for these services.
Indirect benefits		
Improve compliance with EU consumer law	The preferred package of Options will contribute to greater awareness about consumer rights among consumers and traders, for example by leading to more media attention about consumer rights infringements through collective injunction and redress initiatives. This package will thus complement other specific awareness raising measures.	The Fitness Check showed that lack of awareness is an important impediment to well-functioning consumer protection. In addition to this package, the Commission is working to improve awareness about consumer law through training activities for traders, awareness raising campaigns for consumers and developing further guidance on the application of EU consumer law
	If UCPD remedies were applied in all 28 MS, reduction in consumer detriment in the 14 MS that do not have links to UCPD remedies today is estimated at Euro 560 million per year (this is a conservative estimate that doesn't take into account the synergetic effect between remedies, sanctions and active public enforcement).	Conservative estimate since likely synergies between remedies and sanctions are not taken into account. As shown by the results of the regression analyses, effects of UCPD remedies increase strongly when combined with high levels of sanctions.

	Positive impacts on vulnerable consumers of introducing rights to UCPD remedies and of improving collective injunctive relief and redress.	The number of vulnerable consumers experiencing unfair commercial practices increases more than the numbers for other consumer becoming victims of such practices. Vulnerable consumers are more reluctant to bring individual redress actions, so effects of introducing rights to UCPD remedies will be strengthened by also introducing collective injunctive relief and redress.
	Positive environmental impacts of introducing rights to UCPD remedies and of improving collective injunctive relief and redress	Ensuring consumers rights to UCPD remedies is likely to deter more traders from presenting misleading environmental claims. Misleading environmental claims are particularly likely to create mass harm situations.
Modernise consumer protection rules and eliminate unnecessary costs for compliant traders		Greater transparency will ensure that consumers are better informed about differences between consumer rights and rights in pure consumer-to-consumer contracts.
		Extending the scope of the CRD to "free" digitals services would ensure a clear and consistent legal framework at EU level, at the same time facilitating fairer competition for businesses.

II. Overview of Costs – Preferred Option[45]							
Objective/Policy option		Consumers/qualified entities representing consumers		Traders		Courts/authorities	
		One-off	Recurrent	One-off	Recurrent (per year)	One-off	Recurrent
Improve compliance with EU consumer law	Direct costs	Initial familiarisation costs	n/a	0 – EUR 572 484 (average EUR 12 293, median EUR 638) [46] for SMEs	0 – EUR 190 497 (average: EUR 8 484, median: EUR 655) [48] for SMEs	Initial implementation costs	Enforcement costs

[45] Monetary figures are based on responses to the SME panel consultation, average and median in brackets. Micro-enterprises are included under the 'SME' category.
[46] The figures are highly influenced by the outlier value estimated by a Danish micro enterprise (estimates from this country range from zero to EUR 572 484, with average: EUR 149 734, median: EUR 13 227). The 2nd highest estimate was reported by a respondent from EL with EUR 160 000 (average across the 8 replies from that country is EUR 24 375, median: zero, The 3rd biggest range resulted from responses from ES with zero to EUR 101 675 (mean: EUR 16 052, median: EUR 1 796), followed by a PT company that estimated EUR 25 637.
[48] The maximum amount was reported by a micro-enterprise in DK. The four estimates from that country resulted in an average of EUR 49 542 and median of EU 3 835). The 2nd highest value was reported a Portuguese SME (EUR 171 551, another outlier). The average of the 12 estimates from this country amounts to EUR 20 504, the median is EUR 1 609.

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					0 – EUR 5 000 (average EUR 1 703, median EUR 108) for large enterprises EUR 2.276 billion are the EU-estimated costs for the retail trade industry in the EU[47]	0 – EUR 15 000 (average EUR 5 000, median 0) for large enterprises. EUR 2.336 billion are the EU-estimated costs for the retail trade industry in the EU[49]		
	Indirect costs	n/a		n/a	n/a	n/a	n/a	n/a
Modernise consumer protection rules and eliminate unnecessary costs for compliant traders	Introducing transparency obligations for online marketplaces	Direct costs			0 – EUR 48 000 (average EUR 2 179, median EUR 50) for SMEs[50] n./a. for large enterprises[51] EUR 178 million are the EU-estimated costs for	0 – EUR 84 301 (average EUR 3 887, median 0) for SMEs[53] n./a. for large enterprises Zero EUR are the EU-estimated costs for the retail trade industry in		

[47] The figure is estimated on the basis of the median costs observed from the SME panel consultation (by enterprises size) and the overall number of enterprises in the retail trade industry, broken down by enterprise size – NACE REV2, G (Source Eurostat). Given the limited representativeness of the businesses that responded to the consultations, such estimates should be considered as only indicative and treated with caution.

[49] The figure is estimated on the basis of the median costs observed from the public consultation (by enterprises size) and the overall number of enterprises in the retail trade industry, broken down by enterprise size – NACE REV2, G (Source Eurostat). Such estimates should be considered as only indicative and treated with caution.

[50] Notable is the (only) estimate from a micro-enterprise from DK (EUR 48 000). The next highest value was reported by the (only) respondent from SK (EUR 7 933).

[51] The figure is estimated on the basis of the median costs observed from the SME panel consultation and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. Such estimates should be considered as only indicative and treated with caution.

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					the retail trade industry in the EU[52]	the EU[54]		
		Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
	Extending rules on free digital services	Direct costs			Pre-contractual information: 0 – EUR 48 000 (average EUR 2 956, median 0) for SMEs n./a. for large enterprises Zero EUR are the EU-estimated costs for the retail trade industry in the EU[55]	Pre-contractual information: 0 – EUR 168 602 (average EUR 8 367, median EUR 33) for SMEs[57] n./a. for large enterprises EUR 117 million are the EU-estimated costs for the retail trade industry in the		

[53] The three respondents from PT estimated costs of zero, EUR 5 782 and EUR 84 301, the 2nd highest estimate (EUR 20 000) originates from the (only) respondent from DK, the 3rd highest from PL (EUR 10 000).

[52] The figure is estimated on the basis of the median costs observed from the SME panel consultation (and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. Such estimates should be considered as only indicative and treated with caution.

[54] The figure is estimated on the basis of the median costs observed from the SME panel consultation (and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. However the median was stated at zero. Such estimates should be considered as only indicative and treated with caution.

[55] The figure is estimated on the basis of the median costs observed from the SME panel consultation (and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. However the median was stated at zero. Such estimates should be considered as only indicative and treated with caution.

[57] The maximum outlier estimate stems from a small enterprise in PT, the next highest value of EUR 20 000 was reported by the (only) respondent from DK

					Right of withdrawal: 0 – EUR 48 000 (average EUR 3 382, median 0) for SMEs. n./a. for large enterprises Zero EUR are the EU-estimated costs for the retail trade industry in the EU[56]	EU[58] Right of withdrawal: 0 – EUR 168 602 (average EUR 9 119, median EUR 50) for SMEs. n./a. for large enterprises EUR 178 million are the EU-estimated costs for the retail trade industry in the EU[59]		
		Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a

[56] The figure is estimated on the basis of the median costs observed from the SME panel consultation (and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. However the median was stated at zero. Such estimates should be considered as only indicative and treated with caution.

[58] The figure is estimated on the basis of the median costs observed from the public consultation (and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. Such estimates should be considered as only indicative and treated with caution.

[59] The figure is estimated on the basis of the median costs observed from the SME panel consultation (and the overall number of enterprises in the retail trade industry – NACE REV2, G (Source Eurostat). As the costs estimate for large enterprises are not available, they are assumed to be equal to those of enterprises with less than 250 persons employed. Such estimates should be considered as only indicative and treated with caution.

Annex 4. Analytical methods used in preparing the IA

1. Analysis of correlation between remedies and breaches of the UCPD

The correlation between remedies and breaches of the UCPD was analysed through a multivariate approach[60]. The regression model, which was run on micro data from the EU wide consumer survey carried out in the framework of the 2017 Consumer Conditions Scoreboard[61], was aimed at observing the relation between the probability of consumers having experienced at least one unfair commercial practice (UCP) and the fact that they live in a EU country where remedies for breaches of the UCPD are foreseen[62]. In addition, the model includes a set of control variables at both micro level (socio-demographic characteristics of the persons interviewed) and at country level (the effectiveness of public monitoring of compliance with consumer legislation[63]). The model results shows that, all other things being equal, the probability of encountering a UCP in EU countries foreseeing remedies linked to breaches of the UCPD is 4 percentage points lower than in the other Member States.

By combining results from the regression model described above with other sources of statistical information, it was possible to estimate the reduction in consumer detriment (in euro) corresponding to a situation where all EU Member States would provide remedies linked to breaches of the UCPD. This estimate should be considered as indicative only, both because it is based on an analytical approach that evidences correlation, not causation; and because it does not rely on a General Equilibrium Model (meaning that indirect and loop effects of the foreseen policy measured are not taken into account).

Using PROB_GDP (=0.4%) the overall consumer detriment (from all kind of consumer problems) as percentage of the EU Gross Domestic Product[64] and:

- UCP_RED (=7.39%) the relative difference[65] in the probability of encountering a UCP between EU countries with links between remedies and breaches of the UCPD and Member States without such links (as estimated by the regression model described in point 6.3.2 of the main document for this IA)
- UCP_SHARE (=0.144), the share of UCP-related complaints in all complaints, as estimated from the Commission harmonized database on consumer complaints[66]
- DETR_RATIO (=1.812), the average ratio between the post-redress financial detriment due to one consumer problem related to a UCP and the detriment due to one general consumer problem, as estimated based on data from the Commission study on "Measuring consumer detriment in the European Union"[67],

the expected reduction in percentage point of GDP (UCP_GDP) from establishing a linkage between remedies and breaches of the UCPD can be estimated as:

UCP_GDP = PROB_GDP*UCP_RED*UCP_SHARE* DETR_RATIO

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[60] Results are summarized in section 6.3.2 of the Impact Assessment

[61] Survey on "Consumers attitudes towards cross border trade and consumer protection".

[62] The countries with links between remedies and breaches of the UCPD are: BE, BG, CZ, IE, EL, FR, LT, LU, NL, PL, PT, SK, SE and UK.

[63] The indicator is the following: "% of retailers who agree that public authorities actively monitor and ensure compliance with consumer legislation in their sector". It was collected through the 2016 edition of the survey on "Retailers' attitudes towards cross border trade and consumer protection", was conducted in the framework of the 2017 Consumer Conditions Scoreboard.

[64] European Commission own estimate based on the Special Eurobarometer 342 on Consumer Empowerment. (http://europa.eu/rapid/press-release_IP-11-455_en.htm)

[65] According to the model regression, the probability of encountering a UCP is equal to 50.061% in countries with remedies and to 54.056% in countries without remedies. Consequently, the difference between the two groups of countries is equal to – 3.99% in percentage points and to -7.39% in relative terms.

[66] Equal to 0.144. For more information on the Harmonized Consumer Complaints database see: https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/consumer-complaints-statistics_en

[67] http://ec.europa.eu/consumers/consumer_evidence/market_studies/consumer-detriment/index_en.htm

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In numerical terms:

UCP_GDP = 0.4%*0.0739*0.144*1.812=0.00774%[68]

In addition, considering that the overall GDP in 2016 for the countries currently not foreseeing links between remedies and breaches of the UCPD was equal to 7,232,891.3 million Euro, the economic benefit – in terms of reduction in detriment – for the EU consumers associated with the extension of the remedies linked to UCPD breaches to all Member States can be estimated to represent

EURO_DETR=7,233,598.3*(0.00774/100)=560[69] million Euro.

An augmented version of the regression model described above allowed for the estimation of the relation between the probability for a consumer to have experienced at least one UCP and the fact that they are living in a EU country where links between remedies and breaches of the UCPD are foreseen, conditional to the maximum level of sanctions imposed for UCPD breaches in the country. For this purpose, a variable grouping Member States in 3 categories (low, medium and high sanctions), based on the maximum level of fines imposed (see below table 1) was added to the equation regression:

Table 1: Highest monetary fines actually imposed for UCPD breaches

Country	Monetary fine, euro	Category
Bulgaria	25,000	low
Czech Republic	76,701	medium
Denmark	135,000	medium
France	500,000	medium
Italy	5,000,000	high
Latvia	50,000	low
Lithuania	34,754	low
Malta	195,000	medium
Netherlands	300,000	medium
Poland	6,708,619	high
Portugal	25,000	low
Romania	11,000	low
Slovenia	3,000	low
Sweden	200,000	medium

Source: CPC/CPN/CMEG survey (question 40)

Results from this analysis[70] show that the effect of remedies linked to UCPD breaches on the likelihood to have experienced a UCP is strongly amplified in countries imposing a high level of sanctions. Similar results were found when considering the probability of experiencing any problems when buying or using goods or services as the dependant variable in the regression model.

A slightly modified regression model showed that the marginal effect of remedies is amplified in countries having the highest level of public monitoring of compliance with consumer legislation.

[68] The factors presented in the multiplication are rounded while the result was computed on unrounded figures.
[69] The factors presented in the multiplication are rounded while the result was computed on unrounded figures.
[70] Results are summarized in section 8.1 of this Impact Assessment

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Detailed results of the regression models can be found in the JRC technical report: "An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems"[71]

2. Platforms contractual identification behavioural experiment

The experiment investigated the effect of information on contractual entities on product choices. The design mirrors the logic of the study on informational characteristics. The respondents were presented with two of the possible mobile phones and asked which phone they preferred basing their evaluation on three attributes of the contractual information and price. The three attributes were (i) information content about the contractual entity; (ii) information presentation in terms of visual prominence about the contractual entity, and (iii) price of the mobile phone. The following table shows the levels for each attribute.

The sample for the experiment consisted of 1,600 subjects in 4 EU MS (Germany, Poland, Spain and UK). The sample for each discrete choice experiment, 400 subjects in each target country, was representative of the population that purchased a good or service online during the last year, as quotas by sex and age were applied to these samples, based on the last available Eurostat's data from the 2016 survey on ICT.

Discrete choice model methodological note

The parameter estimates are standard logic, therefore the regression coefficients represent the change in the logit for each unit change in the predictor. However, in contrast to traditional Conjoint Analysis that relies on Conjoint Measurement, which is not a behavioural theory (of choice), Discrete choice experiments (DCEs) are based on a long-standing, well-tested theory of choice behaviour that can take inter-linked behaviours into account.

Specifically, RUT proposes that there is a latent construct called "utility" existing in a person's head that cannot be observed by researchers. That is, a person has a "utility" for each choice alternative, but these utilities cannot be "seen" by researchers, which is why they are termed "latent". RUT assumes that the latent utilities can be summarized by two components, a systematic (explainable) component and a random (unexplainable) component. Systematic components comprise attributes explaining differences in choice alternatives and covariates explaining differences in individuals' choices. Random components comprise all unidentified factors that impact choices. Psychologists further assume that individuals are imperfect measurement devices; so, random components also can include factors reflecting variability and differences in choices associated with individuals and not choice options per se. More formally, the basic axiom of RUT is:

$Uin = V_{in} + e_{in}$, (1)

where Uin is the latent, unobservable utility that individual n associates with choice alternative i, Vin is the systematic, explainable component of utility that individual n associates with alternative i, and in is the random component associated with individual n and option i. Because there is a random component, utilities (or "preferences") are inherently stochastic as viewed by researchers. So, researchers can predict the probability that individual n will choose alternative i, but not the exact alternative that individual n will choose.

Experiment: Impact of the identity of the contracting parties involved in the transactions	Information content **(IC)**	• **IC1:** No information on contractual identity • **IC2:** Information on the contractual entity being a trader or non-trader • **IC3:** Information on the contractual entity being a person or a company and its implications on the consumer's right

[71] See annex 14

enabled or facilitated by the platform.	Information presentation **(IP)**	• **IP1:** Low salience (as a text included in the description of the good) • **IP2:** High salience (as a highlighted text out of the description of the good)
	Price (P)	• **A1:** The good has a lower price • **A2:** The good has a higher price

Annex 5. Results of the Fitness Check, the CRD Evaluation and the Assessment of the Recommendation on collective redress.

The results of the Fitness Check of 6 consumer and marketing law directives[72] and the evaluation of the CRD were published on 29 May 2017.[73]

The Fitness Check concluded that the substantive provisions of the respective Directives remain overall fit for purpose if they are applied and enforced effectively. Specifically, the substantive rules laid down in the Directives are capable of addressing most existing consumer problems. However, the findings also point to some problems. The general objective of ensuring a high level of consumer protection is not fully achieved, as infringements of consumer rights remains relatively widespread. The main obstacle to ensuring a high level of consumer protection is that the rules are insufficiently enforced. This is coupled with: (i) limited awareness among consumers of their rights; and (ii) shortcomings over redress opportunities, which makes it difficult for consumers to seek redress.[74]

The findings of the Fitness Check per evaluation criteria can be summarised as follows:

- Effectiveness: The objective of ensuring a high level of consumer protection has so far not been fully met. This is because many traders do not respect EU consumer and marketing rules.[75] There has not been significant progress on traders' compliance with consumer protection rules; roughly the same number of consumers reported infringements in 2008 as in 2016. On the other hand, this is still an overall positive outcome, as infringements happening online today can harm more consumers across the EU at the same time than what was the case in 2008.[76]
- Effectiveness: Most of the Directives are largely principle-based, do not distinguish between online and offline environments and are fully technology-neutral. Therefore, as demonstrated by the proceedings of the CPC networks, they are also capable of addressing new problems, even if the Directives were adopted before the age of e-commerce.[77]
- Efficiency: Stakeholders largely agree that the rules have significant benefits for consumer protection and cross-border trade, and also ensure better protection for businesses.[78] The estimated costs of compliance are considered proportionate when compared to annual turnover and with the benefits they bring for the functioning of consumer markets.[79]
- Efficiency: The Directives do not appear to impose unreasonable burdens on businesses, while the reasonable burdens they impose appear necessary to achieve the high level of consumer protection required by the Treaty.[80]
- Efficiency: Business compliance costs compare well with other sectors. In the first 2012 analysis of burdens imposed by EU legislation, EU rules in the area of consumer protection

[72] Unfair Contract Terms Directive 93/13/EEC (the 'UCTD'); the Consumer Sales and Guarantees Directive 1999/44/EC (the 'CSGD'); the Price Indication Directive 98/6/EC (the 'PID'); the Unfair Commercial Practices Directive 2005/29/EC (the 'UCPD'); the Misleading and Comparative Advertising Directive 2006/114/EC (the 'MCAD') and the Injunctions Directive 2009/22/EC (the 'ID').
[73] SWD (2017) 208 final and SWD(2017) 209 final (both on the Fitness Check) and COM(2017) 259 final, SWD(2017)169 final and SWD(2017) 170 final (on the CRD evaluation), all of 23.5.2017, are available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.
[74] Fitness Check Report. SWD, pages 75, 76.
[75] Fitness Check Report, Executive Summary, page 2.
[76] Fitness Check Report. SWD, page 74.
[77] Fitness Check Report. SWD, page 76.
[78] Fitness Check Report. SWD, page 78.
[79] Fitness Check Report, Executive Summary, page 3.
[80] Fitness Check Report. SWD, page 80.

were considered the second least burdensome by SME respondents among the 32 surveyed areas.[81]

- Coherence: The horizontal EU Directives evaluated in the Fitness Check and EU sector-specific consumer protection legislation complement each other. Stakeholders largely agree that the combination of these horizontal and sector-specific rules provides a clear and coherent legal framework. In particular, the UCPD and UCTD provide a 'safety net' complementing and filling regulatory gaps in the regulated sectors.[82]
- Coherence: The potential for simplification is limited: There is a need to consider reducing information requirements at the advertising stage. Traders must provide the same and more detailed information at the later pre-contractual stage. This notably concerns information requirements about complaint handling and traders' geographical addresses.[83]
- Relevance: The consumer protection and internal market objectives pursued by 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 will continue to require enforcement action at EU level. To be effective, EU-wide enforcement must be based on a common and uniform legal framework.[84]
- EU Added Value: The harmonised rules under these Directives make it possible for national enforcement authorities to address cross-border infringements that harm consumers in several Member States more effectively.[85] The Directives generate coordination gains in enforcement work and more legal certainty and stability for cross-border traders in the EU.[86]

The CRD only entered into application in June 2014. Due to the still early stage of implementation, the CRD Evaluation focused on the progress introduced by this Directive compared to the status before it entered into force and experience with the application during the first two and a half years of its application. The evaluation shows that the Directive has positively contributed to the functioning of the B2C internal market, with a high common level of consumer protection, albeit so far with some limitations.

The findings of the CRD evaluation per evaluation criteria can be summarised as follows:[87]

- Effectiveness: Overall, the transposition and first application of the CRD appears to be in line with the Directive's main objectives of enhancing consumer protection and reducing regulatory fragmentation.
- Efficiency: The limited available data do not allow definitive conclusions about the level of costs faced by businesses in ensuring compliance with the Directive. Specific burdens especially for SMEs have been reported, mainly relating to pre-contractual information requirements and the right of withdrawal.
- Coherence: Overall, the CRD is deemed coherent with other EU legislation and no major problems have been identified. However, the interplay with several other pieces of EU legislation and new EU legislative proposals could be further streamlined and clarified. In particular, consistency should be ensured between the CRD and the proposal for a Directive for contracts for the supply of digital content (DCD)[88]. Both Directives should apply to the same digital content and services. There is a need to clarify if the CRD covers both digital content and digital services for which the consumer does not pay a price.

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[81] Fitness Check Report. SWD, page 79.
[82] Fitness Check Report. SWD, page 81.
[83] Fitness Check Report. SWD, page 82.
[84] Fitness Check Report, Executive Summary, page 3.
[85] Fitness Check Report. SWD, page 84.
[86] Fitness Check Report, Executive Summary, page 3.
[87] CRD Evaluation, SWD, pages 56, 57.
[88] COM(2015) 634.

- Relevance: The original objectives of the Directive are as valid today as when the Directive was first proposed. In particular, the objectives of ensuring a high level of consumer protection and a level playing field for businesses in online B2C contracts are relevant within the framework of the DSM policy.
- Relevance: There is some scope for simplification: The provisions of the CRD are still relevant, except for the requirement to provide the trader's fax number, and the trader's e-mail address where other, more modern means of communication (such as web-based forms) could be sufficient, to the extent they enable the consumer to efficiently contact the trader in a manner which allows the consumer to keep a proof of such exchanges on a durable medium.
- EU Added Value: An EU approach remains the most appropriate response and is more likely to contribute to achieving the objectives set by the Directive than national approaches. The Directive has consistently reduced the regulatory fragmentation among Member States through its harmonisation approach, hence contributing to enhancing consumer trust in cross-border sales and reducing traders compliance cost when selling cross-border. Harmonised rules are also important for effective cross-border enforcement actions between Member States.

Table 1: Replies by consumer and business associations and public authorities on the importance of different problems for protecting the rights of consumers; % of respondents in each category (Fitness Check public consultation 2016)

	Consumer associations		**Business associations**		**Public authorities**	
	Problem	**No problem**	**Problem**	**No problem**	**Problem**	**No problem**
Consumers don't know/ don't understand their rights	**90**	10	**54**	12	**89**	0
Traders don't know/ don't understand consumer protection rules	**85**	15	**55**	16	**79**	11
Traders don't comply with consumer protection rules	**95**	5	29	38	**86**	0
Consumer law is too complex	**64**	35	63	10	**64**	25
There are significant differences between national consumer protection rules across EU countries	40	**60**	48	16	39	46
National administrative authorities lack legal powers to enforce consumer rights	**70**	25	15	47	**65**	14
National authorities responsible for enforcing consumer rights are not active enough	**85**	10	22	44	**65**	15

	Consumer associations		Business associations		Public authorities	
	Problem	**No problem**	**Problem**	**No problem**	**Problem**	**No problem**
Court proceedings are complex / long / costly	**100**	0	33	33	**86**	0
Administrative enforcement proceedings are complex / long / costly	**90**	5	25	34	**50**	22
Injunctions proceedings are complex / long	**75**	15	23	32	**68**	11
Injunctions proceedings are costly	**70**	15	18	31	**57**	15
There are significant differences between national rules on injunctions proceedings across EU countries	**55**	20	19	25	**57**	25

The Commission report on the implementation of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) is scheduled for publication on 25th January 2018 (the Collective Redress Report).

The Report concludes that appropriately designed and balanced collective redress mechanisms contribute to the effective protection and enforcement of rights granted under Union law, since "traditional" remedies are not sufficiently efficient in all situations. Without a clear, fair, transparent and accessible system of collective redress, there is a significant likelihood that other ways of claiming compensation will be explored, which are often prone to potential abuse negatively affecting both parties to the dispute.

In many instances, affected persons who are unable to join forces in order to seek a redress collectively will abandon their justified claims at all, due to excessive burdens of individual proceedings.

The analysis of the legislative developments in Member States as well as the evidence provided demonstrate that there has been a rather limited follow-up to the Recommendation as concerns transition into legislation. The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU. The impact of the Recommendation is visible in the two Member States where new legislation was adopted after its adoption (BE and LT) as well as in SI where new legislation is pending, and to a certain extent in the Member States that changed their legislation after 2013 (FR and UK).

This limited follow-up means that the potential of the principles of the Recommendation to facilitate access to justice for the benefit of the functioning of the single market is still far from being fully exploited. 9 Member States do not provide for any possibility to collectively claim compensation in mass harm situations as defined by the Recommendation. In some Member States that formally provide this possibility, in practice affected persons do not use it due to the rigid conditions set out in national legislation, the lengthy nature of procedures or perceived excessive costs in relation to the expected benefits of actions. The call for evidence has also demonstrated that

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in some cases collective judicial action can be usefully avoided because of successful out-of-court settlements, sometimes as follow-on to administrative action. This highlights the importance of effective out-of-court dispute resolution mechanisms in line with the Recommendation. The Recommendation has a horizontal dimension given the different areas in which mass harm may occur. However, the concrete cases reported, including the car emissions case, demonstrate that the areas of EU law relevant for collective interests of consumers are those in which collective redress is most often made available. These are the areas where actions are most often brought and in which the absence of collective remedies is of the biggest practical relevance. It is also in these areas that binding EU rules on the injunctive dimension of collective redress exist and have proven their value. The Injunctions Directive regulates representative action initiated by qualified entities in particular in the form of non-profit organisations or public authorities in relation to which concerns regarding abusive litigation driven by profit interests of third-party funders appear to be unfounded.

This is confirmed by the results of the call for evidence. While consumer organisations make a strong case for EU-wide intervention in this field, business organisations generally focus their concerns in relation to EU action in the consumer area and refer to proportionality or subsidiarity concerns, urging the Commission to concentrate on public enforcement or on redress via ADR/ODR or the small claims procedure.

Against this background, the Report announced the following Commission actions:

- to further promote the principles set out in the 2013 Recommendation across all areas, both in terms of availability of collective redress actions in national legislations and thus of improving access to justice, and in terms of providing the necessary safeguards against abusive litigation;
- to carry out further analysis for some aspects of the Recommendation which are key to preventing abuses and to ensuring safe use of collective redress mechanisms, such as regarding funding of collective actions, in order to get better a picture of the design and practical implementation;
- to follow-up this assessment of the 2013 Recommendation in the framework of the forthcoming initiative on a "New Deal for Consumers", as announced in the Commission Work Programme for 2018,[89] with a particular focus on strengthening the redress and enforcement aspects of the Injunctions Directive in appropriate areas**.**

Follow-up to recommendations from the Fitness Check and the CRD Evaluation through this IA:

This IA follows-up on these recommendations from the Fitness Check:

- increased deterrent effect of penalties for breaches of consumer law;
- introduction of UCPD remedies;
- making the ID more effective, for example, by expanding its scope and further harmonising the procedure to: (i) facilitate access to justice and reduce the costs for qualified entities, (ii) increase the deterrent effect of injunctions, (iii) produce an even more useful impact on the affected consumers;
- reduction of information requirements that are duplicated in the UCPD and CRD;

This IA follows-up on these recommendations from the CRD Evaluation:

[89] COM(2017)650 final

- Further examining possible targeted amendments to the CRD regarding:
  - extending its scope to include contracts for ”free” digital services;
  - simplifying some of the existing information requirements, in particular to better reflect technological/market developments, for example by allowing traders to use more modern means of communication for their exchanges with consumers, provided that such means allow the consumer to efficiently contact the trader and to keep a proof of such exchanges on a durable medium;
  - reducing the burden on traders, especially SMEs, which some stakeholders consider disproportionate. This concerns provisions on the right of withdrawal for goods used by consumers more than necessary to establish their nature, characteristics and functioning and the rules on reimbursement before the trader has received the goods back;
  - increasing the transparency of the information that online marketplaces provide consumers about the identity and quality (”trader” or ”consumer”) of the supplier, about the differences in the level of consumer protection when contracting with a trader rather than another consumer, and about the default ranking criteria when presenting offers, and establishing the consequences for failing to comply with transparency requirements;

Follow-up to recommendations from the Fitness Check and the CRD Evaluation through other initiatives than this IA:

As indicated in Section 2.1 (conclusions from relevant consultations), a number of recommendations from the Fitness Check and the CRD evaluations are followed up through other initiatives than this IA. The most important of these are listed in Figure 2 in Section 2.2 (overview of drivers, problems and objectives) as "addressed through other initiatives". In addition, the below lists indicate how all the recommendations not addressed in this IA are being dealt with:

Initiatives to follow up on the following recommendations from the Fitness Check:

- Continue collecting data via consumer scoreboards:
  - The Commission publishes consumer scoreboards bi-annually. The consumer scoreboards monitor how the single market is performing for EU consumers and signal potential problems. Published since 2008, they aim to ensure better monitoring of consumer outcomes and provide evidence to inform policy.[90]
- Promoting consumers’ and traders’ awareness of their rights and obligations
  - The Commission is currently preparing a Communication campaign on consumer rights in all EU Member States, to be rolled out from August 2018. It is designed to inform consumers on their high level of rights in the EU, in particular by promoting four key rights, stemming from the Directives on Consumer Rights, Unfair Commercial Practices, Unfair Contract Terms and Consumer Sales and Guarantees. It will also promote more specifically rights on product safety, package travel and transparency of bank account fees in 10 selected Member States.
- Launching a pilot project on training SMEs in the digital age:
  - To improve the traders' awareness of consumer rights, the European Commission has launched a training project for SMEs, based on a request by the European Parliament for a pilot project. The project "ConsumerLaw Ready" is coordinated by a consortium led by BEUC, the European Consumer Organisation, together with SME organisations

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[90] For further information, see https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/consumer-scoreboards_en

UEAPME and Eurochambres. 28 trainers in each EU Member State have been appointed to train trainers (such as local business associations) in their respective countries in their own language about both EU and national consumer laws. Learning material has been developed for each of the countries on the five following topics:
    - Pre-contractual information requirements
    - Right of withdrawal for distance and off-premises contracts
    - Consumer rights and guarantees in case of defective goods
    - Unfair commercial practices and contract terms
    - Alternative Dispute Resolution and Online Dispute Platform

  The training of SMEs started in December 2017 and will continue throughout 2018. A dedicated website was created in November 2017: consumerlawready.eu

- Creation of a Consumer Law Database:
  - A new Consumer Law section will be added to the Commission's e-Justice Portal in early 2018, allowing legal practitioners to check for national transpositions of the EU consumer law directives, relevant case law, and legal literature. This consumer law database should facilitate the knowledge of consumer law and its interpretation across Member States, including for example by businesses operating in several jurisdictions or wishing to expand to other Member States.
- Steering a self-regulatory exercise within the REFIT stakeholder group on the better presentation of mandatory pre-contractual information and standard Terms and Conditions with a view to reach a multi-stakeholder agreement on a set of key principles:
  - A self-regulatory project for better presentation of consumer information and T&Cs was launched in April 2017. Results are expected in the course of 2018. It is chaired by business associations that are members of the Refit Stakeholder Group and the aim is to have business and consumer representatives agree on "Guiding Principles for better presentation of information to consumers".
- Improvement of the UCTD, either via a guidance document or targeted amendments, such as introducing a black list, clarifying the scope of application, exemptions and the relationship with sector-specific rules:
  - The issues identified will be addressed through Commission guidance, to shed light on the rich case law of the European Court of Justice on this important Directive.

Initiatives to follow up on the following recommendations from the CRD Evaluation:

- Promoting consumers' and traders' awareness of their rights and obligations:
  - See above for Fitness Check follow-up.
- Considering further guidance on the CRD provisions which the evaluation found to be perceived as lacking clarity:
  - The Commission plans to update the 2014 CRD Guidance with a view to address the problems with the interpretation of specific CRD provisions identified in the Evaluation.
- Steering a self-regulatory exercise within the REFIT stakeholder group on the better presentation of mandatory pre-contractual information and standard Terms and Conditions with a view to reach a multi-stakeholder agreement on a set of key principles;
  - See above for Fitness Check follow-up.
- Stepping up the enforcement of the Directive across all Member States, including through common actions in the framework of the Consumer Protection Cooperation Regulation:
  - The Commission has been engaged in a series of actions monitoring and enforcing the application of the CRD in the MS. "EU sweeps", EU-wide screenings of websites by the CPC authorities in the form of simultaneous, coordinated checks to identify breaches of consumer law and to subsequently ensure its enforcement, have been initiated to facilitate enforcement of the CRD. Following a 2015 Sweep on CRD, two

more Sweeps (2016 on Comparison Tools in the travel sector and 2017 on Telecommunication and other digital) examined the application of certain CRD requirements on pre-contractual information. In certain cases, enforcement actions were taken to correct the identified irregularities. Moreover, the Commission is planning to launch a study on price information on travel booking websites, including possible breaches of the CRD; this study may serve as basis for future common actions within the CPC network.

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Annex 6. Mechanisms to enforce EU consumer law

EU consumer legislation can be enforced in different ways. Member States have different private and public enforcement systems. These include a variety of mechanisms for individual, collective, judicial, administrative and alternative dispute resolution.

If consumers consider that their consumer rights have not been respected by traders they can seek redress, for example to have their contract terminated or to get compensation for the harm suffered. To get redress, consumers can take individual action against traders, either in courts or through out-of-court dispute resolution mechanisms. Consumers can also complain to public enforcement authorities and independent public bodies as well as to private entities, such as consumer organisations, that have been empowered by the Member States to protect consumer interests.

Consumer rights can also be enforced through collective action. Depending on the mechanisms available under national law, consumers may be able to join forces and bring a legal action as a group. They may also be able to bring their cases to the attention of representative organisations or independent public bodies that have the right to start legal actions in front of a court or a national enforcement authority for the protection of the collective interest of consumers.

The enforcement powers of public authorities vary across Europe. Some national public authorities have direct powers to act, on their own motion or on the basis of complaints, to investigate, stop and penalise breaches of consumer law[91]. In some Member States, they may also order traders to provide redress to consumers[92]. In other national systems, competent entities need to request courts to stop and penalise breaches of consumer law[93]. Finally, in many Member States ordering consumer redress is always left to the courts.

Several EU interventions have aimed at facilitating the public and private enforcement of consumer law. For cross-border purchases, individual consumers can get help via the network of European Consumer Centres. Thanks to the Directive on consumer alternative dispute resolution (ADR)[94] consumers across the EU have access to quality ensured out-of-court dispute resolution systems for both domestic and cross-border contractual disputes. Member States are also encouraged[95] to ensure that collective ADR schemes are available. An online dispute resolution platform (ODR platform) set up by the Commission[96] also helps consumers and traders resolve their domestic and cross-border disputes over online purchases of goods and services.[97]

As to individual consumers taking their cases to court, the Court of Justice of the EU (CJEU) has promoted procedural protection of consumers based on principles of equivalence[98] and effectiveness[99]. In particular, the CJEU has developed an '*ex officio*' obligation for national courts to assess on their own motion whether consumer rights may have been infringed. In addition, a

[91] BG, CY, CZ, EE, FR, HU, IE, IT, LV, LT, MT, PL, PT, RO, SK, ES
[92] EE, ES, PL, PT, RO, UK
[93] BE, DK, EL, FI, HR, LU, SE and the UK
[94] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, available at : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011
[95] By Directive 2013/11/EU on alternative dispute resolution
[96] Available since 15 February 2016, based on Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes available at : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524
[97] The Commission adopted its first report on the functioning of the ODR platform on 13 December 2017, see: https://ec.europa.eu/info/online-dispute-resolution-1st-report-parliament_en
[98] according to which national rules governing actions related to the enforcement of rights which individuals derive from EU law should not be less favourable than those governing similar domestic situations;
[99] according to which these should not render impossible in practice or excessively difficult the exercise of rights conferred by EU legal order.

European small claims procedure[100] has been established for court proceeding that concern cross-border payment claims worth up to EUR 5 000. Both consumers and small businesses can use this procedure. Furthermore EU private international law instruments such as the Brussels I Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Rome I Regulation No 593/2008 on the law applicable to contractual obligations and Rome II Regulation No 864/2007 on the law applicable to non-contractual obligations address the weaker position of consumers vis-à-vis foreign traders. All the above mechanisms are tailored for individual private enforcement of EU consumer rights.

As regards public enforcement of EU consumer law for the protection of collective interests of consumers, the revised CPC Regulation gives enforcement authorities a uniform set of powers to work more efficiently together against wide-spread infringements. Member States may choose whether their authorities exercise those powers directly under their own authority or whether they need to resort to national courts. The revised CPC Regulation also enables the European Commission to launch and coordinate common enforcement actions to address EU-wide infringements[101].

The Injunctions Directive, which is subject to this IA, ensures that so called "qualified entities" may act to protect the collective interest of consumers and bring injunction requests to courts or administrative authorities in all Member States. Following such requests, courts and administrative authorities can stop or prohibit commercial practices that are contrary to EU consumer law. The Commission has also issued a Recommendation on injunctive and compensatory collective redress. This Recommendation encourages Member States to ensure collective redress systems to stop breaches of all EU law (without prejudice to the Injunctions Directive) and to provide victims of these breaches with redress.

[100] Under the recently revised Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, available at : http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32015R2421

[101] According to the revised CPC Regulation 'widespread infringements' are illegal practices having implications in at least three EU Member States. 'Widespread infringement with a Union dimension' are illegal practices which affect a large majority of EU consumers, namely in two-thirds of Member States or more, and amounting to two thirds of the EU population or more (for exact definitions of the above terms please see Article 3 c) and ca) of the revised CPC Regulation).

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Annex 7. Additional data regarding penalties

1. Detailed problem description

Traders infringing consumer law should be effectively investigated and prosecuted by the responsible authorities and face penalties. The existence of penalties also deters traders from engaging in or continuing illegal behaviour. For this reason, the CRD, UCPD and PID contain a requirement for Member States to have in place 'effective, proportionate and dissuasive penalties' to address infringements of the national law provisions transposing these Directives. Also the revised CPC Regulation includes the power to impose fines among the minimum powers of the competent authorities and provides for a legal basis to impose fines for cross-border and widespread infringement of Union consumer legislation[102].

Member States have very different rules on penalties. Fines for the breaches of the UCPD, CRD and PID exist in most Member States. The maximum amounts of the fines vary significantly and Member States follow different procedures for the imposition of fines (administrative and judicial). Several respondents to the dedicated survey reported on the possibility to impose (also) "conditional"/ "suspended" or "daily" fines if the trader continues the infringement after the decision ordering cessation of the infringement. Several countries also provide fines for the infringement of the UCTD and CSGD, which do not expressly require the existence of penalties. Moreover, some national authorities in their replies indicated that infringements of these two Directives (as well as of the CRD and PID) can still be subject to fines if they constitute unfair commercial practices and the fines provided for the infringements of the UCPD are applied.

The maximum level of the available fines is, in several Member States, set at a very low level. A minority of countries (CY, FR, HU, LV, LT, NL, PL and SE) have turnover-based fines at least for the infringements of the UCPD. However, with the exception of only FR, PL and NL, most of these countries also have an absolute cap on the fine, which is ranging from EUR 8 688 to approx. 6.5 million. As an example of the current differences, the fine for infringing the UCPD may reach 10% of the relevant company's annual turnover in FR, PL and NL whilst it is capped at EUR 8 688 in LT, EUR 13 157 in HR and EUR 32 000 in EE.

[102] However, the just revised CPC Regulation does not harmonise the penalties for consumer law infringements. Although it was highlighted during the negotiations that "effective, proportionate and dissuasive" penalties in all Member States are essential for the success of the enforcement mechanisms under the Regulation, it was decided that the level of penalties for breaches of EU consumer law may be addressed in accordance with the findings of the Fitness Check. This is reiterated in Recital 16 of the revised CPC Regulation which reads in its last sentence: "*In view of the findings of the Commission's Report of the Fitness Check of consumer and marketing law, it might be considered to be necessary to strengthen the level of penalties for breaches of Union consumer law*."

Table 1: Overview of the highest maximum fines provided for the breaches of the Directives[103]

<table>
<tr><th></th><th>UCTD</th><th>UCPD</th><th>CRD</th><th>CSGD</th><th>PID</th></tr>
<tr><td>Austria [104]</td><td></td><td></td><td>EUR 1 450</td><td></td><td>EUR 1 450</td></tr>
<tr><td>Belgium[105]</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Bulgaria</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Croatia</td><td></td><td colspan="4">EUR 13 157</td></tr>
<tr><td>Cyprus</td><td>Up to 5% of the annual turnover but not exceeding EUR 200 000</td><td>Up to 5% of the annual turnover but not exceeding EUR 500 000</td><td>Up to 5% of the annual turnover but not exceeding EUR 200 000</td><td></td><td></td></tr>
<tr><td>Czech Republic</td><td></td><td colspan="2">CZK 5 million (approx. EUR 194 000)</td><td></td><td>CZK 5 million (approx. EUR 194 000)</td></tr>
<tr><td>Denmark[106]</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Estonia</td><td></td><td>EUR 32 000</td><td></td><td></td><td></td></tr>
<tr><td>Finland[107]</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>France[108]</td><td>EUR 15 000</td><td>EUR 1 500 000 or up to 10% of the annual turnover</td><td>EUR 75 000</td><td></td><td>EUR 15 000</td></tr>
<tr><td>Germany[109]</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Greece</td><td colspan="3">EUR 1 million</td><td></td><td>EUR 2 000</td></tr>
<tr><td>Hungary[110]</td><td colspan="5">Up to 5% of trader's turnover but not more than HUF 2 billion (approx. EUR 6.5 million).</td></tr>
<tr><td>Ireland[111]</td><td></td><td>EUR 60 000</td><td>EUR 300</td><td></td><td>EUR 300</td></tr>
</table>

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[103] This overview is based on the replies of national authorities to the CPC/CPN/CMEG survey that included a number of questions on penalties. It is complemented with other information that Member States' authorities have formally provided to the Commission. Other sources, such as studies and desk research were used to gather information regarding countries whose authorities did not reply to the CPC/CPN/CMEG survey. Only the **highest indicated maximum fines are included in this overview**. Several respondents also reported on the availability of additional fines that are not included in this overview (such as daily fines or conditional (suspended) fines accompanying an injunction order to cease the infringement). Some MS indicated different maximum fines applicable to individuals, legal persons and/or representatives of legal persons. In these cases, this overview only includes the maximum amounts provided for legal persons. Some respondents stated higher maximum fines for repeat offences, which are also not included. Some respondents indicated that different maximum fines apply depending on the specific provision of the Directive that is infringed – in these cases the overview indicates the highest maximum fine. Some respondents indicated that the stated maximum fines only apply in administrative but not in criminal proceedings.

[104] In Austria, the enforcement of consumer protection law is mainly sought through injunctions brought by consumer associations (*Verein für Konsumenteninformation, Arbeiterkammer*). The indicated maximum amounts are for administrative fines.

[105] In Belgium, there are no administrative fines and penal procedures are applied. Also, a 'transaction' procedure is possible whereby the competent authority proposes the offender to pay a sum of money. If the offender pays it, no further criminal action will be initiated. If the offender does not pay, public prosecutor gets involved.

[106] In Denmark, no administrative fines are available but traders breaching the UCPD and PID may be fined by courts in criminal procedure. Infringements of the other directives could be sanctioned in the same way if they constitute an infringement of the UCPD.

[107] In Finland, there are no administrative fines for past infringements. A prohibition order reinforced by a fine may be sought from the Market Court. There is no upper limit on any fine; the amount will depend on the nature/scale of the infringement and the company's turnover. In practice fines tend to be from EUR 50 000 to 100 000. There is also an offence of marketing crime in the Criminal Code punishable by fine or maximum one year of imprisonment.

[108] In France, the fine for the infringement of the UCPD can be increased up to 10% of annual average turnover in the past three years or up to 50% of the costs of the activity that constituted unfair commercial practice. There are no specific fines for the breaches of the CSGD – these can be addressed via injunctions or legal proceedings to ensure trader's compliance with its legal obligations and the court's decision can be issued subject to penalty.

[109] In Germany, the infringements of consumer law provisions are mainly penalised under civil (contract) law, in particular by the granting of entitlements with regard to compensation, contract termination and rescission.

[110] In Hungary, maximum fines are set depending on the size of the company – the highest maximum fine for large companies is indicated.

	UCTD	UCPD	CRD	CSGD	PID
Italy		EUR 5 million	EUR 5 million		EUR 3 096
Latvia[112]		Up to 10% of the annual turnover but not more than EUR 100 000	Up to 10% of the annual turnover but not more than EUR 100 000		EUR 700
Lithuania		EUR 8 688 but not more than 3% of the annual turnover	EUR 1 448		EUR 1 448
Luxembourg[113]					EUR 120 000
Malta	EUR 47 000				EUR 1 164.69
Netherlands	Up to 1% of trader's turnover (or 10% for engaging in the UCPD black-listed practices) or up to EUR 900 000, whichever is higher.				
Poland	Up to 10% of the trader's turnover				
Portugal[114]		EUR 44 891,81	EUR 35 000	EUR 30 000	EUR 3 000
Romania[115]	RON 1 000 (approx. EUR 220)	RON 100 000 (approx. EUR 22 000)	RON 5 000 (approx. EUR 1 100)	RON 25 000 (approx. EUR 5 500)	RON 2 500 (approx. EUR 550)
Slovak Republic	EUR 66 400				
Slovenia[116]	EUR 40 000				
Spain[117]	EUR 601 012.10. This amount may be increased to the level of five times of the value of the products or services concerned by the infringement				
Sweden[118]	Up to 10% of trader's annual turnover but not exceeding EUR 1 million.				
UK[119]					
Norway[120]		*EUR 136 000*	*EUR 28 000*		

[111] In Ireland, monetary penalties for the breaches of the UCPD can only be imposed by a court of law following criminal prosecution. The maximum fine for a first offence is €3,000 for summary convictions and €60,000 for convictions on indictment. There are higher fines for repeat offenders. Penalties for offences relating to pyramid schemes involve a fine of up to €150,000 and a prison term of up to five years.

[112] In Latvia, breaches of the UCTD may be addressed as breaches of the UCPD; the same is true for breaches of the CSGD where there is a pattern in the trader's behaviour.

[113] In Luxembourg, different maximum fines are provided for the breaches of different obligations under the CRD. The maximum fine is indicated.

[114] In Portugal, only the breaches of the UCTD are not covered by administrative fines. A fine of civil nature – penalty payment – can be imposed by court.

[115] In Romania, only the court can apply administrative fine for the breaches of the UCTD. As regards UCPD breaches, the maximum penalty depends on the company size: the highest maximum fine is indicated.

[116] In Slovenia, the administrative authority can impose a fine of EUR 3 000 whereas higher fines can be imposed by the court.

[117] In Spain, the maximum fines are set in legislation according to gravity of the offence: the indicated amount is the maximum for very serious infringements as established in general national legislation. Regional consumer protection laws may contain different rules, for example, providing for no fine for minor infringements, providing for a minimum fine or setting the maximum fine at 10 times of the unlawful profit made or the damage caused by the infringement (instead of 5 times).

[118] In Sweden, the law sets the direct fine at not more than 10 % of the annual turnover of the trader and not more than EUR 1 million. The amount of the conditional fine is, according to the present case law of Swedish Patent and Market Court, EUR 100 000 – 200 000 per infringement.

[119] In the UK, enforcement authorities do not currently have the power to impose fines for breaches of consumer protection law.

The results of hypothetical case studies (see description under "2. Additional data" below) with the national enforcement authorities also demonstrate significant disparities between penalties that would be imposed in different Member States for one and the same infringement. Obviously, some differences in the level of fines between the Member States could be justified by economic factors, such as the size of the population and GDP. Accordingly, a relatively smaller fine could still be 'effective, proportionate and dissuasive' given the nature of the infringement and the characteristics of the infringing trader. However, the results of these case studies demonstrate both the lack of deterrence (especially vis-à-vis large companies) and the disproportionate character of the penalties also when they are placed into the national context, i.e. when assessed against the average company turnover in different countries.

For example, for infringements of the UCPD by a large company, the estimated fine ranges from just 0.002% to 0.179% of the turnover, i.e. the economic impact of the fine in one country is 90 times lower than in another country. The median fine-turnover ratio for the breaches of the UCPD would seem to be 2.36% for micro companies whereas it would seem to be just 0.011% for the large companies, i.e. the economic impact of the fine on the large companies would be 215 times lower.

Accordingly, the current penalty systems, which are in most cases based on absolute maximum amounts, have very different level of deterrence in different countries and they treat large and small companies in a highly disproportionate manner, to the disadvantage of the smaller ones.

Table 2: Estimated fines for hypothetical identical infringements of the UCPD by a large and a micro company – absolute amounts and as % of the average turnover (EUR)[121]

	AVERAGE TURNOVER		ESTIMATED FINE		FINE as % of TURNOVER	
	Micro	Large	Micro	Large	Micro	Large
AT	367 936	322 367 708				
BE	432 717	432 036 250	500	10 000	0.116	0.002
BG	42 297	81 013 953	1 000	5 000	2.364	0.006
CY	230 405	111 850 000				
CZ	72 896	173 943 269	390	3 900	0.535	0.002
DE	317 341	318 004 842				
DK	470 428	431 111 111				
EE	149 317					

[120] In Norway, both suspended administrative fines (enforcement penalties) and direct administrative fines (infringement penalties) can be imposed for the breaches of the UCPD, CRD and PID. Legislation does not set the maximum level of these fines; the amounts indicated regarding UCPD and CRD are for infringement penalties as established in case law (there is no case law yet regarding the PID). There is a maximum suspended administrative fine (enforcement penalty) for the breaches of the UCTD according to case law (no maximum level set in legislation).No fines are provided for the breaches of the CSGD as such, but a misleading use of guarantees could be tackled under UCPD. UCPD has also been used for tackling misleading price information in breach of the PID.

[121] Source of information on the average turnover of enterprises in the retail trade sector: Eurostat, Structural Business Statistics-2015. For LT and MT the Eurostat data are not available; so, respectively, LV and CY data are used. Source of the data on penalties: CPC/CPN/CMEG survey. Not all respondents provided estimates of the fines. Replies simply re-stating the maximum fines available for the breaches of the relevant Directive were not taken into account. Where the same indicative range of the fine (from minimum to maximum) was indicated both for the infringement by a large and small company, the highest of these possible fines was used in this overview for the large company and the lowest one was used for the small company. This overview does not include those indications of potential fines where the respondent explains that the actual fine would be definitely below the provided amount without giving more precise estimate. Where both the possible 'direct' fine and 'suspended/conditional' fine was indicated for the same infringement, the higher indicated amount was included in the overview. Some respondents had, in addition to a lump sum, also indicated daily fines associated with an injunction, which are not included in this overview. When a lower amount was indicated for traders – natural persons – and a higher amount was indicated for traders – legal persons – only the higher amount for legal persons was included in the overview.

	AVERAGE TURNOVER		ESTIMATED FINE		FINE as % of TURNOVER	
	Micro	**Large**	**Micro**	**Large**	**Micro**	**Large**
EL	134 268	234 681 633				
ES	174 122	431 944 872				
FI	340 752	318 414 516				
FR	265 729	486 671 709				
HR	108 683	122 460 938				
HU	114 330	170 619 643				
IE	380 484	224 010 345				
IT	218 962	347 182 274				
LT	34 616	91 402 632	2 000	4 488	5.778	0.005
LU	524 150					
LV	67 855	91 402 632				
MT	224 188	111 850 000	4 100	12 000	1.829	0.011
NL	196 572	335 149 032	150 000	600 000	76.308	0.179
NO	417.303	237.845.192	30 000	60 000	7.189	0.025
PL	124 786	208 811 404				
PT	108 993	240 705 333				
RO	76 004	204 404 938	1 300	8 700	1.710	0.004
SE	237 496	326 458 491	25 000	100 000	10.526	0.031
SI	162 581	301 326 923	3 000	40 000	1.845	0.013
SK	134 066	119 177 049	5 000	20 000	3.729	0.017
UK	376 675	760 015 431				
				AVERAGE	10.18	0.027
				MEDIAN	**2.36**	**0.011**
				MIN	0.12	0.002
				MAX	76.31	0.179

In the SME Panel consultation, only between 20% and 25% of around 210 respondents considered fines as proportionate. Between 10% and 22 % of the respondents (depending on the Directive) considered that fines are too high for economically weaker companies and between 14% and 28% of the respondents considered that fines are too low for economically strong companies[122].

The survey responses of the national consumer authorities also show that, in most cases, the fact that the infringement has affected consumers also in other Member States is not systematically taken into account in the imposition of fines.

Specifically, only one respondent indicated that, under its national law, the fact that the trader has committed the same or similar breach of consumer law in other Member State(s) must always be

[122] SME Panel question: "Do you consider that in your country the fines imposed for the following breaches of EU consumer law are in general proportionate compared to the traders' economic strength (for example, in terms of turnover)".

taken into account when imposing fines. The cross-border aspect of the infringement may be taken into account in 13 Member States whereas 5 respondents indicated that, on the contrary, it cannot be taken into account (no information available about the remaining 9 Member States).

Table 3: Criteria for the imposition of fines: relevance of the cross-border nature of the breach[123]

	It must always be taken into account	It may be taken into account	It cannot be taken into account
Austria			X
Belgium		X	
Bulgaria		X	
Croatia			
Cyprus			
Czech Republic		X	
Denmark		X	
Estonia		X	
Finland		X	
France		X	
Germany			
Hungary			X
Greece			
Ireland			
Italy		X	
Latvia	X		
Lithuania			X
Luxembourg			
Malta		X	
Netherlands			X
Poland		X	
Portugal			
Romania			X
Slovak Republic		X	
Slovenia		X	
Spain			
Sweden		X	
UK			
Total EU:	**1**	**13**	**5**
Norway		*X*	

Furthermore, no respondent indicated that the fact that the trader has been fined in other Member State(s) for the same or similar breach of consumer law must be taken into account while imposing fines. This aspect may be taken into account in 10 Member States whereas 5 respondents indicated that, on the contrary, it cannot be taken into account (no information about the remaining 13 Member States).

[123] Replies to CPC/CPC/CMEG survey Q 32: "In your Member State, is the fact that the trader has committed the same or similar breach of consumer law in other Member State(s) taken into account while imposing fines?".

Table 4: Criteria for the imposition of fines: relevance of fines imposed in other Member States[124]

	It must always be taken into account	It may be taken into account	It cannot be taken into account
Austria			X
Belgium		X	
Bulgaria			
Croatia			
Cyprus			
Czech Republic		X	
Denmark		X	
Estonia			
Finland			
France		X	
Hungary			X
Ireland			
Italy		X	
Latvia		X	
Lithuania			X
Luxembourg			
Malta		X	
Netherlands			X
Poland		X	
Portugal			
Romania			X
Slovak Republic			
Slovenia		X	
Spain			
Sweden		X	
Total EU	**0**	**10**	**5**
Norway		*X*	

These national divergences and lack of recognition of the cross-border nature of the infringement by the existing national rules and practices regarding fines do not ensure consistent action against traders investigated by several Member States at the same time. It therefore undermines the co-operation between the national enforcement authorities under the CPC Regulation[125]. The CPC offers a 'one stop shop' to address widespread infringement committed by traders across the EU. It provides for a coordinated procedure to assess the problem and decide how to address it concretely. In most cases, the national authorities will seek to obtain commitments from the trader concerned to cease or modify a practice. If this approach, offering a unique channel of communication to the trader, does not work, each country concerned will have to take enforcement measures as foreseen in their national law, including fines or other measures such as blocking websites. They should seek to take these measures in a coordinated manner and simultaneously, whilst this will clearly not be the case regarding fines under the current divergent regimes.

[124] Replies to the CPC/CPC/CMEG survey Q 34: "In your Member State, is the fact that the trader has been fined in other Member State(s) for the same or similar breach of consumer law taken into account while imposing fines".
[125] Article 1 of the revised CPC Regulation.

Lack of consistency with rules on fines in the areas of personal data protection and competition

In the area of personal data protection, the new General Data Protection Regulation 2016/679 (GDPR) sets, in Article 58, the power to impose "administrative fines" as one of the mandatory 'corrective powers' of the supervisory authorities. Article 83 of the GDPR sets the maximum administrative fine as an absolute amount or percentage of the trader's total worldwide annual turnover, whichever is higher depending on the type of infringements – infringements of some GDPR requirements are punishable with fines up to EUR 10 million or 2% of turnover and other infringements are punishable with fines up to EUR 20 million or 4% of turnover. Article 83 also prescribes the criteria for setting the related administrative fines, such as the nature, gravity and duration of the infringement.[126] The Impact Assessment accompanying the Commission proposal for the GDPR Regulation stated that administrative sanctions, such as fines, serve as an important incentive for controllers and processors to ensure compliance with the law and highlighted the importance of ensuring that a data protection violation would not be sanctioned differently from one Member State to another.[127] The recently proposed ePrivacy Regulation mirrors the GDPR approach to administrative fines.[128]

In EU competition law, Regulation 1/2003 provides national competition authorities with the power to enforce, but does not address the modalities such as penalties. On 22 March 2017, the Commission presented a Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Given differences in the methodologies for calculating fines that can have a significant impact on the level of fines imposed by National Competition Authorities (NCAs) as well as the fact that the fines imposed may not reflect the harm caused to competition by the anti-competitive behaviour, the proposed Directive would harmonise key aspects of fines to ensure that they are sufficiently deterrent and reflect the harm caused to competition. To ensure NCAs can set deterrent fines on the basis of a common set of core parameters, it provides, first, for a common legal maximum of no less than 10% of the worldwide turnover and second, when setting the fine, NCAs should have regard to the core factors of gravity and duration of the infringement.[129]

2. Stakeholder views

Strengthening of the penalties

In the public consultation for this IA, a large majority of the responding public authorities (13 or 77 %) and all consumer organisations (16) supported the idea that fines should be available as penalties for breaches of consumer law in all Member States and that there should be common criteria in all Member States for imposing fines. Amongst business organisations, these ideas were supported, respectively, by 15 (31 %) and 20 respondents (44 %).

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[126] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at: https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en , http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG&toc=OJ:L:2016:119:TOC .

[127] SEC(2012) 72 final, p. 108.

[128] Article 23 of the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final, available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52017PC0010.

[129] Chapter V "Fines and periodic penalty payments" of the Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final of 22.3.2017 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0142), and the accompanying IA SWD(2017) 114 final, p. 20 and 31 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017SC0114).

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Table 5: Need for fines, relevance of the cross-border dimension, need for common criteria and common thresholds[130] (public consultation – number and share of "strongly agree" and "tend to agree" replies)

	Public authorities (No and %)	Consumer organisations (No and %)	Business organisations (No and %)
Fines should be available as penalties for breaches of consumer law in all Member States	13; 76,5%	16; 100%	15; 31,3%
When imposing fines, authorities or courts should always take into account that a breach has affected consumers in more than one Member State	12; 70,6%	15; 93,8%	10; 22,7%
There should be common criteria in all Member States for imposing fines. For example, the intentional character and repetition of the breach, the nature of consumer rights affected, the number of consumers affected, the nature and amount of damage suffered by them etc.	13; 76,5%	16; 100%	20; 43,5%
There should be a common maximum level of fines in all Member States for example a common absolute amount or a common maximum % of the trader's turnover	8; 47,1%	14; 100%	15; 31,3%
In all Member States a part of the profits from fines should be dedicated to promote consumer protection, including financing consumer associations	8; 50%	16; 100%	6; 12,8%

All responding consumer associations and a large majority of responding public authorities (between 69%and 75 %) agreed that stronger rules on penalties will lead to: (1) better compliance by businesses with consumer protection rules, (2) greater consumer trust, (3) more effective enforcement of consumer protection rules and (4) improved deterrence by EU consumer protection rules. Business organisations were much less supportive to these statements with support rates ranging from 21% (or 10 respondents) to 13% (6 respondents).

Table 6: Effects of strengthening penalties[131] (public consultation – number and share of "strongly agree" and "tend to agree" replies)

	Public authorities (No and %)	Consumer organisations (No and %)	Business organisations (No and %)
Better compliance by businesses with consumer protection rules	12; 75%	16; 100%	10; 21,3%
More level playing field to the benefit of compliant traders	13; 81,3%	16; 100%	10; 21,3%

[130] Question 130: "Do you agree that the following measures should be established by EU law regarding penalties for breaches of EU consumer protection rules"
[131] Question 138 "Do you agree that strengthening penalties at the EU level would bring about benefits, such as:"

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Greater consumer trust	12; 75%	16; 100%	6; 12,8%
More effective enforcement of consumer protection rules	11; 68,8%	16; 100%	6; 13%
Improved deterrence by EU consumer protection rules	12; 75%	16; 100%	7; 15,2%

In contrast, in the SME Panel consultation, a large majority of respondents (77% of 208) agreed that stronger rules on penalties would improve the compliance by traders with consumer protection rules[132]. Between 66% and 76% of respondents agreed that stronger rules on penalties would increase the level playing field to the benefit of compliant traders, the level playing field between traders operating in different EU Member States and the level playing field between traders of different economic strength.

Earlier, in the Fitness Check public consultation, 95% of consumer associations agreed that consumer protection should be strengthened by making sure that non-compliant traders face truly dissuasive penalties amounting to a significant percentage of their yearly turnover. A majority of responding public authorities (68%) also agreed with this statement. In contrast, the majority of business associations (6% agree v. 75% disagree) were against it. At the same time, those business stakeholders that submitted additional views on penalties were not in principle opposed to penalties at the EU level, but argued that such penalties should be proportionate to the offense and particularly targeted toward persistent violators of EU consumer law.

Type of fines

In the public consultation for this IA, most of the responding consumer associations supported the option that the maximum level of fines should be expressed as a percentage of the trader's turnover (14 respondents or 88 %) or as an absolute amount or a percentage of the trader's turnover whichever is higher (11 or 73 %). These two options were also supported by a significant share of the responding public authorities - respectively, 6 (40 %) and 7 (47 %) but by only a few business organisations, respectively, 5 (11 %) and 1 (2 %). No public authority and only 2 consumer organisations (14 %) supported the option that the maximum level of fines should be expressed as an absolute amount. While business organisations were generally less supportive towards all the listed proposals, the option of maximum absolute amount attracted more support than the others – it was supported by 8 respondents (18 %).

Table 7: Preferred type of fines by stakeholder category (public consultation – number and share of "strongly agree" and "tend to agree" replies) [133]

	Public authorities (No and %)	**Consumer organisations (No and %)**	**Business organisations (No and %)**
The maximum level of fines should be expressed as an absolute amount	0	2; 14,3%	**8; 17,8%**
The maximum level of fines should be expressed as a percentage of the trader's turnover	6; 40%	**14; 87,5%**	5; 10,9%
The maximum level of fines should be expressed	**7; 46,7%**	11; 73,3%	1; 2,3%

[132] Q3 in section B.2 of the SME Panel consultation: "In your view, what would be the impact of strengthening penalties under EU consumer protection law on the following?" (n=208: traders selling to consumers, combined result for replies "significant positive impact" and "moderate positive impact")
[133] Question Q132: "Do you agree that the following measures should be established by EU law?"

as an absolute amount or a percentage of the trader's turnover whichever is higher (for example, up to 100 000 EUR or up to X% of trader's turnover, whichever is higher)			
The maximum level of fines should be expressed as multiplication of the amount of the benefits gained or losses avoided because of the breach (for instance, twice the amount of the benefits gained or losses avoided because of the breach) where those can be determined	4; 26,7%	3; 18,8%	6; 13,6%

In contrast, in the SME panel[134], the highest share of respondents (49 %) considered that the most proportionate, effective and dissuasive way of setting the maximum level of fines is by expressing it as a percentage of the trader's turnover. The support for an absolute amount or a percentage of the trader's turnover whichever is higher and for an absolute lump-sum amount was, respectively, 30% and 16 %.

Effects of stronger fines

In the public consultation, all responding consumer associations and a large majority of responding public authorities agreed that stronger rules on penalties will also lead to a more level playing field to the benefit of compliant traders. Among business organisations this statement was supported by only 21% (10) of respondents (see Table 11 in Annex 7). In contrast, in the SME Panel consultation, an overwhelming majority of respondents (between 66% and 76%) agreed that stronger rules on penalties would increase the level playing field to the benefit of compliant traders, the level playing field between traders operating in different EU Member States and the level playing field between traders of different economic strength.[135]

Relevant turnover for turnover-based fines

According to the survey of the national authorities[136] trader's total worldwide annual turnover of the preceding financial year is taken into account in the application of fines in 4 countries (IT, LV, LT, PL); 3 countries (BE, HU, RO) take into account the trader's total annual turnover of the preceding financial year in the Member State where the infringement took place, whilst no country relies on trader's total EU annual turnover. Respondents from 9 countries (AT, BU, HR, IE, LU, MT, PT, SK, SI) expressly indicated that none of the specified turnover types (i.e. worldwide, EU-wide and national) is taken into account in the application of the fine; respondents from 12 countries did not reply to this question or indicated "do not know".

When asked to specify the product markets considered for the calculation of the fine, only IT and LV indicated that the relevant turnover concerns all product markets of the trader whilst BE replied that the relevant turnover is the one of the specific product market concerned by the breach of consumer law.

In the public consultation, less than half of the respondents from public authorities and consumer and business organisations expressed their views on the type of turnover to be used for calculating turnover-based fines. Amongst those who responded, slightly more public authorities supported the idea that turnover-based fines should be set on the basis of the trader's total annual turnover of the preceding financial year in the Member States where the infringement took place (5; 39%)

[134] Question 2 in section B.2 of the SME Panel.
[135] Question 3 in section B.2 SME Panel: For information on the question see Annex 7, subsection 2.
[136] Question 38 of the CPC/CPN/CMEG survey: "In your Member State, what type of turnover is taken into account when calculating fines?"

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compared to the trader's total worldwide annual turnover of the preceding financial year (4; 31%). In contrast, more consumer organisations supported the option based on the worldwide turnover (8; 50 %) than on the national turnover (3; 19%). Fines based on EU annual turnover were supported by just one public authority (1; 8%) and by 25%of respondents from consumer associations. No business association supported the option of basing the fine on world-wide or EU-wide turnover while 6 respondents (25%) supported the use of the national turnover as reference value.

As to the choice between the total turnover in all product markets and the turnover in the specific market concerned by the infringement, public authorities had preference for the specific product turnover (6 or 46%) over the total turnover (4 or 31%). Also business organisations preferred the use of the specific turnover (8 or 31 %) over the total turnover (1 or 4%). On the contrary, consumer organisations had preference for the total turnover (11 or 69%) over the specific turnover (4 or 25%).

Table 8: Turnover-based fines should be established on the basis of: [137] (public consultation – number and share of respondents selecting the respective option)

	Public authorities (No and %)	**Consumer organisations (No and %)**	**Business organisations (No and %)**
Percentage of the trader's total worldwide annual turnover of the preceding financial year	4; 30,8%	**8; 50%**	0
Percentage of the trader's total EU annual turnover of the preceding financial year	1; 7,7%	4; 25%	0
Percentage of the trader's total annual turnover of the preceding financial year in the Member States where the infringement took place	**5; 38,5%**	3; 18,8%	**6; 25%**
Company's total turnover (in all product markets)	4; 30,8%	**11; 68,8%**	1; 3,8%
Company's turnover in the specific market concerned by the breach of consumer law	**6; 46,2%**	4; 25%	**8; 30,8%**

Costs due to strengthening of the fines

In the SME panel consultation, when asked about costs, the highest share of respondents (44 %) said that strengthening penalties across the EU will have no impact on their costs; 23%replied that costs will increase and 1%that costs will decrease. A relatively large share of respondents (31%) could not reply to this question[138]. It may be assumed that also this category of respondents should not be exposed to significant changes in terms of costs due to strengthened rules of penalties.

In the public consultation, most of the responding public authorities (10 respondents or 56 %) indicated that the costs of administrative and judicial enforcement would increase if the rules on fines are strengthened. Fewer respondents agreed that there will be no effect on costs (4 respondents or 23%) and one respondent that costs would decrease (6 %). As regards the assessment of these costs, 3 respondents (27 %) agreed that the cost increase would be reasonable and 2 or 18% that the increase would not be reasonable. No public authority was in a position to provide an estimate of the increase or decrease of the enforcement costs.

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[137] Question 134 "What would be the best measure to define the maximum level of fines as % of the trader's turnover?" and Question 136 "What would be the best measure to define the maximum level of fines as % of the trader's turnover?"

[138] SME Panel Q4: "What would be the impact of strengthening penalties at EU level on the costs of your enterprise?" n=213.

Table 9: Impact of common EU rules on penalties on administrative and judicial enforcement costs (public consultation – number and share of respondents selecting the respective option)[139]

	Public authorities (No and %)	Consumer organisations (No and %)	Business organisations (No and %)
There will be no effect on enforcement costs	4; 22,2%	2; 12,5%	0
Costs will increase	10; 55,6%	2; 12,5%	11; 32,4%
Costs will decrease	1; 5,6%	2; 12,5%	4; 11,8%
Cost increase will be reasonable	3; 27,3%	6; 50%	0
Cost increase will not be reasonable	2; 18,2%	2; 16,7%	11; 44%

3. Additional data

Table 10: highest and lowest fines actually imposed in the past year for infringements of consumer law Directives (EUR) [140]

	UCTD		UCPD		CRD		CSGD		PID	
	highest	lowest	highest	lowest	highest	lowest	Highest	lowest	highest	lowest
Austria										
Belgium										
Bulgaria			25 000	1 500	1 500	250	1 500	250	1 500	150
Croatia										
Cyprus										
Czech Republic			76 701	19	767	38			1 916	19
Denmark			135 000	1 350						
Estonia										
Finland										
France			500 000							
Germany										
Greece										
Hungary										
Ireland									300	300
Italy			5 000 000	5 000	2 100 000	100 000				
Latvia			50 000	306					100	100
Lithuania										
Luxembourg									250	125
Malta			195 000	2 329	20 000				116	
Netherlands	100 000	100 000	300 000	80 000	220 000	5 000				
Poland			6 708 619	234	3 604	198	210 797	110	49 953	127
Portugal			25 000	3 000						

[139] Question 140 "In your view, what would be the effect of establishing EU common rules on penalties for breaches of EU consumer law on the overall costs of administrative and judicial enforcement?" and Question 142 "Do you consider that the possible increase of costs of administrative and judicial enforcement of EU consumer protection rules would be reasonable?"
[140] Replies to the CPC/ CPN/ CMEG survey Q 40: "Please provide for highest and lowest fine that national consumer enforcement authorities (or courts) in your Member State imposed on traders in the past year for the following breaches of EU consumer law. If possible please indicate the amount of the fine and % of the trader's turnover that this fine constituted."

	UCTD		UCPD		CRD		CSGD		PID	
	highest	lowest	highest	lowest	highest	lowest	Highest	lowest	highest	lowest
Romania			11 000	1 100	1 100	220	2 200	220	220	110
Slovak Republic										
Slovenia	3 000	3 000	3 000	3 000	3 000	3 000	1 200	1 200	1 200	1 200
Spain										
Sweden	100 000	100 000	200 000	25 000	100 000	100 000	100 000	100 000	100 000	100 000
UK										
Norway	*114 000*	*60 000*	*114 000*	*22 000*	*68 000*	*17 000*				

Table 11: Case studies on potential fines for breaches of consumer law Directives (CPC/CPN/CMEG Survey)

Please provide for the estimate of an administrative fine - if available in your legal order - that your authority would apply in the following 10 hypothetical cases. Please explain the method of calculating fines. Please consider that the circumstances of all cases are similar: the infringement is intentional, but the trader has not infringed the law in the past. There are no mitigating factors applicable to the circumstances of the case. There are no pending cases for damages caused by the infringement. If there are no administrative fines available in your Member State for a specific breach of consumer law, please specify it.
Case 1 - Unfair Contract Terms Directive
A large company A established in an EU Member State (having also presence in your country via a branch or assets) sells electronic goods both offline and online to consumers residing in your country and in all other EU Member States. Company A has a market share of 15% of electronic products sale, both offline and online in your country. For around one year, the general terms and conditions of the company A have included an unfair contract term which limits the right of consumers to bring complaints to courts if something goes wrong. About 5% of consumers actually encountered problems with products and had the right to go to the court, but they did not use that right because they were convinced that they cannot do so.
Estimated fine for large company: […]
Case 1bis - Unfair Contract Terms Directive
A small company established in your country and operating only in your country with around 0,1%of the market share of electronic goods sales both offline and online included the same unfair contract term in its contracts with consumers. Estimated fine for small company: […]
Case 2 - Unfair Commercial Practices Directive
A large company B established in an EU Member State (having also presence in your country via a branch or assets) is a smart phone producer and seller. Company B is one of the leading companies in the market across the EU and has a market share of 20% of smart phone sales in your country. For a week, company B mislead consumers in your country and in all other EU countries by advertising its new model of smart phone as 4G-compatible, when it was only compatible with 3G. Within that one week the sale of the new model of smartphone by that company represented 5% of the sale of all smartphones in your country. The new model of the smartphone cost around 300 EUR.
Estimated fine for large company: […]
Case 2bis - Unfair Commercial Practices Directive
A small seller of smartphones established in your country and operating only in your country mislead its consumers in the same way, but the sale of the new model of smartphone by this seller represented 0,001% of the sale of all smartphones in your country.
Estimated fine for small company: […]

Case 3 - Consumer Rights Directive
A large company C, established in an EU Member State (having also presence in your country via a branch or assets), produces clothes and sells them exclusively via its website to consumers in your and all other EU Member States. Company C is one of the leading companies in the market across the EU and has a market share of 5% of clothes sales in your country. For around one year, company C has not provided consumers with its email address so that consumers could not contact it with queries or complaints. On average, a buyer would spend 50 EUR on clothes sold by the company.
Estimated fine for large company: […]
Case 3bis - Consumer Rights Directive
A small company established in your country and operating only in your country sells T-shirts exclusively via its website and engages in the same conduct. On average, a buyer would spend 50 EUR on clothes sold by the company.
Estimated fine for small company […]
Case 4 - Consumer Sales and Guarantees Directive
A large company D, established in an EU Member State (having also presence in your country via a branch or assets), produces furniture and sells it exclusively offline to consumers in your and all other EU Member States. Company D is one of the leading companies in the market across the EU and has a market share of 40% of furniture sales in your country. For around one year, company D has not respected consumers' rights to their 2-year legal guarantee. The furniture sold by the company cost on average 100 EUR.
Estimated fine for large company: […]
Case 4bis - Consumer Sales and Guarantees Directive
A small company established in your country and operating only in your country sells furniture exclusively offline to consumers and engages in the same conduct. During a one year period that small company sold around 2000 pieces of furniture. The furniture sold by the company cost on average 100 EUR.
Estimated fine for small company: […]
Case 5 - Price Indication Directive
A large company E established in an EU Member State (having also presence in your country via a branch or assets) is a big retailer of milk products in your country and in all other EU countries. Company E is one of the leading companies in the market across the EU and has a market share of 10% of milk products sales in your country. For around one year, company E has not provided consumers with the price of yoghurts per unit. During a one year period, yogurts sold by company E represented 3% of all yogurts sold in your country. Yogurts sold by the company cost on average around 50 EUR cents.
Estimated fine for large company: […]
Case 5bis - Price Indication Directive
A small company established in your country and operating only in your country is selling yoghurts only in a village in your country of 10.000 inhabitants and engages in the same conduct. During a one year period, the small company has sold around 10.000 yogurts, for 50 EUR cents each.
Estimated fine for small company: […]

Table 12: Criteria for imposing fines for the breaches of consumer law[141]

	AT	BE	BG	HR	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SW	UK	*NO*	Criterion applies - Total EU
Size of the trader (small, medium or large)	+	+	-	+	+	+	+		+	+			+	-	-	-	-	-	+	-			+	-	-	-	+		+	**12**
Turnover of the trader	-	+	-	-	+	+	+		+	+			+	-	+	+	+	-	-	+	+		+	-	-		+		+	**14**
Scale of the trader's activities in the market concerned by the infringement	-	+	-		+	+	+		+	+			+	-	-	+	+	-	+	+	+		-	-	-	+	+		+	**14**
Consumers' rights affected by the infringement (e.g. right to fair contracts or right to information)	+	+	+	+	+	+	+		+	+			+	-	-	+	+	+	+	+			+	+	+	+	+		+	**20**
Nature, gravity and duration of the infringement taking into account the specificities of the economic sector concerned	+	+	+	-		+	+	+	+	+			+	-	+	+	+	+	+	+	+		+	+	+	+	+		+	**21**
Number of consumers affected and the level of damage suffered by them	+	+	-	-	+	+	+	+	+	+			+	-	-	+	+	-	+	+	+		+	+	+	+	+		+	**19**
Any action taken by the trader to mitigate or remedy the damage suffered by consumers or other adverse effects of the infringement	+	+	+	+	+	+	+		+	+			-	-	+	+	+	+	+	+	+		+	-	+	+	+		+	**20**
Any pending actions for civil remedies for the infringement	-		-			+	-		-	+			-	-	-	-	+	-	-	-			+	-	-	-	-		-	**4**
Intentional or negligent character of the infringement	+	+	+	-		+	+		+	+			-	-	+	+	+	-	+	+	+		+		+	+	+		+	**17**
Any relevant previous	+	+	+	+		+	+	+	+	+			+	+	+	+	+	+	+	+	+		+	+	+	+	+		+	**23**

[141] Replies to the CPC/CPN/CMEG Survey Q30: "In your Member State, what are the criteria for imposing fines for breaches of consumer law?" "+" stands for positive replies, "-" stands for negative replies; blank fields means absence of a reply or unclear reply.

	AT	BE	BG	HR	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	S W	U K	*NO*	Criterion applies - Total EU
infringements by the trader																														
Where pecuniary fines or other penalties have previously been ordered against the trader, compliance with those measures	-	+	-	+		+	+		+	+			+	+	-	+	+	+	+	+	+		+	+	-	+	-		+	**17**
Other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement	+	+	-	+		+	+		+	+			+	-	-	+	+		+	+	+		-		+	+	-		+	**15**

Annex 8: Additional data on redress for victims of unfair commercial practices

1. Detailed problem description

The Fitness Check consumer survey found that misleading and aggressive commercial practices are the consumer-rights related problems that consumers experience most often (see table 1 below)[142]. Such practices are prohibited as "unfair commercial practices" under the UCPD.

On a positive note, the Consumer Conditions Scoreboard 2017 reported a slight decrease in unfair commercial practices[143]. However, it is mainly those consumers who perceive themselves as vulnerable because of their socio-demographic status and the complexity of offers that report having encountered unfair commercial practices. In addition, data from the advertising industry show that misleading advertising is the publicity category with most complains.[144] Misleading advertising was also the cross-border advertising problem that received most complaints.[145]

Against this backdrop, it is clear that lack of compliance with consumer protection rules is a particularly big problem under the UCPD.

The UCPD does not harmonise rules on what consumers can do to remedy the situation when they have become victims of unfair commercial practices. On the contrary, the UCPD leaves it to the Member States to determine if and how civil remedies, such as rights to terminate a contract or to get a refund, should be available to consumers.

The importance of remedies can be illustrated by comparing consumer behaviour under the UCPD and the Consumer Sales and Guarantees Directive 1999/44/EC (CSGD). The CSGD regulates legal consequences of lack of conformity with the contract for consumer goods. As opposed to the UCPD, the CSGD ensures consumers EU-wide rights to remedies, such as having the good brought into conformity with the contract by repair or replacement, having the price reduced and the contract rescinded.[146]

The consumer survey for the Fitness Check regarding consumer rights-related problems in the past year includes relevant data to compare the UCPD and the CSGD. The problem chosen most often by the respondents as their latest problem was defective goods (42 %), followed by unfair commercial practices (23 %), lack of indication of the unit price (18 %), unclear or ambiguous standard contract terms (13 %) and unfair standard contract terms (4 %).[147]

The survey results show that many more respondents who were confronted with unfair commercial practices did not to take any action to solve the problem (27 %) than what was the case for consumers buying defective goods (10%) (see Table 2 below)[148]. The main reason given by victims

[142] The question was: *'In the past 12 months, have you experienced problem(s) with any goods or services where you thought you had a legitimate cause for complaint related to the following five problem types?*

[143] Between 2014 and 2016 consumer exposure to unfair commercial practices by domestic retailers fell by 6.9 percentage points in the EU-28, to 16.8 %.

[144] EASA – the European Advertising Standards Alliance, report "European Trends in Advertising Complaints, Copy Advice and Pre-clearance" (2015), p. 11. 45% of complaints lodged by consumers, competitors and other entities with the advertising Self-Regulatory Organisations (SROs) in 23 Member States in 2015 concerned misleading advertising. This was followed by complaints about taste and decency and social responsibility.

[145] EASA – the European Advertising Standards Alliance, "Cross Border Complaints Report"(2015), p. 9. In 2015, the largest share of cross-border complaints handled through the EASA (the European Advertising Standards Alliance) SRO network concerned misleading advertisements (64.9% or 72 complaints), out of which 14 complaints (17.5%) were found in breach of the advertising codes.

[146] The CSGD also ensures rights to remedies for some victims of unfair commercial practices, but only to a limited extent. Notably, the protection under the CSGD is limited to issues related to conformity with the contract and the right to remedies is only applicable for two years after the purchase. The protection does also not cover the entire spectrum of possible unfair practices, such as aggressive marketing. Furthermore, the CSGD only applies to tangible goods and not to services, for which the risk of misleading or aggressive behaviour is equally high, if not higher.

[147] Consumer Market Study to support the Fitness Check of EU consumer and marketing law (2017), p. 161.

[148] Idem, p. 173.

of unfair commercial practices (36%) for not taking action was that they considered it unlikely to get a satisfactory solution. Fewer consumers that had bought defective goods gave this reason for not taking action (28%) (see Table 3 below)[149]. As a consequence, twice as many consumers who had been confronted with unfair commercial practices as those who had bought defective goods reported that they had not been able to solve the problem (18% as opposed to 9%). 84% of the consumers buying defective goods had received a remedy in the form of refund, compensation, free repair or replacement, but only 18%of consumer victims of unfair commercial practices had received such remedies (see Table 4 below).[150]

These findings indicate that the CSGD is more effective than the UCPD in ensuring that consumers can solve problems when their rights have not been respected. It seems likely that this is, at least to some extent, linked to the fact that the CSGD gives consumers rights to take specific action to get problems remedied, whilst the UCPD does not give consumers such rights. This contrast indicates that unfair commercial practices are allowed to drive consumer detriment because of lack of rules on remedies.

This is corroborated by the consumer detriment study[151]. It indicates that consumers are most likely to get redress if they face problems with tangible goods, for which EU-wide rules on consumer remedies exist (under the CSGD).[152] By contrast, the redress received was significantly smaller in services markets, to which the CSGD does not apply, but which are highly relevant under the UCPD. This study also found that the average financial detriment for consumers that had experienced unfair commercial practices when buying large household appliances was greater than the average detriment for consumers that had met other problems when buying such products (see Tables 6 and 7 below).

As already mentioned, the UCPD leaves it to the Member States to determine if and how remedies should be available to consumers. Under current national laws, victims of unfair commercial practices in all Member States have, at least theoretically, a possibility to claim some remedies. However, the current legal landscape is highly fragmented across the EU. National rules are diverging and two main groups of Member States can be identified:

1. 14 Member States have made explicit links between civil remedies and breaches of national provisions transposing the UCPD. However, the specific rules differ significantly:
    - Some, such as BE and UK, have introduced specific provisions on remedies which are only applicable to UCPD breaches.
    - Others, such as BG, CZ, EL, FR, IE, LT, LU, NL, PT, SE and SK, have made explicit references in national provisions transposing the UCPD to remedies that are also available to breaches of other legislation.
    - Some of the Member States in both of the above groups, such as BE, CZ, FR, IE and UK, restrict the remedies only to specific types of UCPD breaches. For example, French law limits the remedy that the contract shall be deemed null and void to aggressive commercial practices only.

[149] Idem, p. 183.
[150] Idem, p. 189.
[151] Study on measuring consumer detriment in the European Union, February 2017, available at: https://publications.europa.eu/en/publication-detail/-/publication/b0f83749-61f8-11e7-9dbe-01aa75ed71a1/language-en .
[152] The consumer detriment study analysed personal consumer detriment in different product markets and in relation to different problems. The average level of financial detriment before seeking redress across the six markets studied varied between EUR 49.9 and EUR 323.4 per person. Financial detriment after seeking redress varied between EUR 25.1 and EUR 167.5. On average, the highest levels of redress were reported in the clothing, footwear and bags markets. Here, consumers recovered between 50 % and 61 % of their initial costs and losses. By contrast, respondents received the lowest value of redress (as a proportion of their financial detriment) in the mobile telephone services market and the electricity services market. Here, they recovered about 14 % and between 12 % and 21 % of their initial costs and losses respectively.

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2. The 14 other Member States[153] have not made explicit references to remedies in case of breaches of national legislation transposing the UCPD. However, it may still be possible for consumers in these Member States to rely on certain remedies under general civil law.

Table 8 below gives an overview of the civil remedies in the different Member States.

Member State representatives have indicated that the most frequently used UCPD remedies in their countries are related to breach of contracts (so-called contractual remedies): Rights to terminate the contract and to get a refund were identified by 61% of these respondents as the most frequently used UCPD remedies.[154]

However, remedies that are not related to contracts (so-called non-contractual remedies, such as some forms of damages) are also relevant under the UCPD. The "Dieselgate" situation shows that non-contractual remedies can sometimes be more important for consumers than contractual remedies. In the "Dieselgate" case, even consumers in Member States that have linked breaches of national provisions transposing the UCPD to remedies for victims of unfair commercial practices have not been able to claim remedies. This is because the available remedies in most of these Member States are only contractual. They can therefore only be applied against the consumers' contractual counterparts, which are usually the car sellers. By contrast, the national rights to UCPD remedies do not enable consumers to act against the car producer, with whom consumers will not usually have any contract. This has become a delicate issue in the "Dieselgate" situation because it is the car producer who has been responsible for the unfair commercial practice of marketing the cars with misleading environmental claims. Consumers are not able to bring claims against this trader because the links in national law between infringements of the UCPD and remedies do not ensure access to non-contractual remedies.

In a targeted consultation, a clear majority of Member State representatives (75 %) indicated that there would be added value in introducing EU-wide rights for victims of unfair commercial practices to terminate contracts and to get a refund.[155] In the public consultation, 73% of respondents suggested that rights to terminate contracts and to get a refund should be introduced under the UCPD.[156]

At the same time, 50%of Member State representatives replying to the targeted consultation also said that there would be added value in introducing an EU-wide right to damages under the UCPD.[157] In the same vein, in the public consultation, 65%(74) of stakeholders said that victims of unfair commercial practices should be given EU-wide rights to receive compensation for the damage suffered.[158]

Despite the possibilities for remedies under current national law, the Fitness Check did not identify significant examples of case law where victims of unfair commercial practices had claimed remedies. This would seem to contrast with the fact that, as explained above, unfair commercial practices is the most frequent consumer rights-related problem across Europe. This suggests that existing possibilities for remedies are insufficient to ensure that consumers can solve problems when their rights under the UCPD have been breached. An important reason for this appears to be

[153] AT, CY, DE, DK, EE, FI, HR, HU, IT, LV, MT, RO, SL, ES.
[154] From the CPC/CPN/CMEG consultation, the question was: *If consumers use the existing remedies in your Member State, which existing remedies are the most frequently used?*
[155] From the CPC/CPN/CMEG consultation. The question was: *If an EU-wide right to remedies were introduced, which remedies would in your view introduce added value, taking into account the nature and frequency of use of the existing remedies in your Member States?*
[156] From the public consultation. The question was: *Which types of EU-wide remedies should be introduced in case a consumer is a victim of an unfair commercial practice?*
[157] CPC/CPN/CMEG survey
[158] 65% of respondents to the specific question in the OPC: *Which types of EU-wide remedies should be introduced in case a consumer is a victim of an unfair commercial practice (multiple replies possible)?*

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that national remedies are often subject to procedural requirements that make it difficult for consumers to take action to enforce their rights.

Against this backdrop, it would appear that the current situation – where it is left to the Member States to determine if and how remedies should be available – keeps consumer law from being fully effective. Specifically, consumers find it difficult to enforce their rights when they have become victims of unfair commercial practices. This lack of effective mechanisms for individual redress means that traders do not have the added incentive to comply with the UCPD that they would have had if consumers had been ensured rights to claim remedies for breaches of the UCPD.

When asked about this in the public consultation, 35 of 59 consumers (59%) reported that they had experienced problems with getting redress from traders when being victims of unfair commercial practices.[159] A majority of professional respondents indicated that consumers "often" or "a few times" have problems with getting redress in such situations (77 and 34 respondents respectively). All 26 consumer associations, 21 of the 28 replying MS authorities and 30 of the 39 "other" stakeholders confirmed that in their experience, consumers face problems with getting redress in such a situation. Many companies confirmed this as well: 18 of the 42 SMEs replying to this question confirmed that consumer face problems, 16 disagreed, 9 of the 17 large companies confirmed as well, while 4 disagreed. On the other hand, 44% of the 68 business associations did not think consumers face problems with getting redress.[160] A majority of all respondents agreed that differences between national rules on remedies under the UCPD cause harm to consumers (185 respondents agreed (59%), while 87 disagreed (28%).[161] Among consumer respondents to this question, 73 agreed while 11 disagreed. 21 of the 40 SMEs and 7 of the 16 large companies (7 disagreed and 2 did not know) agreed as well, however only 10 of the 74 business associations agreed.

The Platform Transparency Study illustrates that this is also a problem in the digital economy. In a survey, 29% of respondents confirmed that they had experienced problems with getting redress after being victims of unfair commercial practices on online platforms.[162]

As concerns the Internal Market, diverging national rules have created a fragmented legal landscape. This creates unnecessary costs for compliant traders engaging in cross-border trade, who need to adapt to different rules and assess risks related to possible legal challenges.

A majority of respondents to the public consultation agreed that differences between national rules on remedies cause costs for traders engaging in cross-border trade (overall 187 respondents agreed, while 65 disagreed). 27 of 41 SMEs and 11 of the replying 16 large companies agreed as well, however only 29 of 74 business associations agreed while 34 disagreed. When separating companies that engage in cross-border trade from companies that do not, results show that 30 of the cross-border companies agreed that differences between national rules cause costs, while only 6 cross-border companies disagreed.[163]

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[159] The question was: *If you have been a victim of unfair commercial practices (e.g. if you have purchased a product or a service based on misleading claims, such as misleading green claims, or aggressive practices by traders), have you experienced problems with getting redress from traders?*. The answer options included *"I have never been victim to unfair commercial practice"*, which was chosen by 29 respondents and *"do not know*", which was chosen by 6. In total, 88 individuals replied to this question. See Table 9 below for a breakdown of consumers' responses.

[160] The question was: *In your professional experience, do consumers experience problems with getting redress from traders when they have been victims of unfair commercial practices?* See Table 10 below.

[161] The question was: *Do you agree that differences between national rules on remedies for unfair commercial practices cause the following problems? Harm to consumers as they cannot remedy the consequences resulting from unfair commercial practices on the national and cross-border level.* See Table 11 below.

[162] From the platform transparency study. The question was: *How often have you: Personally experienced problems with getting individual redress when I am a victim of unfair commercial practices?*

[163] From the public consultation for this IA. See Table 12 below.

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A targeted question for companies and business associations about costs when trading cross-border due to diverging national rules on remedies received few responses. However, among the 12 respondents that indicated that they did trade cross-border, one third reported facing such costs to a significant extent (4 companies, 33 %), half to some extent (6 companies, 50 %) and 2 did not know (17 %). In response to whether the companies they represent face costs when trading cross-border due to national rules on remedies, 41% (14 of the business associations) said they do so to some extent and 11% (4) to a significant extent.[164]

Significant percentages of SMEs stated that costs related to national rules on remedies discourage their enterprise from entering other EU markets (23% of B2C SMEs gave this response, as did 20% of all SMEs responding to this question, see Tables 13 and 14 below).[165]

SMEs were also asked to quantify costs related to national rules on UCPD remedies.[166] SMEs assessed resources for one-off costs[167] and annual running costs[168] very differently.[169] On average, one-off costs for SMEs were indicated at EUR 710 and annual running costs at EUR 260.[170] Large enterprises also assessed one-off and annual running costs quite differently.[171] In terms of share of their turnover this spanned to up to around 0.3 and 0.4 percent respectively. On average each of these represent less than 0.1% of turnover.

In the public consultation, few respondents gave quantitative estimates of the costs they face because of diverging national rules on remedies. One European business association estimated costs to be 0% of turnover and another at 1% of turnover. A self-employed respondent from AT put costs at 1.5% of turnover, and a self-employed in DE at 40 %. Two microenterprises in DE reported costs of EUR 500 and EUR 10 000 respectively. A big company in RO indicated EUR 140 000 in costs. Cost estimates by individual respondents in HU and LV ranged between EUR 0 and EUR 500 (0.5% of turnover). A DE individual with a small online shop commented that he had no costs due to diverging national rules because such rules made him avoid selling abroad.[172]

In a position paper, a European business association explained that its members, who are cross-border traders, incur costs due to national rules on UCPD remedies. These are primarily costs "determining their legal obligations in the various Member States in which they operate, and either tailoring their consumer-facing information to each jurisdiction or finding an EU-wide solution allowing compliance in all markets".[173]

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[164] The question was: *Does your company (or the companies you represent) face costs when trading cross-border due to a need to adapt to current different national laws related to remedies?*

[165] From the SME panel consultation. The question was: *Do these costs (to check compliance with and adjust business practices to national rules related to remedies for consumers that have been harmed by unfair commercial practices) have an impact on your decision to enter other EU markets or not?* SME ID126

[166] From the SME panel consultation. The question was: *Please estimate the resources your enterprise needs to invest, when selling to another EU country, to check compliance with and adjust business practices to national rules related to remedies for consumers that have been harmed by unfair commercial practices?*

[167] One-off costs are initial resources, needed once and not repeated, in order to enter a new EU market, e.g. working hours of staff for initial familiarisation with the rules applicable in the new Member State.

[168] Running (or regular) costs are resources needed on a regular basis when trading cross-border, e.g. continuously checking compliance with the rules applicable in the Member State.

[169] In a span ranging from EUR zero to more than 350 000. In terms of share of turnover, this represented from zero and up to more than 12 000 per cent.

[170] One-off costs represent around a quarter of a percent of the turnover while the annual running costs represent much less than a tenth of a percent of the turnover considering the median among the responding businesses.

[171] In a span from EUR zero to more than 43 000.

[172] From the public consultation. The question was: *What are your (or the companies' you represent) estimated costs when trading cross-border due to a need to adapt to current different national laws related to remedies? Estimated amount or % of turnover.*

[173] From the position paper "AIM contribution to the European Commission consultation on the targeted review of EU consumer law Directives", October 2017.

2. Additional data

Table 1: Consumer problems related to consumer rights in the past year[174]

Tables 2 to 4: Data from the Consumer Market Study to support the Fitness Check of EU consumer and marketing law (2017):[175]

Table 2: Action taken to resolve the most recent consumer rights problem at country level by type of the problem (Table 54 (page 173) in the Consumer Market Study)[176]

	You complained to the seller or service provider	You complained to the manufacturer	You complained to a public authority	You complained to a consumer association	out-of-court dispute resolution body such as an ombudsman, arbitration, mediation or council	You took the trader to court	You took other actions	**You did not take any action**
Lack of indication of the unit price	38%	7%	3%	3%	1%	0%	4%	50%
Defective goods	75%	16%	4%	3%	1%	1%	2%	**10%**
Misleading or aggressive commercial practices	46%	11%	9%	9%	4%	1%	8%	**27%**
Unclear or ambiguous standard contract terms	61%	13%	6%	10%	3%	2%	4%	18%
Unfair standard contract terms	57%	10%	8%	8%	3%	2%	5%	21%

[174] From the Fitness Check consumer survey (representative total sample of 23'501 respondents in EU28 + NO and IS, number of respondents ranging from 1000 respondents in the largest countries to 250 in the smallest. The survey covered UCPD, UCTD, PID and CSGD. Detailed results are provided in the "Consumer Market Study to support the Fitness Check of EU consumer and marketing law" (2017), available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

[175] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

[176] Base: EU28 respondents had encountered a problem in the past year at least rarely (n = 16,800; of which lack of indication of the unit price n = 2,942; defective goods n = 7,049; misleading or aggressive commercial practices n = 3,941; unclear or ambiguous standard contract terms n = 2,102; unfair standard contract terms n = 721).

Table 3: Reasons for not taking any action by type of consumer rights issue (Table 66 (page 183) in the Consumer Market Study)[177]

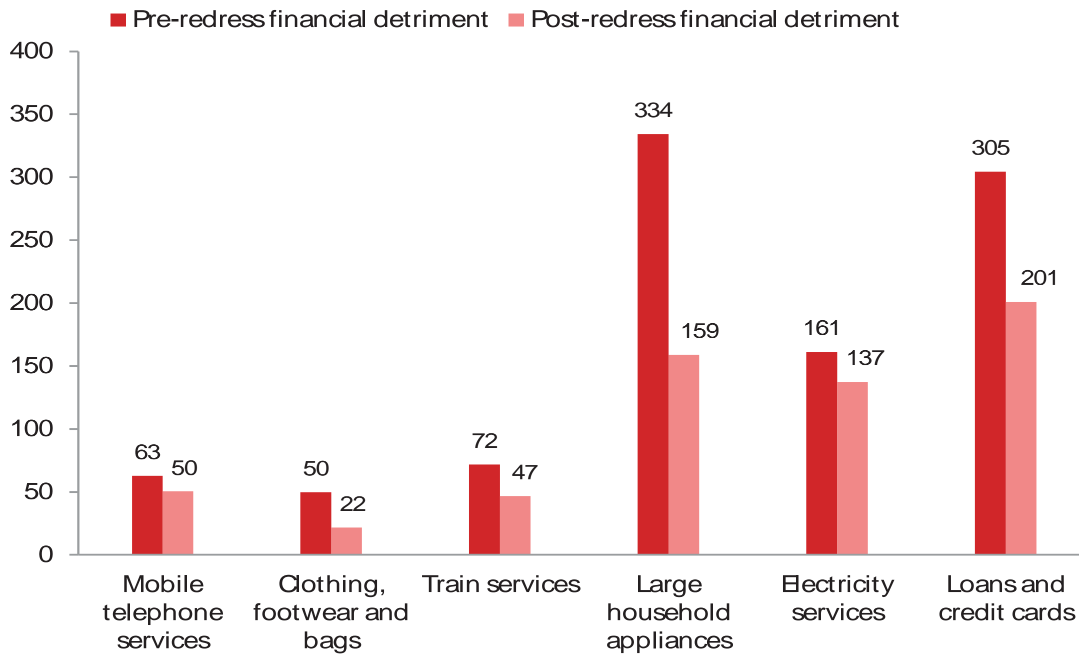
		You were unlikely to get a satisfactory solution to the problem you encountered	The sums involved were too small	You did not know how or where to complain	You were not sure of your rights as a consumer	You thought it would take too long	You tried to complain about other problems in the past but it was not successful	You thought complaining would have led to a confrontation, and you do not feel at ease in such situations	Other	Don't know
Most recent problem	Lack of indication of the unit price	19%	54%	10%	10%	20%	2%	10%	7%	10%
	Defective goods	**28%**	38%	7%	8%	14%	3%	7%	15%	11%
	Misleading or aggressive commercial practices	**36%**	20%	17%	12%	17%	10%	9%	11%	13%
	Unclear or ambiguous standard contract terms	34%	28%	9%	19%	18%	8%	9%	5%	17%
	Unfair standard contract terms	41%	15%	20%	16%	8%	13%	10%	3%	19%

Table 4: Outcome of problem resolution efforts by type of consumer rights issue (Table 71, page 189) in the Consumer Market Study)[178]

	The problem is still pending	You decided not to buy the product / service	You did not know which product / service to buy	**You received a refund / compensation for the product**	**The product was replaced**	**The product was repaired free of charge**	The product was repaired at a discounted rate	You received no refund / compensation, repair or replacement	You received a refund / compensation for the service	The service was performed again	You received no refund/compensation and the service was not performed again	Other
Lack of indication of the unit price	11%	26%	4%	19%	23%	4%	1%	6%	0%	0%	0%	5%
Defective goods	9%	0%	0%	**31%**	**42%**	**11%**	1%	6%	0%	0%	0%	1%
Misleading or aggressive commercial practices	18%	25%	0%	**7%**	**8%**	**3%**	1%	4%	13%	7%	8%	7%
Unclear or ambiguous standard contract terms	**22%**	15%	0%	6%	8%	2%	1%	4%	16%	11%	8%	5%
Unfair standard contract terms	**25%**	14%	0%	8%	10%	2%	1%	4%	14%	6%	10%	4%

[177] Base: EU28 respondents that did not take any action on their last problem (n = 4,499)
[178] Base: EU28 respondents that took any action to resolve the most recent problem (Q23 = 1-7; n = 12,703)

Table 5: Pre- and post-redress financial detriment (average per respondent who experienced a problem and sought redress, in euro), online survey[179]



[179] Study on measuring consumer detriment in the European Union, Part 3, Annex XXI, Figure 1, available at: https://publications.europa.eu/en/publication-detail/-/publication/b0f83749-61f8-11e7-9dbe-01aa75ed71a1/language-en .

Tables 6 and 7[180]

Table 6: Pre- and post-redress financial detriment, large household appliances market, online survey

QD6. Which of the items below describe the problem with the appliance or with the seller you obtained it from?

Pre- and post-redress financial detriment (average per respondent who experienced a problem, in Euro)

		qd5 QD5. Did you obtain this appliance from a seller based in your country of residence, in another EU country, or outside the EU?																				
		Seller based in my country of residence							Seller based in another EU country							Total						
		Count	Unweighted Count	Mean	Standard Error of Mean	Valid N	Unweighted Valid N	Standard Deviation	Count	Unweighted Count	Mean	Standard Error of Mean	Valid N	Unweighted Valid N	Standard Deviation	Count	Unweighted Count	Mean	Standard Error of Mean	Valid N	Unweighted Valid N	Standard Deviation
No misleading or aggressive commercial practices	FinancialDet_pre	600.2832	608	307.163729$_a$	20.17353	561.1905	568	477.89993	55.8137	57	229.572094$_a$	42.305904	44.119	45	281.005	665.4622	674	301.0666	18.82689	610.3433	618	465.121
	FinancialDet_post	600.2832	608	162.069330$_a$	15.12356	561.1905	568	358.26888	55.8137	57	123.297823$_a$	25.515918	44.119	45	169.482	665.4622	674	159.3619	14.0571	610.3433	618	347.282
At least one misleading or aggressive commercial practice	FinancialDet_pre	55.5922	55	**305.504359a**	58.97408	47.6348	47	407.0271	16.9696	18	**376.722504a**	133.3048	12.3588	13	468.634	73.5736	74	**319.393**	52.97382	61.0054	61	413.757
	FinancialDet_post	55.5922	55	**241.298900a**	60.35278	47.6348	47	416.5426	16.9696	18	**273.374368a**	101.4135	12.3588	13	356.52	73.5736	74	**248.3227**	51.06594	61.0054	61	398.855
Total (all types of problems)	FinancialDet_pre	655.8754	663	307.0338989	19.14704	608.8253	615	472.4414	72.7833	75	261.7724005	44.153806	56.4778	58	331.823	739.0358	748	**302.7319**	17.77032	671.3487	679	460.436
	FinancialDet_post	655.8754	663	168.2682915	14.72802	608.8253	615	363.40481	72.7833	75	156.1384437	30.421748	56.4778	58	228.625	739.0358	748	**167.4457**	13.61925	671.3487	679	352.88

Note: Values in the same row and subtable not sharing the same subscript are significantly different at p< .05 in the two-sided test of equality for column means. Cells with no subscript are not included in the test. Tests assume equal variances.[23]

1. This category is not used in comparisons because the sum of case weights is less than two.

2. Tests are adjusted for all pairwise comparisons within a row of each innermost subtable using the Bonferroni correction.

3. Cell counts in some subtables are not integers. They were rounded to the nearest integers before performing pairwise comparisons.

[180] Calculations based on Study on measuring consumer detriment in the European Union, available at: https://publications.europa.eu/en/publication-detail/-/publication/b0f83749-61f8-11e7-9dbe-01aa75ed71a1/language-en

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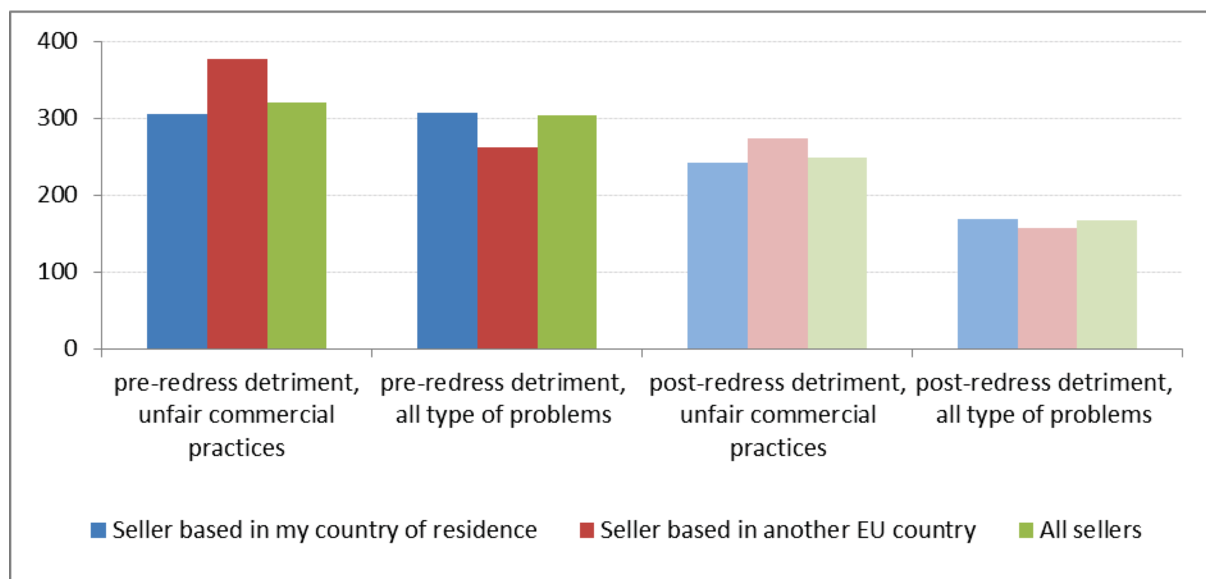
Table 7: Pre- and post-redress financial detriment (average per respondent who experienced a problem and sought redress, in euro), large household appliances online survey



Tables 6 and 7 indicate that consumers who had experienced unfair commercial practices in relation to purchases of large household appliances suffered on average pre-redress financial detriment of EUR 319.40, higher than all types of consumer problems combined (EUR 302.7). After seeking redress, the average financial detriment related to unfair commercial practices was EUR 248.3. This is significantly higher compared to the post-redress financial detriment for all types of problems combined (EUR 167.5). When the seller was based in another EU country, the pre- and post-redress detriment related to unfair practices tended on average to be higher by 23.3% and 13.3% than with sellers based in the country of residence.[181]

[181] Due to the rather low sample sizes of this the result is not statistically significant at the 5% -level.

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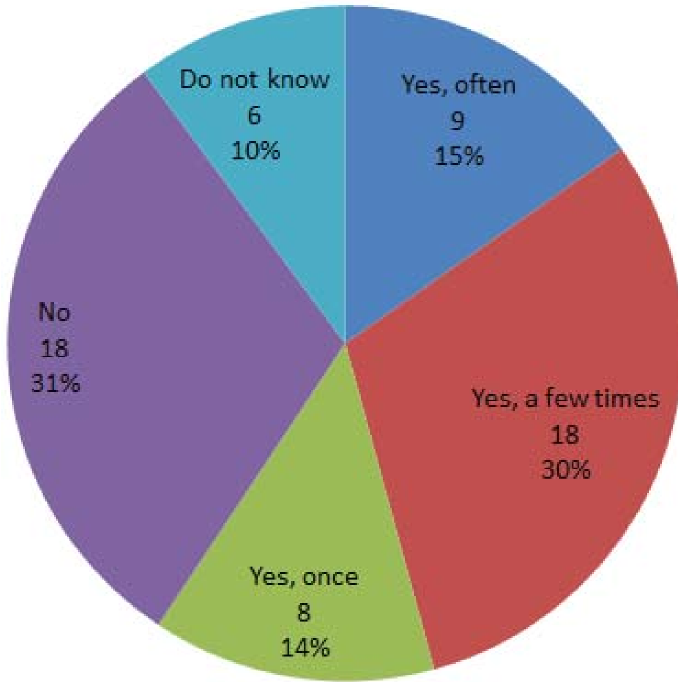
Table 8: Overview of civil remedies in the different Member States:

	Existence of a direct link between civil remedies and UCPD breaches	Civil remedies for UCPD breaches referred to by the direct link			
		Certain breaches of the UCPD	Damages	Contract termination	Price reduction
Austria	-	-	-	-	-
Belgium	+	+[182]	-	+	-
Bulgaria	+[183]	-	+	+	-
Croatia	-	-	-	-	-
Cyprus	-	-	-	-	-
Czech Republic	+	+[184]	+	-	-
Denmark	-	-	-	-	-
Estonia	-	-	-	-	-
Finland	-	-	-	-	-
France	+	+[185]	-	+	-
Germany	-	-	-	-	-
Greece	+	-	+	-	-
Hungary	-	-	-	-	-
Ireland	+	+[186]	+	-	-
Italy	-	-	-	-	-
Latvia	-	-	-	-	-
Lithuania	+	-	+	-	-
Luxembourg	+	-	-	+	-
Malta	-	-	-	-	-
Netherlands	+	-	+	+	-
Poland	+	-	+	+	-
Portugal	+	-	+	+	-
Romania	-	-	-	-	-
Slovakia	+	-	-	+	-
Slovenia	-	-	-	-	-
Spain	-	-	-	-	-
Sweden	+	-	+	-	-

[182] For seven specific black-listed practices (corresponding to Annex No. 12, 16, 17, 24, 25, 29, 31), the court must apply the remedy, for others it has the discretion whether or not to apply the remedy or modify it.
[183] Remedies can be used following an order by the Commission for Consumer Protection prohibiting the application of the unfair commercial practice.
[184] Remedies limited to certain UCPD breaches.
[185] Remedies provided only for aggressive practices.
[186] Remedies not provided for the breach about failing to meet a commitment in a code of practice and the operation of pyramid schemes.

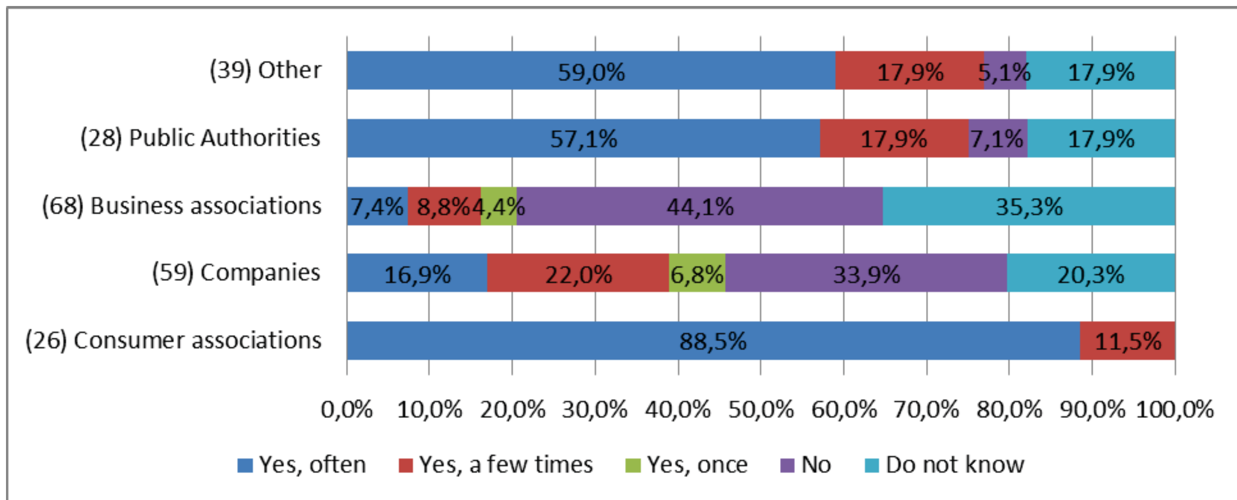
UK	+	+ [187]	+	+	+

Table 9: If you have been a victim of unfair commercial practices (e.g. if you have purchased a product or a service based on misleading claims, such as misleading green claims, or aggressive practices by traders), have you experienced problems with getting redress from traders?



[187] Remedies not provided for misleading omissions.

Table 10: In your professional experience, do consumers experience problems with getting redress from traders when they have been victims of unfair commercial practices? Breakdown by respondent category:[188]



188 From the public consultation (OPCID226)

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Table 11: Differences between national rules on remedies for unfair commercial practices cause harm to consumers as they cannot remedy the consequences resulting from unfair commercial practices on the national and cross-border level (based on 313 replies across all stakeholder groups):[189]

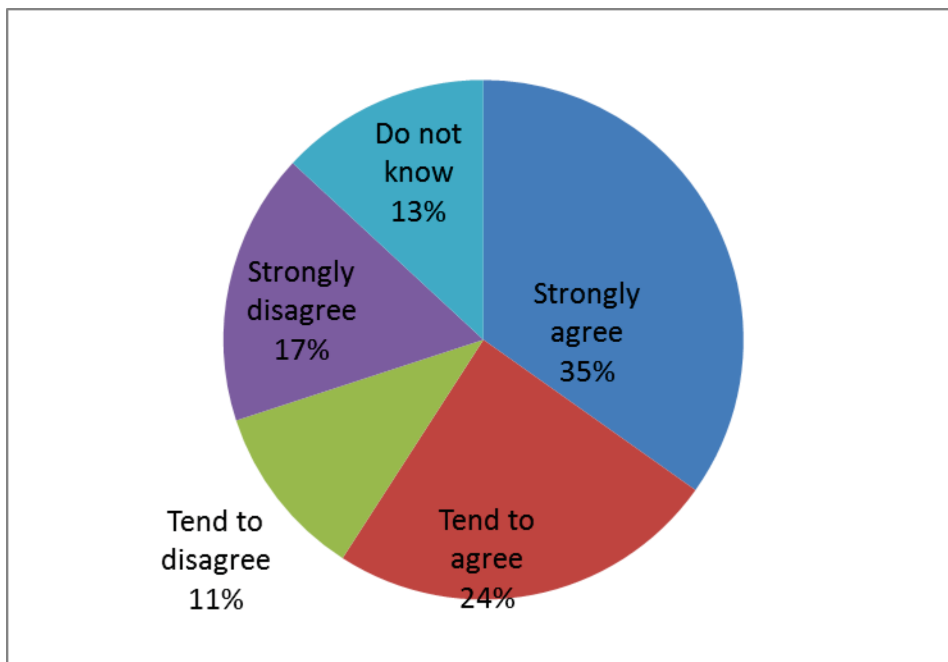
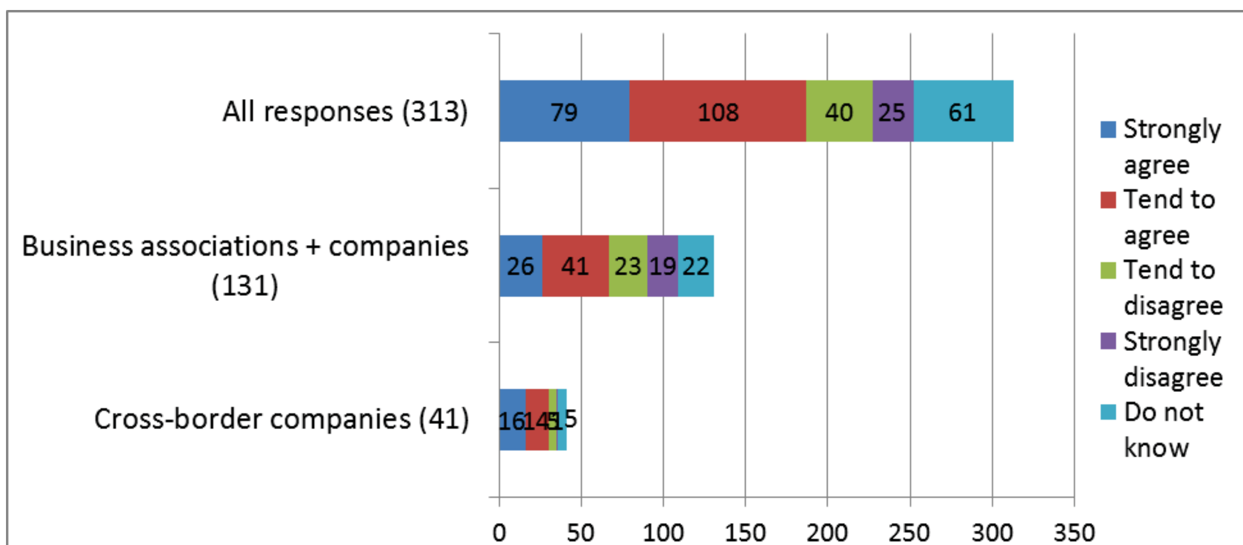


Table 12: Differences between national rules on remedies for unfair commercial practices cause costs for traders engaging in cross-border trade due to need to adapt to different national rules on remedies (all responses across all stakeholder categories including businesses and business associations; specifically business associations and companies, and companies who declare trading cross border – in absolute numbers):[190]



[189] From the public consultation.
[190] From the public consultation.

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Table 13: Do these costs (to check compliance with and adjust business practices to national rules related to remedies for consumers that have been harmed by unfair commercial practices) have an impact on your decision to enter other EU markets or not?[191]

All SMEs consulted:

	Answers	Ratio
It encourages my enterprise to enter other EU markets	26	11%
It has no significant impact on my enterprise's decision to enter other EU markets	102	44%
It discourages my enterprise from entering other EU markets	47	20%
Do not know	59	25%
	234	100%

B2C SMEs consulted:

It encourages my enterprise to enter other EU markets	23	11.50%
It has no significant impact on my enterprise's decision to enter other EU markets	83	41.50%
It discourages my enterprise from entering other EU markets	46	23.00%
Do not know	48	24.00%
	200	100.00%

[191] From the SME panel consultation.

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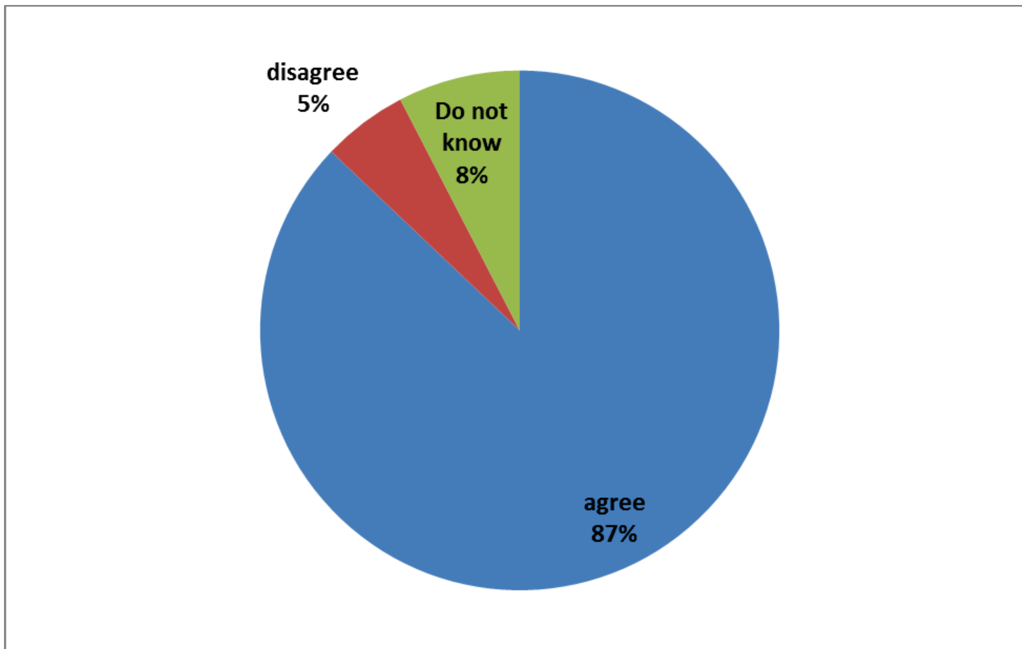
Table 14: SMEs views on introducing UCPD remedies: Should there be an EU-wide right for consumers to claim remedies directly from the traders who have harmed them with their unfair commercial practices?[192]

n=216 (SMEs selling to consumers)



B2C SMEs consulted:

Strongly agree	108	47.79%
Tend to agree	88	38.94%
Tend to disagree	6	2.65%
Strongly disagree	7	3.10%
Do not know	17	7.52%
	226	100.00%

Smallest (self-employed, micro and small) SMEs consulted:

Strongly agree	92	47.4%
Tend to agree	76	39.2%
Tend to disagree	5	2.6%
Strongly disagree	6	3.1%
Do not know	15	7.7%
	194	100.0%

[192] From the SME panel consultation.

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Table 15: In your Member State, to what extent would the introduction of an EU-wide right to individual remedies create costs for making amendments to the existing legal framework?[193]

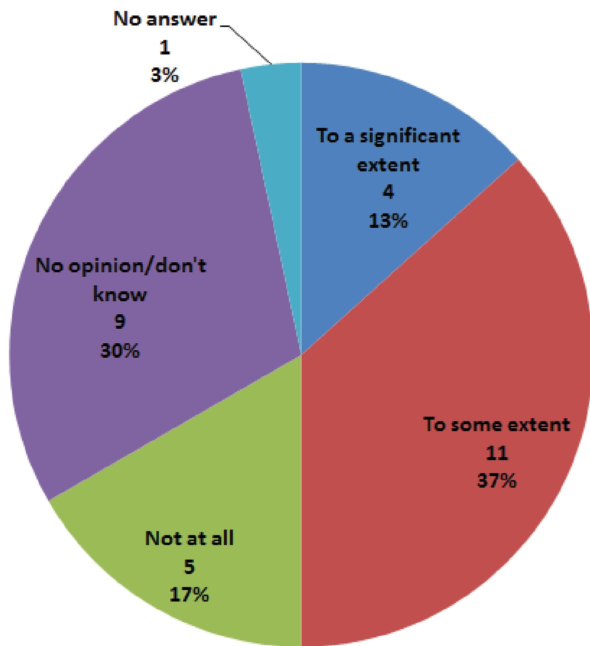
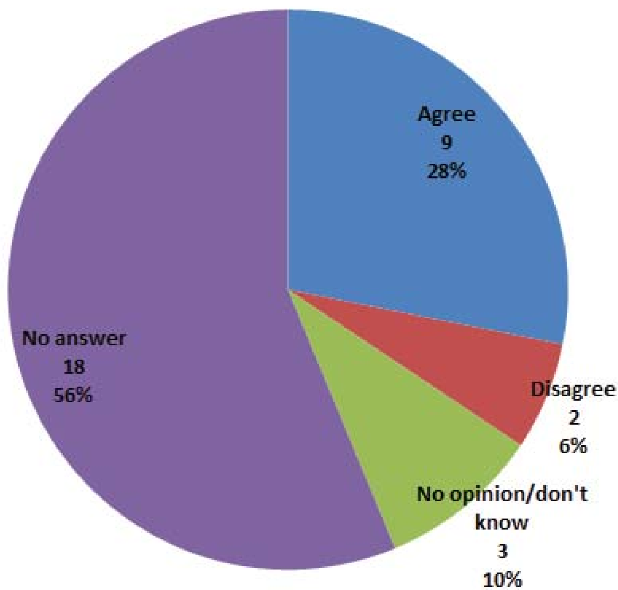


Table 16: Do you agree that these costs are reasonable, when taking into account the possible benefits for consumers?[194]



Question 21 in the public consultation: What should be done, in your opinion, to ensure that traders comply better with consumer protection rules?: (ID168)Victims of unfair commercial

[193] From the CPC CPC/CPN/CMEG survey.
[194] *Idem* CPC/CPN/CMEG survey.

practices should be given rights to claim remedies from the traders (for example, to terminate the contract or claim damages).

Question 4 in section B.1 of the SME panel consultation: If a new EU rule was introduced to grant consumers an EU-wide right to claim remedies directly from the trader who has harmed them with unfair commercial practices, would this have an impact on your enterprise's decision to enter other EU markets? n= 205 SMEs selling to consumers

Question 112 in the public consultation: Do you agree that introducing an EU-wide right to remedies for victims of unfair commercial practices would bring about benefits, such as: 1) Better compliance by businesses with consumer protection rules; 2) More level playing field to the benefit of compliant traders?; 3) Greater consumer trust?

Question 6 in section B.1 of the SME panel consultation: Please estimate the savings for your enterprise of introducing an EU wide right to individual remedies for victims of unfair commercial practices?

You may wish to answer either in staff time or Euros, or both in case you incur staff and other costs.

One-off costs: Please indicate the one-off resources you would need to invest to ensure compliance with this new rule. (e.g. checking compliance with the new rules and adjusting business practices as a result (e.g. update your website), costs of legal/technical advice)

Regular costs: Please estimate the resources you would need to invest on a regular basis to comply with this new rule. (e.g. manage the updated website)

(Note: Please indicate in working days, with 1 working day equalling 8 hours of staff time. Please do not consider staff time for translation. If no staff time was involved, indicate ‘0’.)

Summary of responses:

Savings have been obtained by converting full time equivalents using the standard cost model and the second highest ISCO level (ISCO 2 professionals), adding pecuniary costs estimates:

One-off savings

Size class	**Range of estimated savings in Euro (median/mode)**	**Number of responses**
Micro	0 – 24 176 (0/0)	44
Small	0 – 21 675 (0/0)	18
Medium	0 – 1 682 (338/0)	10
Large	0 - 1 000 (0/0)	4
SMEs	0 – 24 176 (0/0)	72

Annual regular/running savings

Size class	**Range of estimated savings in Euro**	**Number of responses**

	(median/mode)	
Micro	0 – 10 000 (0/0)	44
Small	0 – 5 000 (0/0)	18
Medium	0 – 978 (175/0)	10
Large	0 (0)	4
SMEs	0 – 10 000 (0/0)	72

Note**:** (*) Less than three estimates were received in this category

Question 123 in the public consultation: What would be the estimated additional costs for your business (or the businesses you represent) of introducing an EU-wide right to individual remedies for victims of unfair commercial practices?

One-off costs: A self-employed in DE indicated costs of 25% of turnover and an individual in LV estimated zero costs.

Annual running costs: A self-employed in AT indicated costs of 0.6% of turnover, one in DE assumed 35% costs in terms of turnover. A small company in DE projected 5%. Individuals estimated costs of 150% of turnover and EUR 2 000 (2% of turnover) respectively (LV, DE).

Question 5 in section B.1 in the SME panel consultation: Please estimate the resources your enterprise would need to invest due to a possible new EU consumer right to claim remedies for harm suffered from unfair commercial practices?

You may wish to answer either in staff time or Euros, or both in case you incur staff and other costs.

One-off costs: Please indicate the one-off resources you would need to invest to ensure compliance with this new rule. (e.g. checking compliance with the new rules and adjusting business practices as a result (e.g. update your website), costs of legal/technical advice)

Regular costs: Please estimate the resources you would need to invest on a regular basis to comply with this new rule. (e.g. manage the updated website)

(Note: Please indicate in working days, with 1 working day equalling 8 hours of staff time. Please do not consider staff time for translation. If no staff time was involved, indicate '0'.)

Summary of responses:

Costs have been obtained by converting full time equivalents using the standard cost model and the second highest ISCO level (ISCO 2 professionals), adding pecuniary costs estimates:

One-off costs

Size class	Range of estimated resources in Euro (median/mode)	Number of responses
Micro	0 – 572 484 (322/0)	51
Small	0 – 101 675 (1 311/0)	23
Medium	0 – 8 000 (1 287/0)	11

Large	0 – 5 000 (108/-)	3
SMEs	0 – 572 484 (380/0)	85

Note: (*) Less than three estimates were received in this category

Annual regular/running costs

Size class	Range of estimated resources in Euro (median/mode)	Number of responses
Micro	0 – 190 497 (483/0)	51
Small	0 – 171 551 (1 000 /0)	23
Medium	0 – 3 200 (698/0)	11
Large	0 – 15 000 (0/0)	3
SMEs	0 – 190 497 (655/0)	85

Note: (*) Less than three estimates were received in this category

Question 109 in the public consultation: If such an EU-wide consumer right were to be introduced, should it 1) Define which types of remedies should be available to consumers EU-wide; or 2) Require Member States to ensure that consumers have a right to remedies, but leave the types of remedies to be defined at national level.

Question 110 in the public consultation: Which types of EU-wide remedies should be introduced in case a consumer is a victim of an unfair commercial practice (multiple replies possible)? Right to terminate the contract and to get a refund of the price paid; Right to receive compensation for the damage suffered; Right to a price reduction; Other.

3. Stakeholder views

Improve compliance with EU consumer law

In the public consultation, in response to a question about what should be done to ensure that traders comply better with consumer protection rules,[195] 63% (240) of all respondents indicated that victims of unfair commercial practices should be given rights to claim remedies from the traders. 16% disagreed with this. When broken down by respondent group, the responses to this questions show that MS authorities (25 of 28), consumer associations (all 27 responding) and citizens (86 of 93) agreed that victims of unfair commercial practices should be given rights to claim remedies to ensure that traders comply better with consumer protection rules. On the other hand, only 31% of the 121 companies agreed with this (12% of the responding companies disagreed) and 52% of 69 business associations disagreed (35% agreed). Out of the companies that agreed (38), over 70% were SMEs. 27% of the SMEs replying to this question agreed (9% disagreed and 64% said they did not know). 11 of 22 large companies agreed (6 disagreed and 5 did not know).

Protect the economic interests of consumers and ensure a high level of consumer protection

In the SME panel consultation, a clear majority (87%, of a total of 263 replies) supported introducing an EU-wide right to remedies. The percentages were similar when the responses were filtered for B2C companies and for SMEs (see Table 14 in Section 2 of this Annex).

[195] Question 21 in the public consultation: For information on the question, see subsection 2 in this Annex.

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In the public consultation for the Fitness Check, 95% of consumer associations and 75% of consumer respondents and public authorities agreed that consumer protection against unfair commercial practices should be strengthened by introducing a right to remedies. In contrast, only 10% of business associations agreed with this, while 64% disagreed. Responding businesses were split in this respect, with 45% agreeing and 37% disagreeing.

Deciding UCPD remedies on national or EU level

In the public consultation for this IA, 52% (65) of respondents said that it should be decided at EU level which remedies should be made available for breaches of the UCPD, while 38% (48) said the choice of remedies should be left to MS.[196] A breakdown by respondent group of responses to this question shows that, out of the 16 responding consumer associations, 13 supported defining UCPD remedies on EU level, while 3 said it should be left to the MS. Out of the 33 responding business associations, 20 supported leaving this to the national level, whilst 6 were in favour of rather harmonising the remedies at EU level. Out of the 17 responding MS authorities, 8 said that the types of remedies should be defined at national level and 7 MS authorities preferred defining them at EU-level. 23 of the 29 citizens replying to this question said that the type of remedies should be defined at EU level, while 6 preferred leaving the choice to the MS. Of the 20 responding companies (of which 14 SMEs and 6 large companies), 9 chose determining the types at EU-level, while 8 preferred leaving the choice to the MS (3 selected "do not know"). When looking at possible difference of views between SMEs and larger companies among the 20 responding ones, it appears that 6 out of 14 SMEs preferred leaving the choice to the MS, whereas 5 indicated that this should be decided at EU level. An opposite trend is to be observed among the 6 large companies, 4 of which supporting the option of deciding this rather at EU level. This question was not asked in the CPC and SME consultations.

Frequently used UCPD remedies

In reply to the CPC/CPN/CMEG survey, 15 MS authorities indicated that the most frequently used UCPD remedy in their countries today is the right to terminate the contract and to get a refund. The 15 MS are HR, DK, EE, FI, HU, IE, IT, LT, MT, NL, PT, RO, SK, ES, SW.

UCPD remedies with added value

Also in reply to the CPC CPC/CPN/CMEG survey, 20 MS indicated that there would be added value in introducing an EU-wide right to terminate the contract and get a refund of the price paid. The MS are AT, BE, BG, HR, CY, DK, EE, FR, HU, IE, LV, LU, MT, NL, PL, PT, RO, SK, ES, SE. 15 MS authorities said there would be added value in introducing an EU-wide right to compensation for damages under the UCPD. The 15 MS are AT, BE, BG, CY, HR, DK, EE, FI, LV, IE, MT, NL, PL, RO, ES.

In the public consultation, to a question about which types of EU-wide remedies should be introduced,[197] 12 of the 16 responding MS authorities, 26 of the 28 citizens and all the 16 consumer associations replying indicated the right to terminate the contract and get refund of the price paid. 6 of the 24 responding business associations agreed, along with 8 of 13 SMEs and 4 of 5 large companies. 9 of the 16 responding MS authorities, 15 of the responding 16 consumer associations, 23 of 28 citizens, 10 of 24 business associations, 5 of 13 SMEs and 2 of 5 large companies indicated that a right to compensation for damages should be introduced.

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[196] Question 109 in the public consultation, please see the question in Subsection 2 of this Annex.

[197] Question 110 in the public consultation, please see the question in Subsection 2 of this Annex.

Promote the smooth functioning of the internal market

On increased consumer trust, the mystery shopping exercise for the Consumer Market Study supporting the Fitness Check found that consumers may not actually be aware of differences in the national consumer laws, but still suspect that such differences exist. This may lead consumers to avoid cross-border purchases. Consumers are also concerned about possible differences in their rights, even if their rights towards traders in other Member States are the same or even better than in their own country.[198]

In the public consultation, 64% of all respondents agreed that introducing such rights would contribute to greater consumer trust.[199] The agreeing respondents were: All 16 consumer associations, 13 of 16 MS authorities, 25 of 28 individuals, 10 of 21 companies (6 of 15 SMEs and 4 of 6 large companies), 14 of 45 business associations (of the 45, 27 disagreed, 14 agreed and the rest did not know) and 10 of 11 other stakeholders (NGOs, associations etc.).

Also in the public consultation, 67% of all respondents agreed that introducing an EU-wide right to UCPD remedies wold create a more level playing field for compliant traders. The agreeing respondents were: All 16 consumer associations, 13 of 16 MS authorities, 26 of 28 citizens, 13 of 21 companies (9 of 15 SMEs and 4 of 6 large companies), 13 of 45 business associations (28 disagreed and 4 did not know) and all 11 other stakeholders.

In the SME consultation, 25% of the (205) respondent SMEs stated that introducing an EU-wide right to remedies under the UCPD would encourage their enterprise to enter other EU markets.[200]

Costs related to amending national rules

In the CPC CPC/CPN/CMEG survey, MS authorities gave diverging answers when asked if the introduction of EU-wide rights to UCPD remedies would create costs related to amending national rules. A majority of the respondents agreed that costs related to amending national rules to introduce UCPD remedies would be reasonable. Data on responses to these questions is provided in Tables 15 - 16 in subsection 2 of this Annex.

[198] Lot 3 Report, p. 103.
[199] Question 112 in the public consultation: For information on the question see the question in Subsection 2 of this Annex.
[200] Question 4 in section B.1 of the SME panel consultation: For information on the question see Subsection 2 of this Annex.

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Annex 9: Additional data on the Injunctions Directive

1. Detailed problem description

The risk of mass harm situations that affect the collective interests of consumers increases constantly in light of globalisation and digitalisation.[201,202] Infringing traders may affect thousands or even millions of consumers with the same misleading advertisement or unfair standard contract terms in various economic sectors, such as telecommunications, financial services and energy.[203] The "Dieselgate" scandal is a greatly publicized example of mass harm situations taking place across the EU.[204]

Examples of mass harm:

- In DE, one of Europe's largest network-independent telecoms providers offered consumers contracts that included a significant fee for "non-use" that has been found unfair within an injunction action.[205]
- A consumer credit company in Latvia misled consumers with respect to interest rates in credit cards leaving several thousands of consumers with harm up to €10,000. [206]
- Energy suppliers in the UK overcharged approximately four million households due to billing blunders that caused detriment of almost £300m.[207]

In mass harm situations, the existing individual enforcement and redress possibilities appear insufficient and infringing traders are not sufficiently deterred from non-compliance. As demonstrated by the Fitness Check, reliance on individual private enforcement results in consumer detriment and the under-deterrence of infringements.[208] Given the low awareness of their rights, consumers may not detect the illegal practice in the first place. For instance, consumers may not see

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[201] The problem of mass harm related to both domestic and cross-border infringements of EU law relevant for collective interests of consumers has been already identified in the 2008 Commission Green Paper on collective redress (COM(2008) 794 final, available at http://ec.europa.eu/consumers/archive/redress_cons/greenpaper_en.pdf, as well in the 2008 Commission White Paper on Damages actions for breach of the EC antitrust rules, (COM(2008)0165) available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0165. The growth of cross-border infringements has been confirmed in the 2015 Study supporting the IA for the revision of the CPC Regulation (2015 CPC IA Study), available at https://ec.europa.eu/info/sites/info/files/cpc_review_support_study_1_en.pdf

[202] Breakthroughs such as the internet and the rise of emerging economies have further accelerated global exchanges and transformed their nature, which boosts the capacity of traders to reach a large number of consumers simultaneously. See the Reflection paper on harnessing globalisation, COM(2017) 240 of 10 May 2017. The growth of cross-border infringements and the related consumer detriment is also a product of increasing numbers of businesses operating in more than one Member State, through networks of branches, subsidiaries or agents. This creates conditions for infringing commercial practices to be repeated in other Member States, therefore with a cross-border dimension, 2015 CPC IA Study p. ix, the Commission IA for the revision of the CPC Regulation, Brussels, 25.5.2016 SWD(2016) 164 final, p. 9 available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1518701034039&uri=CELEX:52016SC0164 . At the same time, as demonstrated by data gathered in the context of the EC works for a DSM Strategy, the top 100 online retailers at the EU level represented 52% of total online retail turnover in 2013, "A Digital Single Market Strategy for Europe - Analysis and Evidence", 6.5.2015, SWD (2015)100 final, p. 8 available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0100&from=EN

[203] Several studies and reports have identified the risk of mass harm in different economic sectors: Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (2008 Problem Study), p.21, 2012 Commission report on the application of the ID, Brussels, 6.11.2012 COM(2012)635final, p. 4-5 available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434096245408&uri=CELEX:52012DC0635, 2017 Fitness Check Study Lot 1, part 4, p. 13, EC 2017 Call for evidence on collective redress (hereinafter " 2017 call for evidence on collective redress",) publication planned for January 2018.

[204] For several examples of mass harm situations see: 2008 Problem Study, p. 20, Study on the application of Directive 2009/22/EC on injunctions for the protection of consumers' interests (former Directive 98/27/EC) available at https://ec.europa.eu/info/files/study-application-directive-2009-22-ec-injunctions-protection-consumers-interests_en, 2017 Fitness Check, Lot 1 Study, part 4, p. 16 and 2017 call for evidence on collective redress.

[205] 2017 call for evidence on collective redress.

[206] BEUC position paper "European collective redress – what is the EU waiting for?", Ref: BEUC-X-2017-086 -31/07/201, p. 8

[207] http://www.telegraph.co.uk/bills-and-utilities/gas-electric/four-million-overcharged-due-to-energy-billing-errors/

[208] Fitness Check, Lot 1 Study, Part 1 Main report, p. 159.

the link between the misleading character of the advertising and its effects on their economic behaviour and may not even realise that a breach of the UCPD takes place. Consumers may not be adequately informed about the relevant legal consequences and the remedies available to them. Consumers might not even have a direct right to remedies, as is the case with UCPD remedies in certain Member States. Moreover, consumers may not be able to identify the small amount of loss in each case (e.g. a few euros in monthly telecommunication or energy services bills), yet the aggregated amount of harm may be significant. Furthermore, even if consumers are aware of the infringement and their related loss, they may rationally decide not to take legal action due to the overall negative balance of the perceived costs and benefits. Given the above, it is even less probable that individual consumers would take an action for stopping illegal practices in mass harm situations for the protection of collective interests of consumers, even if possibilities for this are ensured by law in some Member States.[209]

Many consumers affected by a breach of EU consumer law do not seek individual redress:

The 2017 Consumer Conditions Scoreboard reported that in 2016 almost a third (6.1 percentage points more than in 2014) of the consumers having faced a problem within the EU, whether domestically or cross-border, did not follow it up despite feeling it would have been legitimate to do so. The main reasons for not acting are: excessive length of the procedures (for 32.5% of those who didn't take action); perceived unlikelihood of obtaining redress (19.6%); previous experience of complaining unsuccessfully (16.3%); uncertainty about consumer rights (15.5%); not knowing where or how to complain (15.1%) and psychological reluctance (13.3%).[210] Compared with 2014, consumers appear less inclined to take their complaints to court or to an out-of-court dispute resolution body (respectively -1 and -1.7, statistically significant decreases).[211] The survey carried out within the 2017 Study on Procedural Protection of Consumers echoed the above results.[212]

A comparison of this data with EC data from 2008 shows that EU consumers today face the same problems while seeking redress individually as ten years ago.[213]

Several instruments for ensuring enforcement of EU consumer law and consumer redress already exist at European level.[214] However, there is a gap of private enforcement, including consumer redress in mass harm situations. Most EU-level private enforcement instruments which are primarily aimed at individual consumer disputes, were not designed to address the procedural specificities of mass harm or to take into account the collective interests of consumers.[215] Furthermore, public enforcement alone is not sufficient either. Public authorities are often not able or willing to follow up on each infringement due to multifaceted reasons, including resource limitations and political discretion concerning enforcement priorities. The revised CPC Regulation is also not able to address all aspects of cross-border mass harm situations, in particular consumer redress. It ensures that national consumer enforcement authorities in all Member States have certain

[209] BE, DK ES, HU, LU, PT.
[210] 2017 Consumer Conditions Scoreboard, p. 56.
[211] 2017 Consumer Conditions Scoreboard, p. 58, see also data presented in Table 3 of Annex 8.
[212] The above Study revealed that the responding consumers did not take any action due to the following reasons: 18% considered the value of the claim to be too small, 17% costs of the procedure too high, 15% perceived lack of confidence in obtaining a satisfactory outcome, 14% length of the procedure, 11% costs and complexity due to the trader being based in another MS, 9% lack of awareness of consumer rights, 9% lack of knowledge of where to make the complaint, 7% previous experience (e.g. past attempts to resolve such problems were unsuccessful), 2017 Study on Procedural Protection of Consumers PI Study, Online Survey Data, p. 40 available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847
[213] 2008 Problem Study, p. 42.
[214] For an overview of EU legal framework for the enforcement and consumer redress, see Annex 6.
[215] An example of an EU instrument that does take into account collective redress actions is the Antitrust Damages Directive 2014/104/EU which does apply to antitrust collective redress actions in the Member States where they exist.

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minimum enforcement powers to stop cross-border infringements of EU laws enumerated in its Annex. However, these minimum powers do not include the power to order redress, as public enforcers only have the possibility to agree to voluntary remedial commitments with the trader.[216]

The need for an EU enforcement instrument that addresses the collective interests of consumers was already evident in 1998, when the Injunctions Directive was first adopted. The ID made it possible for "qualified entities", mainly consumer organisations and independent public bodies, to bring "actions for an injunction"[217] for the protection of the collective interests of consumers with the primary aim of stopping infringements of EU consumer law. Such actions may be brought to challenge both domestic and cross-border infringements without an explicit mandate from the affected consumers. This makes the ID an instrument particularly relevant for addressing mass harm situations where the interests of a number of consumers have been harmed or may be harmed by the same illegal practice. The 2008 and 2012 Commission reports on the application of the ID as well as the 2017 Fitness Check have all confirmed the significant role of the ID in the EU-level regulatory toolbox.[218] However, these reports have also concluded that there are considerable shortcomings to the current ID, which, if left unaddressed, will continue to hinder its full effectiveness, including its deterrent effect, and efficiency.[219]

Efficiency aspects of collective injunctions and redress[220]

In a hypothetical case of unfair standard contract terms, the costs for a lower court procedure borne by an individual consumer has been estimated at EUR 1 095 on average across Member States, within a range between EUR 0 and EUR 7 569 (taking into account lawyer's fees, court fees and other costs associated with the first instance court procedure for this hypothetical example). If 100 affected consumers would go to court, the sum of the costs for their individual actions would be EUR 109 500. The overall costs of an injunction action could be expected to be significantly lower than the sum of costs for individual actions, due to economies of scale (e.g. with respect to lawyers' fees). This simplified calculation does not take into account the amount of time saved or the reduced levels of stress for consumers thanks to the fact that the legal action is sought in their protection by a representative entity. Importantly, another benefit of an injunction action that cannot be measured is the number of potential future cases prevented as a result of the injunction order.

The use of injunctions appears to be far from meeting the existing needs. A Commission Study estimated that 120,000 cross-border infringements were committed by traders in the five sectors analysed in 2014.[221] In the survey carried out within the Fitness Check, qualified entities[222] reported

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[216] Revised CPC Regulation, Recital 46 and Article 9(4)(c).

[217] As defined by Article 2 of the ID.

[218] In the Fitness Check public consultation, at least half of respondents of all types, except business associations, agreed that a court issuing an injunction to stop an infringement of consumer rights constitutes either a very effective or rather effective means of protecting consumer rights in the event of a breach of EU consumer law. 64 % of public authorities indicated this to be effective, as did slightly more than half of consumers (53 %). Most public authorities (60 %) and business respondents (55 %) agreed that injunctions by administrative authorities that stop infringements of consumer rights represent a very effective or rather effective means of protecting consumer rights. In contrast, 42 % of consumers and only 20 % of consumer associations agreed that such a mechanism is effective. Injunctions were seen as most effective against the use by traders of unfair standard contract terms (44 %), use by traders of misleading or aggressive commercial practices (44 %) and breaches of traders' obligations related to the information they are legally required to provide to consumers (43 %).

[219] 2008 COM Report on the application of the ID, Brussels, 18.11.2008, COM(2008)756 final, p. 9 available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0756, 2012 COM Report on the application of the ID p. 16; Fitness Check, Lot 1 Study, Part 1, p. 235.

[220] Fitness Check Study, Lot 1, Part 1, p. 160.

[221] Analysed sectors were clothing and sport goods, electronic goods, financial services (with focus on unsecured loans and credit cards), food supplements, tickets for sport/entertainment and cultural events, 2015 CPC IA Study, pp. 10 and vi.

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a total of 5 763 injunction actions brought in the five year period since June 2011, the large majority originating from Germany, which traditionally relies on the private enforcement of consumer law by publicly funded consumer organisations and active business organisations. Nearly half of the responding qualified entities indicated they did not initiate any injunction actions since June 2011, often due to insufficient financial capacity.

There are significant disparities among Member States in the national legal framework for the injunction procedure[223], its level of use and its effectiveness. The Fitness Check found that the injunction procedure is used relatively often in several Member States mainly for domestic infringements (AT, BE, DK, FI, FR, DE, EL, IE, IT, LV, NL, PT, SE). In others, it is only used to some extent (BG, EE, HU, LU, PL, SK, ES, UK) and in some Member States it is rarely used or not used at all (HR, CY, CZ, LT, MT, RO, SI). [224]

Even in those Member States where injunctions are considered effective and are widely used, their potential is not fully exploited due to a number of procedural elements that are not sufficiently regulated by the ID.[225] Key identified shortcomings are the limited scope, cost[226], length and the complexity[227] of the procedure, as well as its limited effects on consumers.[228] [229]

The scope of the ID is limited to the EU instruments enumerated in its Annex I. It thus leaves out several instruments that are important for the protection of the collective interests of consumers, from various areas such as passenger rights, financial services, environment, energy, telecommunication, data protection.[230] The Fitness Check consultation, next to the previous

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[222] In total, 29 qualified entities from 21 Member States (AT, BG, HR, CY, CZ, DK, FI, FI, DE, EL, IE, LV, LT, LU, MT, NL, SK, SI, ES, SE, UK) consisting of 10 public authorities, 17 consumer organisations, 1 private association and 1 business association responded to the survey. Given that the survey did not cover all qualified entities across the EU and in line with a caveat noted in the 2012 Commission report, the number of documented cases does not necessarily mean that these are the only actions for injunctions that have actually been initiated. For the representativeness of the survey, and in particular for comparison between the number of qualified entities responding to the survey and those listed in the list of qualified entities published by the Commission in the OJ under article 4 of the ID (available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:361:TOC); see Fitness Check Study, Lot 1, part 4, p. 8.

[223] For an overview of national legal framework related to collective injunction and redress actions see subsection 2 of the present Annex.

[224] Fitness Check Study, Lot 1, Part 1, p. 131.

[225] Fitness Check Study, Lot 1, Part 1, p.115-117.

[226] In the Fitness Check public consultation the majority of businesses (71 %), consumer associations (70 %), consumers (69 %) and public authorities (57 %) agree that injunction proceedings being too costly represents a very or rather important problem in terms of protecting the rights of consumers. In contrast, 18 % of business associations considered the problem to be very or rather important.

[227] In the Fitness Check public consultation no less than 75% of consumer associations indicated that the problem of injunctions proceedings being too complex/long is either “very important” or “rather important” for protecting consumer rights, followed by consumers (72%), public authorities (68%) and businesses (65%). Among business associations, 23% considered the complexity/length of injunctions proceedings to be an important problem.

[228] A majority of qualified entities responding to the above-mentioned Fitness Check survey confirmed difficulties as regards the costs, complexity, length and limited effects of the injunctions procedure both in domestic and cross-border infringements. Regarding difficulties to apply the injunction procedure for domestic infringements, 22 qualified entities identify costs and complexity as problematic, 20 refer to limited effects of the procedure and 19 refer to the length of the procedure. Regarding difficulties to apply the injunction procedure for cross-border infringements, 19 qualified entities refer to the costs and limited effects of the procedure, and 20 identify the complexity and the length of the procedure as problematic. An overview of the obstacles to the effective use of the injunctions directive as reported by qualified entities in the Fitness Check report is presented in Figures 5 and 6 in Annex 9, as well as in Part 4 of the Fitness Check Study, Lot 1.

[229] In the ID survey, the fact that not all relevant areas of law are covered by the procedure, the cost and length of the procedures, the lack of funding for qualified entities, the lack of a possibility to seek injunctions and redress within a single procedure, the complexity of the procedures, the lack of effective schemes for the execution of injunction orders, the lack of measures ensuring that consumers are informed about the breach of law affecting them, the insufficient level of traders' compliance with the injunction order and the too strict criteria for qualified entities were all reported as issues significantly contributing to the possible failure of the injunction procedure in effectively stopping the breach of law in their respective Member State; see responses to question 22.

[230] Fitness Check Study, Lot 1, Part 1, p. 99 and 236.

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Commission reports on the application of the ID, demonstrates the relevance of the injunction actions in a large range of economic sectors.[231]

The injunction procedure set out in the ID has limited effects on individual consumers and infringing traders. As reported by the Fitness Check, this constitutes a limitation from an effectiveness and efficiency point of view. The Fitness Check showed that the impact of the ID on the reduction of consumer detriment in the last 5 years was considered to be low, particularly in cross-border situations (Figure 12 in Annex 9). In the ID survey, 54% of all respondents agreed (33% strongly agreed, 21% tended to agree) that consumers suffer harm due to the continuation of infringements caused by the sub-optimal use of injunctions in cross-border situations, whereas 16% disagreed. Injunction orders are not sufficiently publicized. As a result, affected consumers are not aware of the breach identified in the injunction order and the infringing traders are not deterred by the "naming and shaming" effect of such publicity.[232] In most Member States, to obtain redress, consumers may not be able to rely on the injunction order and may have to litigate against that trader for the same issues, including proving the infringement anew. This increases their litigation risk and also generates costs for the court systems. In addition, in some legal systems, prescription periods for bringing damages actions are shorter than the duration of the injunction procedure, including possible appeals.[233] Even when consumers know about the decision stopping an infringement, for the reasons described above, such as rational apathy vis-à-vis small claims, many are unlikely to engage in individual litigation to claim redress for the harm caused by the ceased infringement. As a result, the profits illegally obtained from the infringement remain with the trader.[234] This, coupled with the fact that the existing penalties for non-compliance with the injunction order in the Member States do not seem deterrent enough, does not discourage the trader to continue the infringement and does not sufficiently prevent possible future infringements.[235]

The fact that the injunction procedure set out in the ID primarily produces effects for the future and the lack of clarity about whether it may also cover redress for the victims of the infringement are widely considered by qualified entities as the major reasons for its insufficient effectiveness and deterrence. Qualified entities responding to the Fitness Check survey viewed the 'possibility to bring an action for damages or redress to be paid to the consumers concerned within the injunction procedure' as the most beneficial procedural element to be further harmonised in the ID.[236]

In order to address the gap of collective consumer redress, the 2013 Commission Recommendation on Collective Redress explicitly called Member States to ensure in their legal systems the existence of injunctive and compensatory collective redress in all areas of EU law[237]. However, as shown by the 2017 Commission Report, the impact of the Recommendation has been limited. Only a few Member States have introduced or amended their legislation and nine Member States still do not

[231] See Fitness Check Study Lot 1, Part 1, p. 99, Part 2 p. 72-77 and Part 4, p. 13.
[232] Consumer organisations are faced with significant costs while informing consumers about the ongoing actions. For instance, in Italy, Altroconsumo paid €130,000 for publishing announcements to the Volkswagen car owners in five Italian newspapers, BEUC position paper "European collective redress – what is the EU waiting for?", Ref: BEUC-X-2017-086 -31/07/201, p. 11.
[233] For example, in Germany, the regular prescription period is three years, beginning at the end of the year in which the infringement occurred, whereas litigation of an injunction claim can last much longer than that. In the case of *RWE* that reached the Court of Justice, the first injunction claim was brought on 30 October 2006, whereas the Bundesgerichtshof rendered the last instance on 31 July 2013. Under German law, prescription of individual claims is not suspended while a collective action on the same issue is pending, Fitness Check Study Lot 1, Part 1 p. 121.
[234] Fitness Check Study, Lot 1, Part 1, p. 119.
[235] Fitness Check Lot 1, Part 1, p. 128.
[236] See below Figure 9 in the present Annex.
[237] The Recommendation was accompanied by the Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final. The Communication reported the main views expressed in the 2011 public consultation on collective redress and reflected the position of the Commission on some central issues regarding collective redress.

provide for any possibility of claiming compensation collectively.[238] In Member States where compensatory redress exists, it is still reported to be not effective enough to fully reach its objectives[239]. In the survey carried out within the 2017 Study on collective redress, 91.52% of respondents found gaining compensatory redress in mass claims difficult within current national systems.[240] In the 2017 Commission call for evidence on collective redress[241], respondents referred, inter alia, to excessive cost of procedure, overall complexity of procedure, difficult access to evidence and overall length of the procedure as being reasons for not taking a collective action in a mass harm situation.[242 243]

The findings of the 2017 Study on Procedural Protection of Consumers confirmed that the existing injunctive and compensatory collective redress mechanisms are insufficiently effective in most Member States. The survey carried out within this study revealed that, based on their experience, 50% of the responding lawyers, judges, consumer organisations and ADR entities considered the existing national collective redress mechanisms to be unsatisfactory for both compensatory and injunctive relief.[244] The study also highlighted the lack of a direct effect of injunction procedures on the ability of the victims to obtain redress[245].

Since the ID applies to both domestic and cross-border infringements, problems related to its effectiveness have cross-border implications. In the ID survey, 50% of all respondents agreed, whereas 18.9% disagreed, that differences between national injunction procedures cause costs for qualified entities that wish to bring injunctions before the courts/authorities of other Member States. 54.4% of all respondents agreed, while 15.6% disagreed, that such differences cause harm to consumers due the continuation of the infringement caused by the sub-optimal use of injunctions in cross-border situations. Moreover, 37.8% of all respondents agreed, whereas 22.2% disagreed, that

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[238] CY, CZ, EE, IE, HR, LU, LV, SI. In AT there is no proper legal collective redress framework but an extension of traditional multiparty litigation devices to mass claims established by the case law. In NL the available mechanism provides only for a possibility to have an out-of-court settlement approved by the court, but there is no proper judicial collective redress in place. In DE the existing mechanism is limited to investors' claims. For an overview of national legal framework see Annex 10. For an overview of legislative framework in all Member States on compensatory collective, see the Collective Redress Report as well as subsection 2 of the present Annex for an overview of the national laws.

[239] 2017 Study on collective redress.

[240] Question 12 of the survey carried out within 2017 Study on collective redress. The empirical exercise within the 2017 Study on collective redress consisted of a short country overview for each jurisdiction, followed by the empirical findings per country which are based on qualitative interviews and an online survey which was distributed amongst stakeholders with relevant experience in the area of mass claims in each Member State. In total, 136 respondents with practical experience in mass claims or with legal reform participated in the study. From these, ca 40 % were interviewed, 60% participated in the online survey. Stakeholders comprise of 24 Lawyers representing claimants, 17 lawyers representing defendants, 21 lawyers representing both, 25 organisations representing/ potentially representing claimants, 10 organisations representing/ potentially representing defendants, 1 claimant, 4 defendants, 5 public authorities representing claimants, 13 judges and 25 categorising themselves as "other" (including academics, ministry representatives, representatives of authorities)

[241] 61 responses have been provided to the 2017 call for evidence on collective redress from 16 MS and from United States of America (4 from AT, 10 from BE, 6 from CZ, 11 from DE, 2 from DK, 5 from FI, 4 from FR, 1 from EI, 3 from IT, 1 from LU, 1 from MT, 3 from NL, 1 from PT, 1 from RO, 1 from SE, 5 from UK, 2 from U.S.A.). Among the respondents were 18 consumer associations, 16 business associations, 6 other NGOs, 6 National Ministries, 3 other public bodies/institutions, 2 companies, 3 individuals and other respondents such as 4 law firms. The publication of the results of call for evidence is planned for January 2018

[242] Question 30 of the EC 2017 Call for evidence on collective redress "What where the reasons for not bringing an action?".

[243] As to the specific procedural modalities that contribute to the possible failure of the collective compensatory procedure to effectively ensure redress, respondents to the ID survey referred to the length, complexity and cost of the procedures, the fact that not all relevant areas of law are covered by the procedure, the too strict criteria and lack of funding for representative entities, the lack of effective schemes for the execution of judgments/decisions providing for redress, the lack of measures ensuring that consumers are informed about the breach of law affecting them, the lack of measures ensuring that consumers affected by the breach can rely on injunction orders to bring their follow-on redress actions, the insufficient level of traders' compliance with the judgments/decisions providing for redress traders, the fact that approval of the out-of-court settlements between the representative entities and traders by court/authority is not regulated by national law, the fact that courts/authorities are not obliged to encourage out-of-court settlements between the representative entities. See responses to question 24.

[244] 2017 Study on Procedural Protection of Consumers, Online Survey Data, p. 30.

[245] *Ibidem*, p. 271-279.

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differences between national injunction procedures cause costs for traders engaging in cross-border trade due to the unequal deterrent effect of national procedures.[246] The Fitness Check identified only one Member State (ES) in which a qualified entity reported going abroad to use injunctions.[247] It appears that, in practice, qualified entities do not bring injunctions before another Member State's courts/authorities where the infringement originated, as allowed by Article 4 of the ID, mainly because of additional costs of the procedure (e.g. translations, cost of foreign lawyers). Instead, they challenge cross-border infringements by bringing injunction actions against foreign traders in the courts of their own Member States, which is possible under EU private international law rules. However, the use of injunctions for cross-border infringements is still low and the qualified entities from different Member States are not cooperating with each other sufficiently i.e. they are not exchanging best practices or developing common strategies to challenge widespread infringements affecting at the same time consumers that they represent in different Member States[248]. Only a few cases were reported in which qualified entities brought parallel coordinated actions, each in its own Member State, to tackle the same infringement affecting consumers in those Member States[249]. The ID is not clear on whether it is possible to bring a coordinated action by several entities in front of a court in a single Member State or whether a single qualified entity can bring a single action in the name of qualified entities from other Member States. Whether the action is brought by a qualified entity domestically or abroad, domestic procedures available under the current ID are ultimately not effective enough to address mass harm situations with a cross-border dimension.

2. Legal mapping of the national transposition of the ID[250]

Scope

According to the Study supporting the Fitness Check, 22 Member States (all except for CY, DK, IE, LV, RO, SE) have extended the scope of the ID to other instruments. These extension include depending of the MS either other consumer law instruments or instruments from other areas of law, e.g. competition law, telecommunications, data protection, anti-discrimination, passenger rights and payment services or both4 Member States (UK, FR, LT, NL) have a different scope for domestic and cross-border infringements. According to the Study on the 2013 Recommendation on Collective Redress, 12 Member States (BG, HR, DK, FR, HU, LT, LU, NL, PT, SL, ES, SE) have extended the ID also to other areas, mainly competition, environment, employment or anti-discrimination.

Type of procedure (judicial/administrative)

According to the Study supporting the Fitness Check, in 20 Member States (AT, BE, BG, HR, CY, CZ, DK, FI, DE, EL, IE, IT, LT, LU, NL, PT, SL, ES, SE, UK) the ID procedure is judicial. In 4 Member States (LV, MT, PL, RO) the ID procedure is administrative. In 4 Member States (EE, FR, HU, SK) it may be both judicial and administrative.

Qualified entities

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[246] Question 16 ID survey.
[247] Fitness Check Study, Lot 1, Part 1, p. 134.
[248] In the Fitness Check survey, 71% of responding qualified entities have not cooperated with consumer organisations in other EU countries on injunction actions and 67% have not informed qualified entities from other countries if an infringement affected consumers from their country, Fitness Check Study, Part 1, p. 138.
[249] For example, a coordinated "cross-border" action was initiated in May 2009 by a consortium made of France’s UFC-Que Choisir, Portugal’s DECO and Belgium’s Test-Achats.
[250] Sources: national reports of the Study supporting the Fitness Check and the 2017 Study on collective redress. The figures from the two studies may differ, since the collective injunctive relief referred to in the 2013 Recommendation went beyond the ID and the national reports of the study may have reflected all mechanisms for injunctive relief available under national law, such as interim measures, not just the specific injunction procedure envisioned under the ID.

According to the Study supporting the Fitness Check, in 4 Member States (AT, DE, RO, EL) only consumer and business organisations are qualified. In 2 Member States (LV, FI) only public authorities are qualified. 22 Member States have a mixed system (BE, BG, HR, CY, CZ, FR, HU, IT, LU, MT, NL, PL, PT, SL, DK, EE, IE, LT, ES, SE, UK, SK).

Funding and access to justice for qualified entities

According to the Study supporting the Fitness Check, in 24 Member States (AT, BE, BG, HR, CY, Z, DK, EE, FR, DE, EL, HU, IE, IT, LU MT, NL, PL, PT, SL, SK, ES, SE, UK) costs are as a rule borne by the losing party. In 5 Member States (FI, LV, MT, PL, ES) qualified entities are exempted from fees for the administrative procedure. In 2 Member States (HU, SK) consumer organisations are exempted from court fees. In 1 Member State (PT) only public authorities are exempted from court fees. In 2 Member States (FR, EL) consumer organisations can claim the damage to the collective interest of consumers into their own purse. In 1 Member State (NL) pre-trial costs of investigation and claim collection can be fully claimed from the defendant under certain conditions.

Time limits

According to the Study supporting the Fitness Check, 17 Member States (AT, BE, BG, DK, FI, FR, DE, EL, IE, IT, LV, MT, NL, PL, SK, ES, UK) have introduced summary procedures. 2 MS (RO, PL) have introduced express time limits for the decision in injunction action.

Publicity

According to the Study supporting the Fitness Check, in 4 Member States (BE, HR, DE, ES) the publication of the decision is at the discretion of the court. In 1 Member State (PT) there is mandatory automatic publication of decisions concerning practices that violate consumers' rights. In 1 Member State (FI) all decisions are published on the websites of the Competition and Consumer Authority. In 1 Member State (PL) the trader can be ordered to inform consumers about the unfairness of a standard term. In 1 Member State (FR) the trader is obliged to inform consumers by all appropriate means about the unfairness of contract terms. For compensatory collective redress, once a case is declared admissible by the court, the courts in 10 Member States (BE, DK, EE, FI, FR, HU, LT, NL, PL, SE) are entrusted with the determination of modalities of publicity.

Penalties for non-compliance with injunction order

According to the Study supporting the Fitness Check, all Member States except 3 (SE, HU, EE), foresee sanctions for non-compliance with the injunction order. In 5 Member States (CY, FR, LU, DE, UK) non-compliance is treated as contempt of court or as a criminal offence and may be sanctioned with public law fines and even imprisonment. In 1 Member State (CY), in the case of the infringement of an injunction order, the court can also order the payment of compensation to any person who suffered damage as a result. In 2 Member States (AT, DE) the qualified entity would have to apply to the court again to obtain a penalty order, the amount of which will depend on the severity of the level of non-compliance. In 3 Member States (BG, PL, ES) penalties are calculated per day of non-compliance with the order. In 2 Member States (EL, FR) penalties are paid to the consumer organisation that had obtained the judgment.

Penalties for the infringement within the injunction procedure

According to the Study supporting the Fitness Check, in 9 Member States (AT, EL, HU, LV, LT, MT, PL, PT, SL) it is possible to have the claim for penalties for the infringement within the injunction procedure in the fields covered by the transposition of the ID.

Injunction order as proof of breach for follow-on redress actions

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According to the Study supporting the Fitness Check, in the area of consumer law 4 Member States (BE, BG, DK and IT) allow follow-on actions to rely on the injunction order. In 2 Member States (NL, UK) follow-on actions are possible not as a matter of law but rather of practice.

Injunctions and redress in one procedure

According to the Study supporting the Fitness Check, 9 Member States (AT, BG, CZ, DK, HU, LT, PT, ES, UK) have the possibility to provide injunctive relief and redress (including damages actions) in a single procedure. However, this is often a theoretical possibility governed by general procedural rules and not by specific legislation. For instance, it may be possible under the rules of civil procedure for a court to join two related actions in a single procedure. In 9 Member States (AT, BG, EL, HU, IT, LV, LU, SL, UK) qualified entities may claim other measures beyond the injunction (e.g. evidence of compliance with the injunction order). According to the Study on the 2013 Recommendation on Collective Redress, approximately 16 Member States have the possibility to provide injunctive relief and redress (including damages actions) in a single procedure (AT, BE, BG, DK, FI, EL, HU, LT, MT, NL, PL, RO, ES, SI, UK).

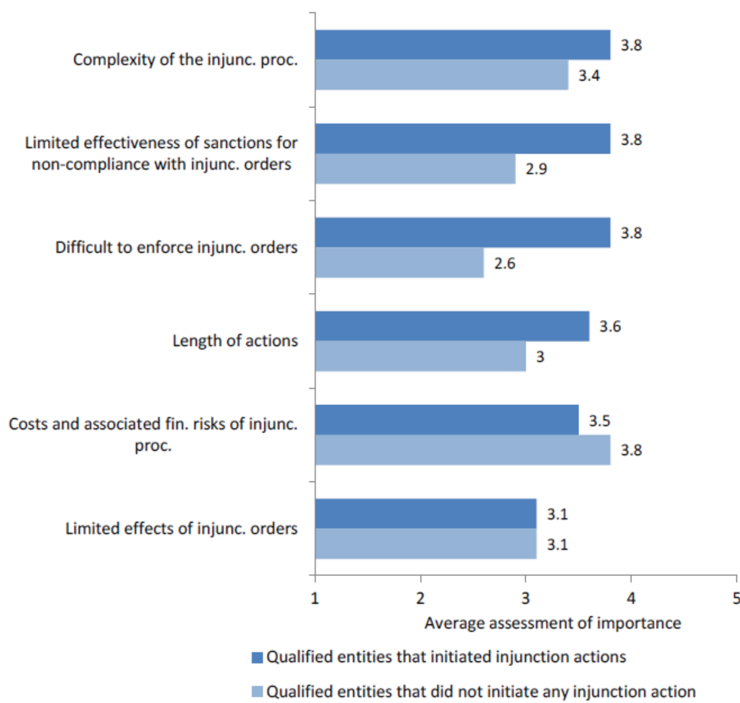
Compensatory collective redress[251]

According to the Study on the 2013 Recommendation on Collective Redress, 19 Member States provide for some form of compensatory collective redress (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK). In over half of them it is limited to specific sectors, mainly to consumer claims. Only 6 Member States (BG, DK, LT, NL, PT, UK) have taken a horizontal approach in their legislation, allowing for collective compensation proceedings across all areas. In AT there is no proper legal collective redress framework but an extension of traditional multiparty litigation devices to mass claims established by the case law. In NL the available mechanism provides only for a possibility to have an out-of-court settlement approved by the court, but there is no proper judicial collective redress in place. In DE the existing one is limited to investors' claims. Representative collective actions aimed at obtaining compensation are available in BE, BG, EL, FI, FR, LT IT, HU, PL, RO, ES, SE. In 2 Member States (FI and PL) only public authorities are entitled to bring representative actions, while in some others non-governmental entities share this competence with public authorities (HU, DK).

[251] For full overview of national legislative framework relevant for the common principles for collective redress as set out by the 2013 Recommendation on collective redress, see the EC Report on the assessment of the implementation of this Recommendation available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847 .

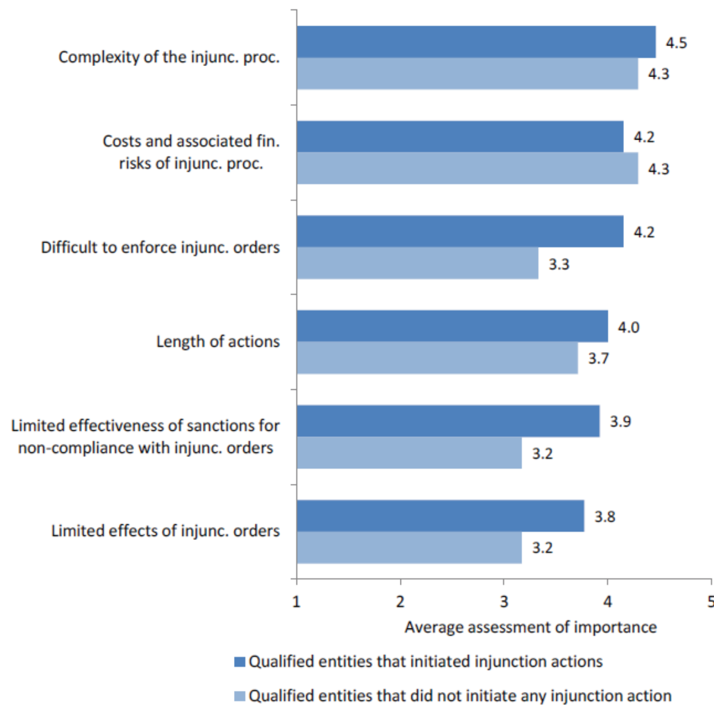
3. Outtakes from the qualified entities survey conducted for the Study supporting the Fitness Check of EU consumer and marketing law

Figure 1: importance of potential obstacles to the effective use of the injunctions procedure related to national infringements



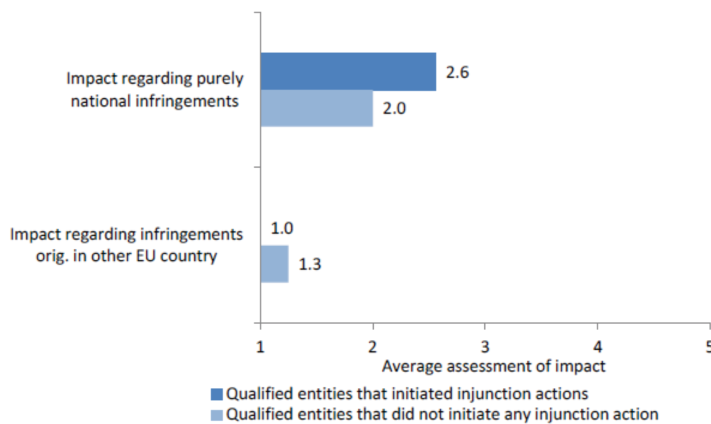
Source: Civic Consulting, Survey of qualified entities. Question: '*On a scale of 1 to 5, please indicate the importance of the following potential obstacles to the effective use of the injunctions procedure related to national infringements.*'
Note: respondents were shown a scale from 1 (Not at all important) to 5 (Very important) where only the endpoints of the scale were labelled.

Figure 2: importance of potential obstacles to the effective use of the injunctions procedure related to cross-border infringements



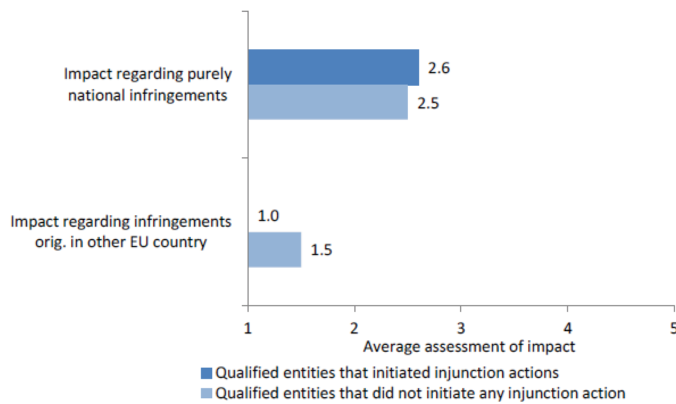
Source: Civic Consulting, Survey of qualified entities. Question: '*On a scale of 1 to 5, please indicate the importance of the following potential obstacles to the effective use of the injunctions procedure related to infringements originating in another EU country.*' Note: respondents were shown a scale from 1 (Not at all important) to 5 (Very important) where only the endpoints of the scale were labelled.

Figure 3: impact of the injunction procedure on reducing the number of infringements to consumer protection rules



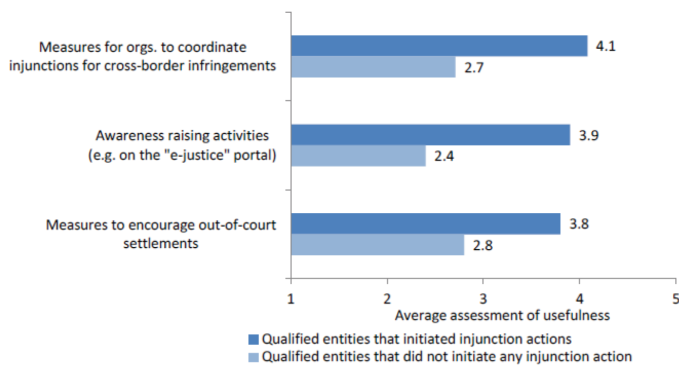
Source: Civic Consulting, Survey of qualified entities. Question: '*On a scale of 1 to 5, please assess the impact of the injunction procedure on consumers in your country in terms of reduction in the number of infringements to consumer protection rules in the last five years.*' Note: respondents were shown a scale from 1 (No reduction at all) to 5 (Very significant reduction) where only the endpoints of the scale were labelled.

Figure 4: impact of the injunction procedure on reducing consumer detriment



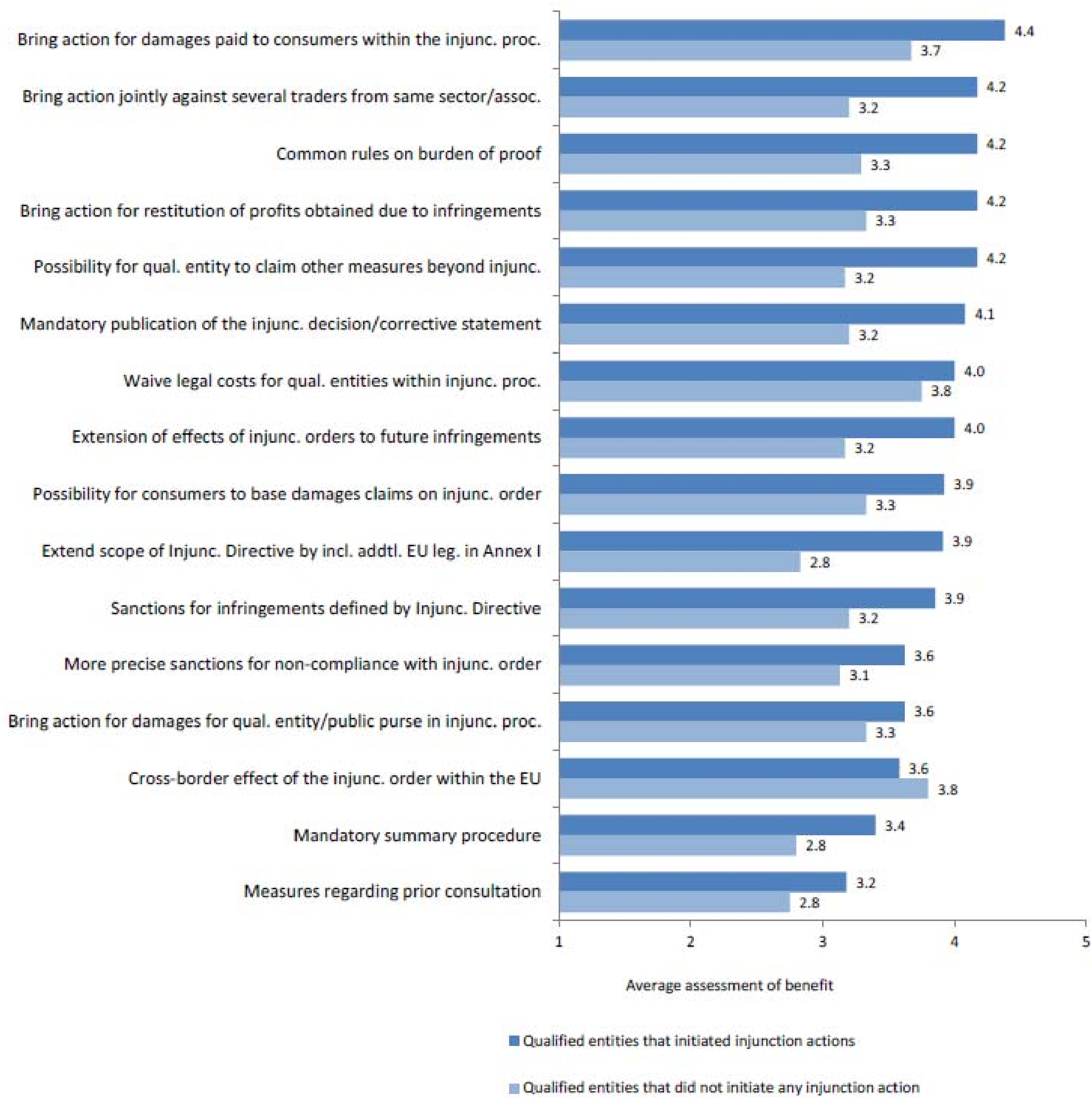
Source: Civic Consulting, Survey of qualified entities. Question: *'On a scale of 1 to 5, please assess the impact of the injunction procedure on consumers in your country in terms of reduction in consumers' detriment in the last five years.'* Note: respondents were shown a scale from 1 (No reduction at all) to 5 (Very significant reduction) where only the endpoints of the scale were labelled.

Figure 5: extent to which further measures to increase the use of the injunction procedure and strengthening cooperation would be useful



Source: Civic Consulting, Survey of qualified entities. Question: *'On a scale of 1 to 5, please assess the extent to which further measures to increase the use of injunction procedures by consumer organisations and to strengthen the cooperation between consumer organisations from different EU countries would be useful.'* Note: respondents were shown a scale from 1 (Not at all useful) to 5 (Very useful) where only the endpoints of the scale were labelled.

Figure 6: extent to which further harmonisation of the injunction procedure would be beneficial



Source: Civic Consulting, Survey of qualified entities. Question: *'On a scale of 1 to 5, please assess the extent to which further harmonisation of the injunction procedure across the EU and under the Injunctions Directive would be beneficial.'*
Note: respondents were shown a scale from 1 (Not at all beneficial) to 5 (Very beneficial) where only the endpoints of the scale were labelled.

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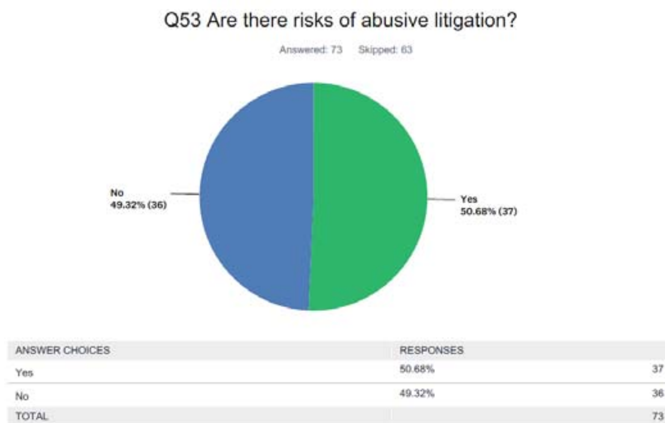
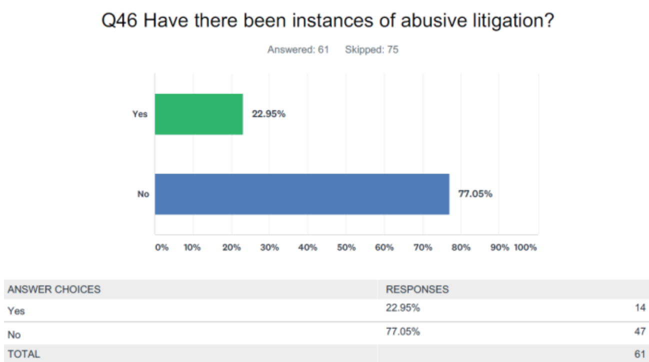
4. Outtakes from the survey conducted for the Study supporting the assessment of the implementation of the 2013 Commission Recommendation on collective redress

Figure 7: risks of abusive litigation



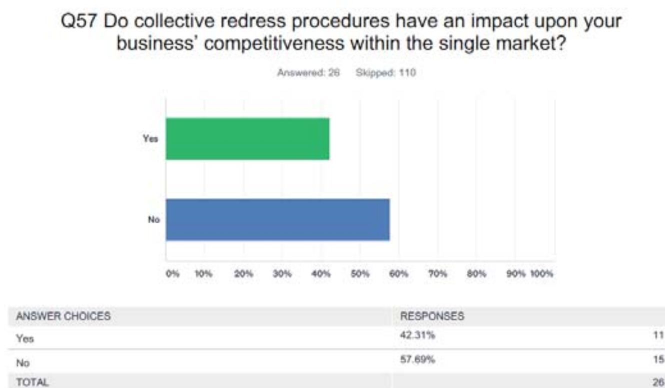
ANSWER CHOICES	RESPONSES	
Yes	50.68%	37
No	49.32%	36
TOTAL		73

Figure 8: instances of abusive litigation



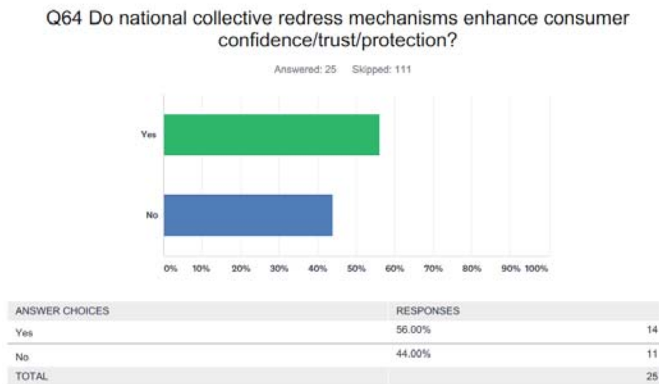
ANSWER CHOICES	RESPONSES	
Yes	22.95%	14
No	77.05%	47
TOTAL		61

Figure 9: impact of collective redress on competitiveness



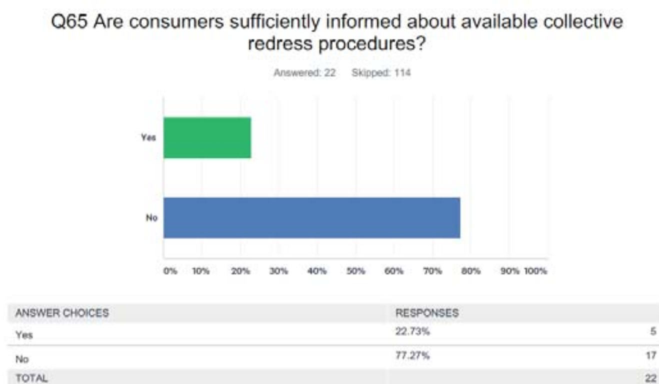
ANSWER CHOICES	RESPONSES	
Yes	42.31%	11
No	57.69%	15
TOTAL		26

Figure 10: impact of collective redress on consumer protection



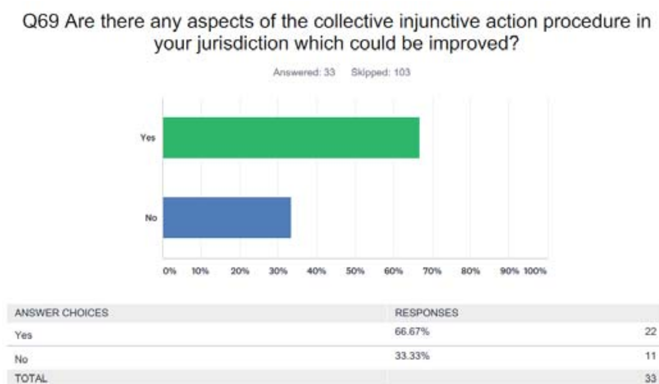
ANSWER CHOICES	RESPONSES	
Yes	56.00%	14
No	44.00%	11
TOTAL		25

Figure 11: consumer awareness of collective redress



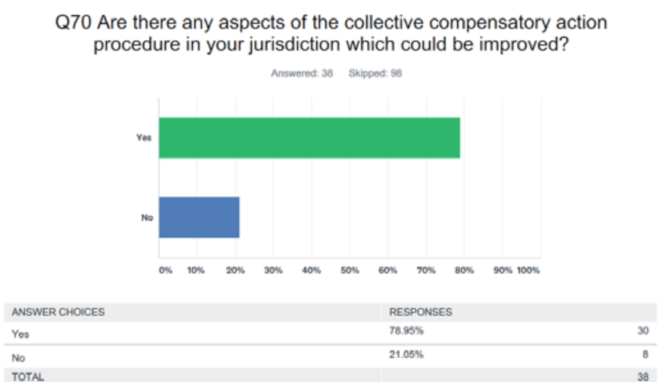
ANSWER CHOICES	RESPONSES	
Yes	22.73%	5
No	77.27%	17
TOTAL		22

Figure 12: improvements to national injunctive collective redress measures



ANSWER CHOICES	RESPONSES	
Yes	66.67%	22
No	33.33%	11
TOTAL		33

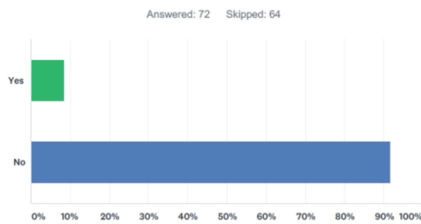
Figure 13: improvements to national compensatory collective redress measures



ANSWER CHOICES	RESPONSES	
Yes	78.95%	30
No	21.05%	8
TOTAL		38

Figure 14: conflict of interest between third party funder and claimant

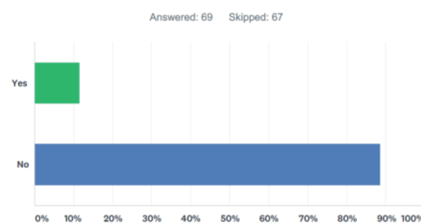
Q40 Are you aware of any circumstances in which a conflict of interest has arisen in practice between a third party funder and a claimant party?



ANSWER CHOICES	RESPONSES	
Yes	8.33%	6
No	91.67%	66
TOTAL		72

Figure 15: third party funding attempt to influence decisions of claimant

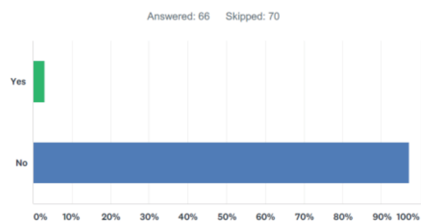
Q41 Are you aware of any situations in which a third party funder has attempted to influence the decisions of a claimant party?



ANSWER CHOICES	RESPONSES	
Yes	11.59%	8
No	88.41%	61
TOTAL		69

Figure 16: third party funding against competitor or dependant defendant

Q42 Are you aware of any situations in which a third party funder has provided funding for an action against a competitor or against a defendant on whom the funder is dependant?



ANSWER CHOICES	RESPONSES	
Yes	3.03%	2
No	96.97%	64
TOTAL		66

5. Outtakes from the ID survey conducted for this Impact Assessment

Question 12: The Fitness Check concluded that, in its current form, the ID is not sufficiently effective in meeting its objectives. The main obstacles to its effectiveness include the injunction procedure's cost, length, complexity and limited effects on alleviating the harm suffered by the affected consumers. Having in mind the above objective of increasing the effectiveness of the ID, do you agree with the following statements?

"The scope of the ID should be extended to all EU law relevant for the protection of the "collective interests of consumers" (areas going beyond the existing Annex I to the ID, e.g. passenger rights, energy services, telecommunications, data protection)".

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65% of the respondents agreed that the ID's scope should be extended to all EU law relevant for the protection of the collective interests of consumers, while 19% disagreed. As to the responses to the above question by the type of stakeholders: 94% of consumer associations strongly agreed and 6% tended to agree; 52% of Member States authorities strongly agreed (AT, BE, BG, CY, EL, HU, IT, LU, LV, PL, PT, RO, SE, SK, UK + Iceland and NO), while 34% tended to agree (BE, BG, CY,CZ, EE, EI, ES, HU, IT, LT, MT, SE,SI, SE,), 5% tended to disagree (FI+NO) and 9% did not know (DK, SK); 5% of business associations strongly agreed, 15% tended to disagree, 65%strongly disagreed and 15% did not know

"Qualified entities should be able to seek injunctions and consumer redress within a single legal procedure".
As to the responses to the above question by the type of stakeholders: 88% of consumer associations strongly agreed, while 6% tended to agree and 6% tended to disagree; 55% of Member States authorities strongly agreed (AT, BE, BG, CY, CZ, EI, EL, IT, LU, PT, RO, SE, SI, SK, UK + Iceland and NO) while 34% tended to agree (AT, BG, CZ, EE, EL, ES, FI, HU, IT, LU, LT, MT, SE), 5% tended to disagree (PL,SK) and 7% did not know (DK); 5% of business associations strongly agreed, 11% tended to agree, 32% tended to disagree, 47%strongly disagreed and 5% did not know.

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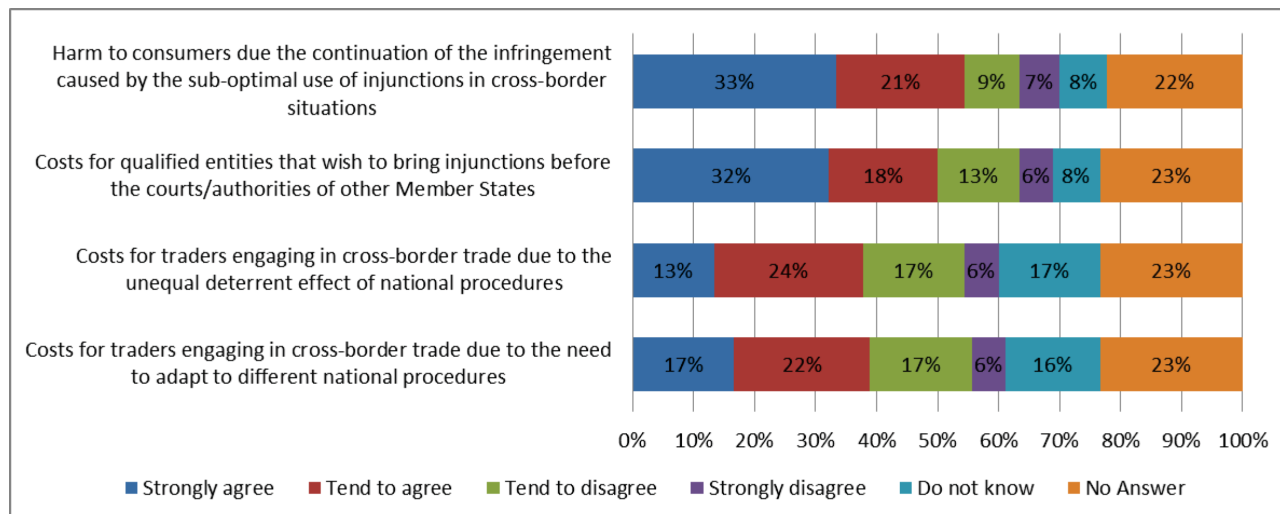
Figure 17: answers to question 12 ID survey about possible amendments to the ID

Question 16: Do you agree that differences between national injunction procedures cause the following problems?

Figure 18: answers to question 16 ID survey about current problems

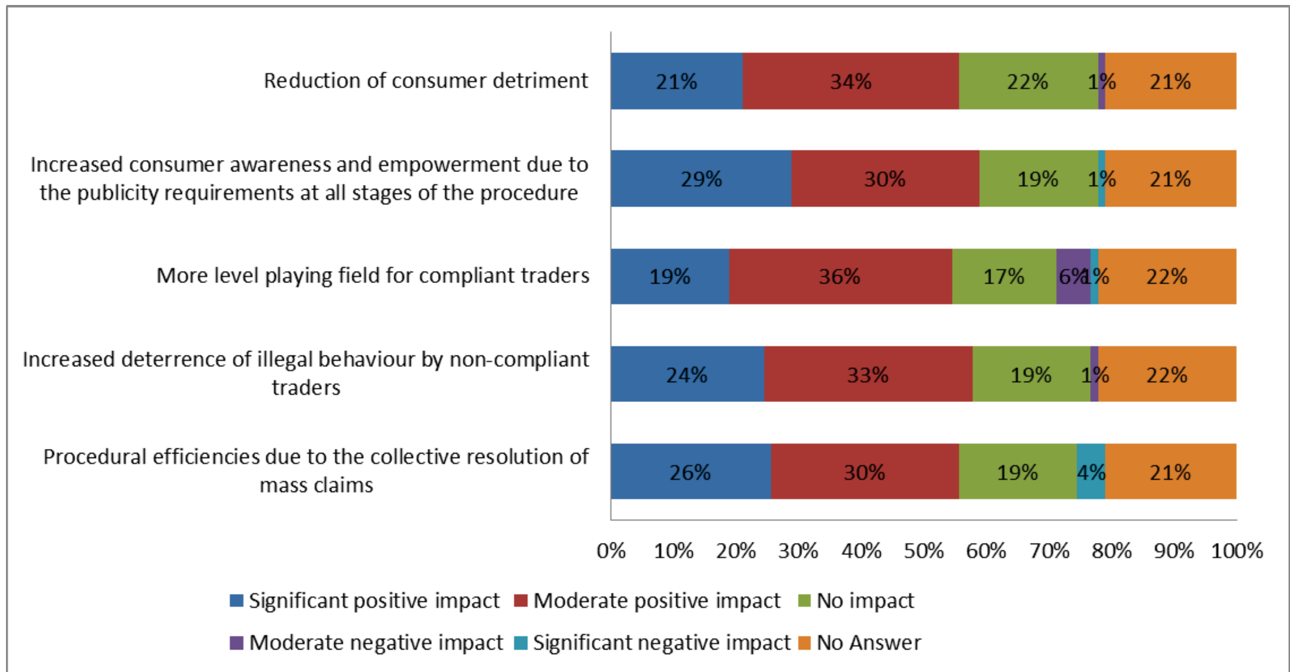


Policy "option A" foresees a procedure, which has the following features: - The procedure covers all EU law relevant for the protection of the collective interests of consumers; - Independent public bodies, consumer organisations and business associations are allowed to bring injunctions as qualified entities, subject to independence criteria; - Access to justice is facilitated for qualified entities that are not able to fully cover litigation costs; - Maximum time-limits for each stage of the procedure are defined by law, while leaving discretion for courts/administrative authorities to take due account of the concrete circumstances of the case; - Courts/administrative authorities have the power to require the trader to provide information in its possession needed to assess the lawfulness of the practice subject to the injunctions procedure; - The infringing trader is required to widely publicise about the injunctions order (e.g. website, newspapers, social media) and, where possible, to individually inform thereof all concerned consumers; - Effective, proportionate and deterrent financial penalties are ensured in case of non-compliance by the trader with the outcomes of the procedure ;- All interested consumers can invoke the injunction order as proof of the breach of EU law in follow-on actions.

Policy "option B" foresees a procedure, in addition to the features of policy option A, has the following features concerning redress: - A single procedure ("one stop shop") whereby qualified entities would be able to ask courts/administrative authorities for stopping a breach of the collective interests of consumers (injunction order) and for redress (redress order); - The court/administrative authority would have the power to invite the qualified entity and the trader to negotiate an amicable settlement out-of-court; - If settlement is reached it would be subject to the approval of the court/administrative authority; - If no amicable settlement is reached or if it is not approved, the court/administrative authority would continue collective redress procedures according to national law; - The infringing trader is required to widely publicise about the injunction/redress order and/or approved settlement (e.g. website, newspapers, social media) and, where possible, to individually inform thereof all concerned consumers.

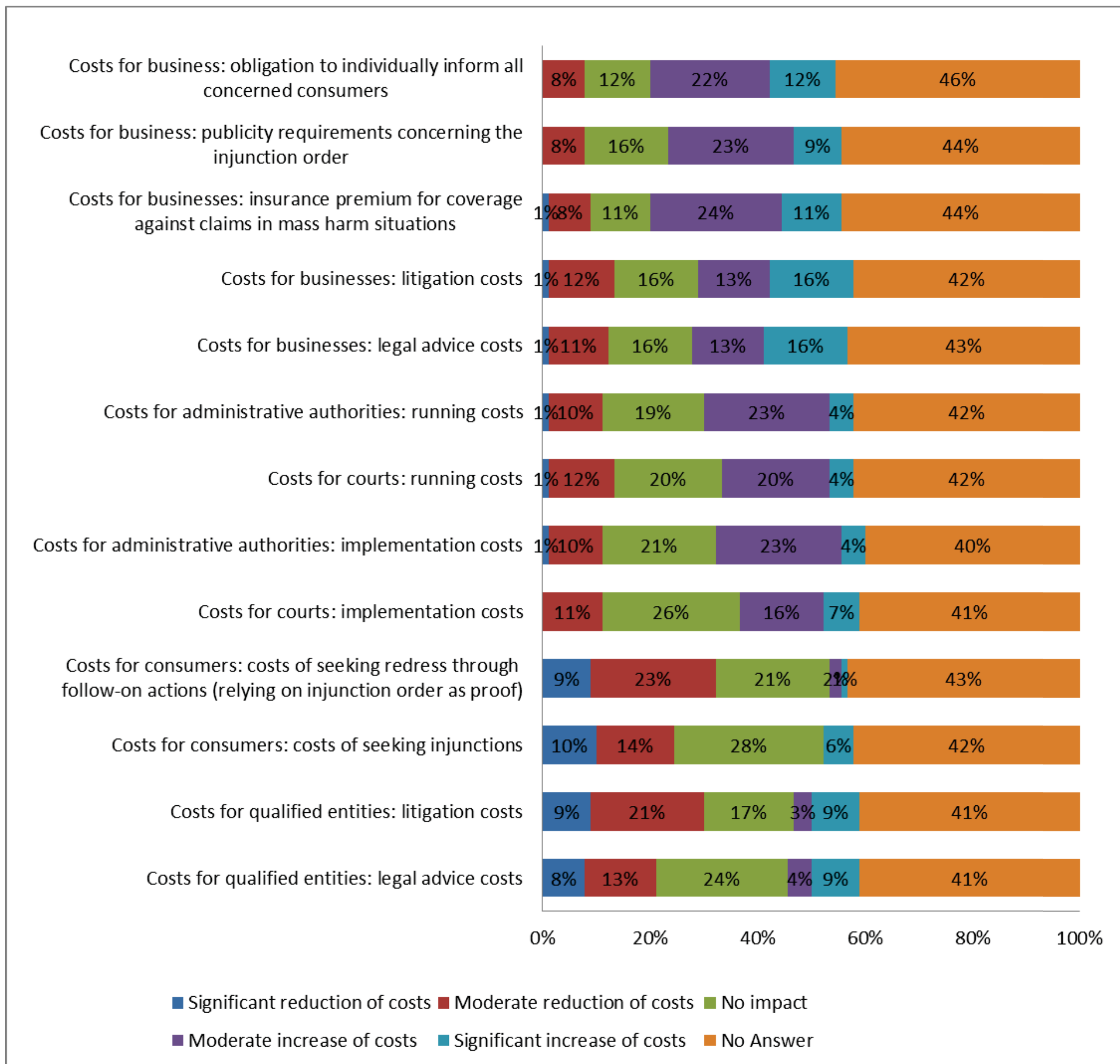
Question 40: Under option A what would be the impact of the introduction of the above-mentioned new rules on the following?

Figure 19: answers to question 40 ID survey about the impact of measure A



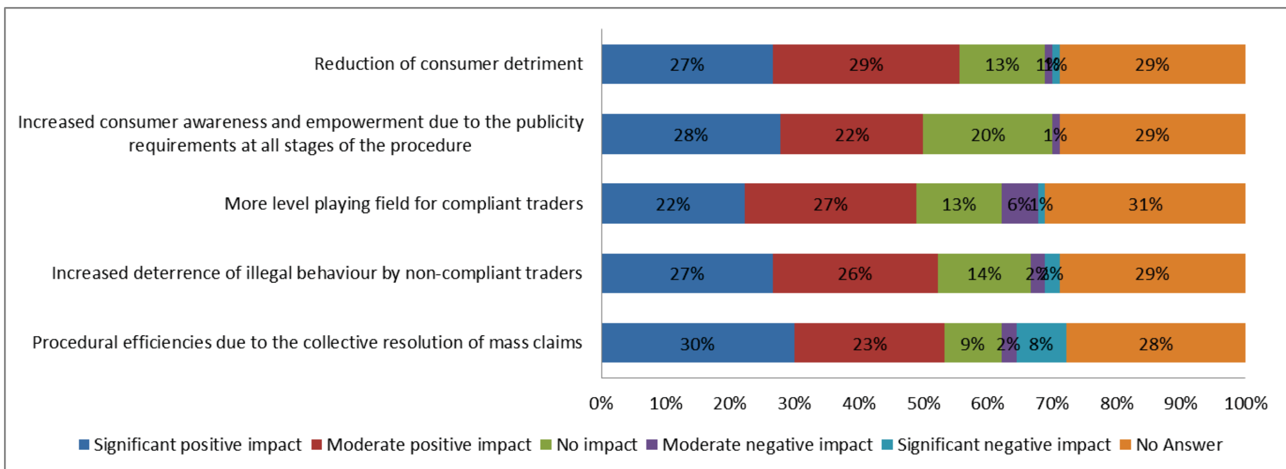
Question 42: Under option A, what would be the cost impact of the introduction of the above-mentioned new rules on the following?

Figure 20: answers to question 42 ID survey about the cost impact of measure A



Question 51: Under option B what would be the impact of the introduction of the above-mentioned new rules on the following?

Figure 21: answers to question 51 ID survey about the impact of measure B



Question 53: Under option B, what would be the cost impact of the introduction of the above-mentioned new rules on the following?

Figure 22: answers to question 53 ID survey about the cost impact of measure B

	Significant reduction of costs	Moderate reduction of costs	No impact	Moderate increase of costs	Significant increase of costs	No Answer
Costs for business: obligation to individually inform all concerned consumers	1%	6%	14%	17%	17%	46%
Costs for business: publicity requirements concerning the injunction order, redress order and approved settlement	1%	7%	17%	16%	14%	46%
Costs for businesses: insurance premium for coverage against claims in mass harm situations	1%	8%	12%	17%	17%	46%
Costs for businesses: litigation costs		13%	9%	11%	20%	47%
Costs for businesses: legal advice costs		8%	11%	14%	20%	47%
Costs for administrative authorities: running costs	1%	6%	20%	16%	12%	46%
Costs for courts: running costs	1%	9%	13%	20%	11%	46%
Costs for administrative authorities: implementation costs		6%	19%	20%	9%	47%
Costs for courts: implementation costs	1%	10%	16%	21%	7%	46%
Costs for consumers: costs of seeking redress	18%	16%	17%	3%	4%	42%
Costs for qualified entities: litigation costs	9%	12%	18%	7%	11%	43%
Costs for qualified entities: legal advice costs	9%	12%	18%	8%	10%	43%

Question 49 If it is possible to quantify such costs, what would be the estimated costs of adjusting to the new rules of Option A for your institution or business?

You may wish to answer either in staff time or in amount in Euros, or both. "One-off costs" are the one-off resources you need to invest. "Annual costs" are the resources you need to invest on a regular basis to comply with rules. Do not consider staff time for translation. If no staff time was involved, indicate '0'.

Question 60 If it is possible to quantify such costs, what would be the estimated costs of adjusting to the new rules of Option B for your institution or business?

You may wish to answer either in staff time or in amount in Euros, or both. "One-off costs" are the one-off resources you need to invest. "Annual costs" are the resources you need to invest on a regular basis to comply with rules. Do not consider staff time for translation. If no staff time was involved, indicate '0'.

3. Stakeholder views

3.1 Improved injunctions procedure without redress (measure A)

Overall assessment

The Fitness Check showed that the impact of the ID on the reduction of the number of infringements in the last 5 years was considered to be low, particularly in cross-border situations (Figure 3 in Annex 9). This impact largely depends on the regulatory choices that the Member States have made and whether the Member States have gone beyond the procedural elements provided in the ID. In case the Member States have only implemented the minimum standards prescribed in the current ID, the Fitness Check considered the effectiveness to be insufficient. By targeting the top obstacles reported within the Fitness Check, the overall effectiveness of the ID would be improved and its impact on the reduction of the number of infringements would be increased. In case of remaining infringements, the new measures would constitute a further incentive to reach amicable settlements. As shown by the 2012 Commission Report on the ID, the mere possibility of an injunction action has a deterrent effect. [252] However, this is only the case if the procedure is indeed effective and there is a real chance that injunction actions may be brought forward. In the ID survey, 58% of all respondents considered that measure A would have a positive impact on increasing the deterrence of non-compliance (25% significant positive impact, 33% moderate positive impact), whereas only 1% predicted a moderate negative impact and 19% predicted no impact. 83% of the 41 responding MS authorities and 92.8% of the 14 responding consumer organisations predicted an increase of deterrence, while only 25% of the 12 responding business associations shared this view. Overall, the combination of the proposed amendments under measure A is likely to improve compliance. The specific aspects of the individual amendments will be discussed further below.

Scope

[252] 2012 Commission Report on the ID, p. 8. The Report was unable to express the impact on the level of compliance in quantitative terms, but the findings were confirmed by the qualitative views of the public authorities and consumer organisations.

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The limited scope of the ID prevents it from improving compliance in areas that harm the collective interests of consumers but which are not covered by its Annex I. As echoed by the 2008 and 2012 Reports on the ID and the Fitness Check study, unfair commercial practices and unfair contract terms that are prevalent across many economic sectors, such as telecommunications, tourism and package travel, online and distance sales, financial services, and energy, have remained the most prominent types of infringements for which injunctions are sought. Furthermore, the 2017 Commission Study on measuring consumer detriment in the EU showed that consumers suffered between EUR 20.3 and EUR 58.4 billion detriment due to the problems encountered across six assessed markets, namely clothing and footwear, large household appliances, loans, credit and credit cards, train services, mobile telephone services and electricity services.[253] In the ID survey, 65% of all respondents agreed that the ID's scope should be extended to all EU law relevant for the protection of the collective interests of consumers, while 19% disagreed (Figure 17 in Annex 9). In particular, 86.4% of the 44 responding MS authorities, 100% of the 16 responding consumer organisations and 20% of the 20 responding business associations shared this view. By extending the scope of the ID to additional areas of EU law that may affect the collective interests of consumers, it would become sufficiently future-proof and responsive to the different forms of non-compliance that may emerge in mass harm situations.

Requirements for qualified entities

The number and type of qualified entities that may use the ID is limited, as not all Member States allow independent public bodies, consumer organisations and business associations to have the possibility to become qualified entities. The 2017 Study on Procedural Protection of Consumers particularly recommended clarifying and strengthening the role of consumer organisations in the context of collective claims.[254] In the ID survey, 65% of all respondents agreed that independent public bodies should be qualified entities. 64.3% of the 42 responding MS authorities, 100% of the 15 responding consumer organisations and 73.7% of the 19 responding business associations shared this view. 75% of all respondents agreed that consumer organisations should be qualified entities. 84.1% of the 44 responding MS authorities, 100% of the 16 responding consumer organisations and 66.7% of the 18 responding business associations shared this view. The views were divided on the possible role of business associations, where 38% agreed (7% strongly agreed, 31% tended to agree) and 38% disagreed (13% strongly disagreed, 25% tended to disagree) that they should be qualified entities. In particular, 39.5% of the 43 responding MS authorities, 64.3% of the 14 responding consumer organisation and 38.9% of the 18 responding business associations shared this view. Regardless of the qualified entity in question, 80% of all respondents agreed that qualified entities should meet reputability criteria, e.g. concerning their representativeness of the affected interests and to ensure the lack of a conflict of interests, whereas 3% disagreed. This view was strongly shared by 90.5% of the 42 responding MS authorities, 87.5% of the 16 responding consumer organisations and 90% of the 20 business associations. By enabling all categories of qualified entities (consumer organisations, business associations, independent public bodies) to bring injunction actions, provided that they meet reputability criteria, the use of the ID, also for reaching amicable settlements, would increase in most Member States, particularly if certain categories were previously not granted standing.

Access to justice

[253] As outlined above these estimates refer to the revealed personal consumer detriment (sum of total post-redress financial detriment and monetised time loss).

[254] An evaluation study of national procedural laws and practices, Strand 2, Procedural Protection of Consumers, JUST/2014/RCON/PR/CIVI/0082, June 2017, Executive Summary page 29, para. 42, available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847.

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The Fitness Check and all previous Reports on the ID identified the costs and associated financial risks of injunction actions as a key obstacle that contributes to their sub-optimal use, which limits the ID's impact on encouraging compliance. As confirmed by country reports, qualified entities have limited financial and human resources to bring actions, in particular those from smaller Member States. In the ID survey, 55% of all respondents agreed (42% strongly agreed, 13% tended to agree) that qualified entities should benefit, under objective criteria, from facilitated access to justice if they are not able to pay the costs related to bringing the action, whereas 28% disagreed. In particular, 72.1% of the 43 responding MS authorities, 87.6% of the 16 responding consumer organisation and 21% of the 19 responding business associations shared this view. In the mass harm case study of the ID survey, respondents mainly identified lawyers' fees (43%), preparation fees such as collecting information, translation and publicity (41%), costs of paying for the lawyers' fees of the other part in case of loss (40%), costs of paying the other part in case of loss (34%), court/administrative fees (14%) and costs of settling the dispute out-of-court (4%). By enabling underfunded qualified entities to receive, under objective criteria, dedicated financial support, the financial obstacles would be considerably alleviated in most Member States.

Efficiency

The Fitness Check and previous Reports on the ID have identified the length of proceedings as a key obstacle, which varies in its level of seriousness depending on the Member State. In the ID survey, 67% of all respondents agreed (31% strongly agreed, 36% tended to agree) that there should be maximum time limits for all procedural steps, while leaving the necessary discretion for courts/authorities to take due account of the concrete circumstances of the case, whereas 16% disagreed. In particular, 72.1% of the 43 responding MS authorities, 93.8% of the 16 responding consumer organisations and 68.4% of the 19 responding business associations shared this view. By ensuring that the expediency of the procedure is duly maintained at all stages of the procedure (e.g. through time limits), while leaving discretion for the court/authority, the length of the injunction action would be significantly shortened in most Member States. Without this intervention, infringing traders may continue to breach EU law for the duration of the proceedings - which could constitute several years in some Member States - while continuing to gain unlawful profits and creating consumer detriment. Another key aspect of ensuring the efficiency and effectiveness of the injunction procedure is the ability of courts/authorities to urgently assess the circumstances concerning the alleged breach affecting the collective interests of consumers, which is currently not regulated in the ID. In the ID survey, 73% of all respondents agreed (52% strongly agreed, 21% tended to agree) that courts/authorities should have the power to require the trader to provide information in its possession in the context of the ID. In particular, 93.2% of the 44 responding MS authorities, 100% of the 16 responding consumer organisations and 42.1% of the 19 responding business associations shared this view.

Publicity

Publicity is an important tool for both informing consumers and deterring traders that fear damage to their reputation, which is not sufficiently regulated in the ID. The Fitness Check found that the effectiveness of publicity of the injunction decision generally depends on practicalities such as the placement of the notices in newspapers and on websites that receive wide exposure. In the Study for the evaluation of the 2013 Recommendation on collective redress, 77.27% of respondents did not consider that consumers are sufficiently informed about the available collective redress procedures. In the ID survey, 63% of all respondents agreed (47% strongly agreed, 16% tended to agree) that traders should be obliged to publicise the outcomes of the procedure, whereas 24% disagreed. In particular, 81.8% of the 44 responding MS authorities, 100% of the 16 responding consumer organisations and 10.6% of the 19 responding business associations shared this view. Furthermore, again 63% of all respondents agreed (43% strongly agreed, 20% tended to agree) that traders should also be obliged, where possible and proportionate, to individually inform all concerned consumers,

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whereas 24% disagreed. In particular, 86.3% of the 44 responding MS authorities, 100% of the 16 responding consumer organisations and 5.3% of the 19 responding business organisations shared this view. By introducing publicity requirements for the traders that cover a broad range of communication channels, there would be increased deterrence, particularly for traders whose economic activity is connected to their reputation. As publication may not always be sufficient, there should also be an obligation, where appropriate, for the trader to inform all victims of the infringement. Publicity would also help compliant traders become more aware of the illegal practices of their non-compliant competitors. However, the publicity requirements would have to be proportional to the stage of the proceedings and other relevant circumstances of the case, taking due account of the risk of reputational damage and of the respect of business secrecy. In particular, publicity for injunction orders with interim effects would have to be more limited than publicity for those with definitive effect, since there would be a possibility that the finding of the breach could be overturned.

Penalties
Penalties for non-compliance with the procedural outcomes under the ID are not sufficiently regulated in the ID, which creates an unequally deterrent landscape across the Member States. In the ID survey, 80% of all respondents agreed (63% strongly agreed, 17% tended to agree) that traders who do not comply with the outcomes of the procedure should face effective, proportionate and dissuasive penalties, whereas 6% disagreed. In particular, 89% of the 43 responding MS authorities, 100% of the 16 responding consumer organisations and 84.2% of the 19 responding business associations shared this view. By changing the current regulatory choice on penalties into an obligation to have in place effective, proportionate and dissuasive penalties, infringing traders would be more likely to comply with the outcome of the procedure. By analogy, the deterrence effects discussed regarding penalties for consumer law breaches would apply. The positive impacts of regulating penalties for non-compliance within the injunction procedure is additionally supported by the findings from the Fitness Check showing that systems with clear legal rules on penalties for non-compliance in the injunction order are more effective than systems where the penalties must be obtained through a separate court procedure.

Effects on consumers
With targeted improvements, measure A would be able to ensure a higher level of consumer protection than the current ID, but it would fail to fully facilitate consumer redress in mass harm situations, which only measure B could ensure. The Fitness Check showed that the impact of the ID on the reduction of consumer detriment in the last 5 years was considered to be low, particularly in cross-border situations (Figure 12 in Annex 9). In the ID survey, 54% of all respondents agreed (33% strongly agreed, 21% tended to agree) that consumers suffer harm due to the continuation of infringements caused by the sub-optimal use of injunctions in cross-border situations, whereas 16% disagreed.[255] In particular, 85.4% of the 41 responding MS authorities, 84.6% of the 13 responding consumer organisations and 15.4% of the 13 responding business associations shared this view. In the ID survey, 56% of all respondents considered that measure A would have a positive impact on reducing consumer detriment, whereas only 1% predicted a moderate negative impact and 22% predicted no impact. In particular, 90.2% of the 41 responding MS authorities, 73.4% of the 15 responding consumer organisations and 8.3% of the 12 responding business associations shared this view. Furthermore, 59% of all respondents considered that measure A would have a positive impact on increasing consumer awareness and empowerment due to the added publicity requirements for traders, whereas only 1% predicted a significant negative impact and 19% predicted no impact. In

[255] This impact largely depends on the extent to which the Member States have complemented the injunction relief with redress.

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particular, 90.3% of the 41 responding MS authorities, 86.7% of the 15 responding consumer organisations and 8.3% of the 12 responding business associations shared this view.
In case only injunctions are improved, even pure injunctive relief may have tangible benefits for consumers. For example, an injunction order would be reducing consumer detriment in case the injunction immediately stops the application of unfair contract terms that contain contractual obligations for consumers.[256] However, the injunction order would have only limited effects on reducing consumer detriment in case additional steps must be taken to seek redress, such as follow-on redress actions. In the ID survey, 69% of all respondents agreed (50% strongly agreed, 19% tended to agree) that once a final injunction decision has been issued, all affected consumers should be able to rely on it as proof of the breach of EU law for their follow-on redress actions, whereas 18% disagreed. In particular, 88.6% of the 44 responding MS authorities, 100% of the 16 responding consumer organisations and 31.6% of the 19 responding business associations shared this view. By introducing the possibility within the ID to use the final injunction decision (with definitive effect) as proof of the breach, consumers would be able to take additional follow-on redress steps more easily.[257] In order to achieve this effect before the courts/authorities across the EU, the ID would introduce the cross-border evidentiary effects of injunction orders as a rebuttable presumption of the infringement. Furthermore, in the ID survey, 62% of all respondents agreed that follow-on redress actions should *always* be available in the form of collective redress actions, whereas 20% disagreed. In particular, 86.1% of the 43 responding MS authorities, 100% of the 16 responding consumer organisations and 5.3% of the 19 responding business associations shared this view. As explained in section 2.3.5, consumers may rationally decide to forego individual legal actions due to the expected negative balance of costs and benefits of such action, which may be the case even after the possibility to rely on the injunction order as proof has been introduced. Actions initiated by representative bodies may therefore help alleviate the enforcement shortcomings from dispersed individual consumer actions. Since measure A would not prescribe representative collective redress within the injunction procedure, it would however ultimately fail to fully address redress concerns in mass harm situations. For instance in the ID survey, although the responding consumer organisations considered measure A to lower the consumer costs of obtaining redress through the use of follow-on actions (25% significant cost reduction), measure B was viewed much more favourably (57% significant cost reduction) in this respect.

Effects on fair competition

With an improved deterrence effect and more harmonised procedural elements across the EU, measure A would ensure the better functioning of the internal market. Furthermore, in the ID survey, 55% of all respondents considered that measure A would have a positive impact on fair competition between compliant and non-compliant traders (19% significant positive impact, 36% moderate positive impact), whereas only 6% predicted a negative impact and 17% predicted no impact at all. In particular, 82.9% of the 41 responding MS authorities, 85.7% of the 14 responding consumer organisations and 8.3% of the 12 responding business associations shared this view.

Courts/authorities

The Fitness Check found that collective actions allow for the exploitation of significant economies of scale in the preparation and litigation of cases and may reduce the coordination and transaction costs of bringing together affected consumers. By improving the effectiveness of the ID, these benefits would increase. In the ID survey, 56% of all respondents considered that the introduction of measure A would have a positive impact on the procedural efficiencies due to the collective

[256] For more examples, see the 2012 Commission Report on the ID.
[257] Such a solution would be inspired by Article 9 of Antitrust Damages Directive 2014/104/EU.

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resolution of mass claims (26% significant positive impact, 30% moderate positive impact), whereas only 4% predicted a negative impact and 19% predicted no impact. In particular, 82.9% of the 41 responding MS authorities, 80% of the 15 responding consumer organisations and 8.3% of the 12 responding business associations shared this view. The national authorities responding to the ID survey did not consider the implementation costs of measure A for courts (28.1% moderate reduction, 37.5% no impact, 34.4% moderate increase) or for administrative authorities (3% significant reduction, 24.2% moderate reduction, 27.3% no impact, 45.5% moderate increase) to be significant. Likewise, they did not consider the running costs due to the possible introduction of measure A for courts (3.1% significant reduction, 28.1% moderate reduction, 28.1% no impact, 40.6% moderate increase) or for administrative authorities (3.1% significant reduction, 25% moderate reduction, 18.8% no impact, 53.1% moderate increase) to be significant. Moreover, when taking into account the possible benefits for consumers, the national authorities considered these costs to be reasonable (9.8% strongly agree, 34.1% tend to agree, 9.8% tend to disagree, 46.3% no opinion/do not know).

Qualified entities
The existing costs of bringing actions under the ID would be directly alleviated with financial support for underfunded qualified entities and by shifting the costs of publicity to the trader. Furthermore, qualified entities would also experience cost savings from the procedural efficiencies discussed above. In the context of the hypothetical mass harm case study, the qualified entities responding to the ID survey held mixed views about the impact of Option 4a on their legal advice costs (14.3% significant reduction, 19% moderate reduction, 47.6% no impact, 9.5% moderate increase, 9.5% significant increase) and litigation costs (14.3% significant reduction, 28.6% moderate reduction, 42.9% no impact, 4.8% moderate increase, 9.5% significant increase). The precise impact of measure A on such costs would depend on the financial and legal capacities of the qualified entity in question, as well as the circumstances of the mass harm case. In the cross-border context, the ID survey revealed that 50% of all respondents agreed, whereas 19% disagreed, that the costs faced by qualified entities are problematic when they wish to bring injunction actions before the courts/authorities of other Member States. In particular, 80.5% of the 41 responding MS authorities, 83.3% of the 12 responding consumer organisations and 7.7% of the 13 responding business associations shared this view. By supporting cooperation between qualified entities from different Member States, measure A would facilitate the exchange of best practices and the development of common strategies for tackling cross-border infringements.

Compliant traders
The Fitness Check found that compliance with the ID and its national implementation legislation produces no costs for compliant traders other than the regular costs of ensuring that the business practices are indeed compliant. The business associations responding to the ID survey also considered that measure A could increase the insurance premiums for coverage against claims in mass harm situations (54.5% significant increase, 36.4% moderate increase, 9.1% no impact). Furthermore, in the cross-border context, the ID survey revealed that 39% of all respondents agreed, whereas 22% disagreed, that traders engaging in cross-border trade currently experience costs due to the need to adapt to the different national procedures of the ID. In particular, 63.4% of the 41 responding MS authorities, 33.3% of the 12 responding consumer organisations and 23.1% of the 13 responding business associations shared this view. Moreover, 37% of all respondents agreed, whereas 23% disagreed, that such costs would be due to the unequally deterrent effect of different national procedures of the ID. In particular, 61% of the 41 responding MS authorities, 50% of the 12 consumer organisations and 7.7% of the 13 responding business associations shared this view. Further harmonisation of the procedural elements of the ID would alleviate these costs. From a broader perspective, the introduction of targeted amendments that increase the effectiveness of the ID could lead to the increased use of the ID, including the increase of possible frivolous claims

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against compliant traders. However, this risk is mitigated by the control criteria built into the improved procedure, such as the reputability criteria for qualified entities. Moreover, the Fitness Check found no evidence to suggest that qualified entities have displayed any form of frivolous action in the context of the ID or that they would risk their status as qualified entities to bring such claims. Therefore, the costs of introducing measure A would be insignificant for compliant traders and the costs for traders engaging in cross-border trade would be lowered due to further harmonisation among the national procedures. Furthermore, in case of infringements, non-compliant traders would benefit from enhanced legal certainty and the ability to resolve mass harm liability through a collective procedure, but only insofar as injunctive relief is available under national law.

3.2 Improved injunctions procedure with redress (measure B)

Overall assessment

With the improved procedural effectiveness of measure A and additional collective redress possibilities, measure B would improve compliance more than measure A. As highlighted in the 2017 Study supporting the Report on the 2013 Recommendation on collective redress, the mere possibility of a collective redress claim would act as a threat and incite business to comply with the law. In the ID survey, 53% of all respondents considered that measure B would have a positive impact on increasing the deterrence of non-compliance (27% significant positive impact, 26% moderate positive impact), whereas only 4% predicted a negative impact and 14% predicted no impact. In particular, 81.6% of the 38 responding MS authorities, 100% of the 12 responding consumer organisations and 9.1% of the 11 responding business associations shared this view. The increased deterrence effect of better possibilities for redress within the injunction procedure is therefore likely to increase compliance with EU consumer law, in particular concerning businesses that are sensitive to reputational damage. All of the procedural amendments proposed under measure A, which would also be included under measure B, would magnify these effects further and increase the likelihood of improving compliance.

Effects on consumers

With the improved procedural effectiveness of measure A and additional collective redress possibilities, measure B would ensure a high level of consumer protection in mass harm situations more than measure A. The Fitness Check identified a trend, in recent years, by courts or public authorities aimed at complementing the injunction orders and procedures with additional remedies, in particular with compensation orders. Furthermore, the Study supporting the Fitness Check suggested that those Member States that introduced redress orders had experienced an increase in the effectiveness of the injunction procedure and reduced consumer detriment. More broadly, in the 2017 Study on collective redress 56% of respondents considered that collective redress would enhance consumer confidence/trust/protection (Figure 10 in Annex 9). The 'possibility to bring an action for damages or redress to be paid to the consumers concerned within the injunction procedure' was viewed by qualified entities responding to the Fitness Check survey as the most beneficial procedural element to be added to the ID (see Figure 6 in Annex 9).

These findings were confirmed by the ID survey in which 65% of all respondents agreed (44% strongly agreed, 21% tended to agree) that qualified entities should be able to seek injunctions and consumer redress within a single procedure, whereas 21% disagreed (11% strongly disagreed, 10% tended to disagree). In particular, 88.6% of the 44 responding MS authorities, 93.8% of the 16 responding consumer organisations and 15.8% of the 19 responding business associations shared this view. By adding a possibility to issue redress in the context of the injunction procedure, the obstacles to individual consumer redress that were highlighted under measure A would be significantly alleviated. In the ID survey, 50% of all respondents considered that measure B would have a positive impact on increasing consumer awareness and empowerment due to the publicity

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requirements of the traders (28% significant positive impact, 22% moderate positive impact), whereas only 1% predicted a negative impact and 20% predicted no impact. In particular, 81.6% of the 38 responding MS authorities, 91.7% of the 12 responding consumer organisations and 9.1% of the 11 responding business associations shared this view. Furthermore, 56% of all respondents considered that measure B would have a positive impact on reducing consumer detriment (27% significant positive impact, 29% moderate positive impact), whereas 2% predicted a negative impact and 13% predicted no impact. In particular, 89.5% of the 38 responding MS authorities, 100% of the 12 responding consumer organisations and 9.1% of the 11 responding business associations shared this view. Furthermore, the consumer organisations responding to the ID survey considered measure B to have a very positive impact on reducing the consumer costs of seeking redress (57.1% significant reduction).
In order to ensure efficiency, Article 5 of the ID already envisions a form of voluntary negotiation in order to put a stop to the infringement before the court/authority is asked to issue an injunction order. Likewise, depending on the circumstances of the case, an out-of-court negotiation procedure could be beneficial for eliminating the continuing effects of the infringement in the redress stage instead of having the court/authority issue a redress order. In the ID survey, 68% of all respondents agreed (27% strongly agreed, 41% tended to agree) that courts/authorities should have the power to invite the qualified entity and trader to negotiate out-of-court for an amicable settlement on consumer redress, whereas 12% disagreed. In particular, 79.5% of the 44 responding MS authorities, 80% of the 15 responding consumer organisations and 63.2% of the 19 responding business associations shared this view. Furthermore, 57% of all respondents agreed (18% strongly agreed, 39% tended to agree) that the settlement should be subject to the approval of the court/authority, whereas 24% disagreed. In particular, 68.2% of the 44 responding MS authorities, 86.7% of the 15 responding consumer organisations and 35% of the 20 responding business associations shared this view. By introducing the possibility to have out-of-court negotiations for redress together with the other procedural amendments that increase the deterrent effect of the ID, the likelihood of achieving amicable redress outcomes would be increased. By ensuring that the settlement is subject to the approval of the court/authority, the fairness of the redress outcome would be duly scrutinised, taking into account the interests of the consumers that did not participate in the negotiations directly.

Effects on fair competition
With an increased deterrence effect, measure B would contribute more to ensuring the better functioning of the internal market than measure A. Furthermore, in the ID survey, 49% of all respondents considered that measure B would have a positive impact on ensuring fair competition between compliant and non-compliant traders (22% significant positive impact, 27% moderate positive impact), whereas only 7% predicted a negative impact and 13% predicted no impact at all. In particular, 83.7% of the 37 responding MS authorities, 90.9% of the 11 responding consumer organisations and 9.1% of the 11 responding business associations shared this view. Moreover, in the 2017 Study on collective redress, 57.69% of business respondents did not consider collective redress procedures to have any negative impact on their business' competitiveness within the internal market (Figure 9 in Annex 9).

Courts/authorities
As under measure A, improving the effectiveness of the ID would enable significant economies of scale in the preparation and litigation of cases and may reduce the coordination and transaction costs of bringing together affected consumers not only for injunctive relief but also for redress. Furthermore, in most Member States, the courts/authorities would experience additional procedural efficiencies if both injunctive relief and redress could be assessed within a single procedure, instead of resorting to different proceedings. In the ID survey, 53% of all respondents considered that the introduction of measure B would have a positive impact on the procedural efficiencies due to the

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collective resolution of mass claims (30% significant positive impact, 3% moderate positive impact), whereas 10% predicted a negative impact and 9% predicted no impact. In particular, 86.8% of the 38 responding MS authorities, 84.6% of the 13 responding consumer organisations and 9.1% of the 11 responding business associations shared this view. The national authorities responding to the ID survey did not consider the implementation costs of measure B for courts (28% moderate reduction, 24% no impact, 41% moderate increase, 7% significant increase) or for administrative authorities (14% moderate reduction, 29% no impact, 43% moderate increase, 14% significant increase) to be significant. Likewise, they did not consider the running costs due to the possible introduction of measure B for courts (28% moderate reduction, 24% no impact, 41% moderate increase, 7% significant increase) and for administrative authorities (14% moderate reduction, 29% no impact, 43% moderate increase, 14% significant increase) to be significant. The expected costs are slightly higher under measure B than under measure A due to the additional procedural elements. However, the national authorities responding to the ID survey considered that, when taking into account the possible benefits for consumers, these costs are reasonable (21% strongly agree, 19% tend to agree, 5% tend to disagree, 5% strongly disagree, 50% no opinion/do not know).

Qualified entities
As under measure A, the existing costs of bringing actions under the ID would be directly alleviated with financial support for underfunded qualified entities, by shifting the costs of publicity to the trader and by supporting cooperation between qualified entities from different Member States. In addition, under measure B qualified entities would experience additional procedural efficiencies from the possibility of assessing injunctive relief and redress in a single procedure, which enables them to bear the costs of preparing a single action, not two separate actions. In the context of the hypothetical mass harm case study, the qualified entities responding to the ID survey held mixed views about the impact of measure B on their legal advice costs (19% significant reduction, 9.5% moderate reduction, 38% no impact, 19% moderate increase, 14% significant increase) and litigation costs (19% significant reduction, 14% moderate reduction, 38% no impact, 9.5% moderate increase, 19% significant increase). The precise impact of measure B on such costs would depend on the financial and legal capacities of the qualified entity in question, as well as the circumstances of the mass harm case. More broadly, under measure B qualified entities would benefit from increased possibilities of representing the interests of the victims with due fairness safeguards. The impact of collective redress on access to justice was also acknowledged in the 2017 Study on collective redress, where 63% of the respondents considered that collective redress enhances access to justice and 60% considered such actions to be capable of ensuring the fairness of proceedings.

Compliant traders
As under measure A, compliance with measure B produces no costs for compliant traders other than the regular costs of ensuring that the business practices are indeed compliant. The business associations responding to the ID survey considered that measure B could increase the insurance premiums for coverage against claims in mass harm situations (91% significant increase, 9% no impact). The expected insurance figures are higher under measure B than measure A due to the addition of redress claims within the injunction procedure. From a broader perspective, the introduction of targeted amendments under measure A and the added redress possibility under measure B could lead to the increased use of the ID, including the increase of possible frivolous claims. However, this risk is mitigated by the control criteria built into the improved procedure, such as the reputability criteria for qualified entities (e.g. concerning the purpose of the organisation and its financial capacity). In redress cases, the court/authority would further scrutinize the merits and extent of the mass harm alleged by the qualified entity. Importantly, the Fitness Check found no evidence of any form of frivolous action in the context of the ID.

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Moreover, the 2017 Study on collective redress, which assessed both compensatory and injunctive collective redress, found that the views were divided with 51% of respondents agreeing and 49% disagreeing that there are risks of abusive litigation (Figure 7 in Annex 9). However, when asked about the actual materialisation of such risks, 77% of all respondents reported that they had never experienced any instances of abusive litigation (Figure 8 in Annex 9). Furthermore, 92% of respondents were not aware of any circumstances in which a conflict of interest has arisen in practice between a third party funder and a claimant, 88% of respondents were also not aware of any situations in which a third party funder has attempted to influence the decisions of the claimant and 97% of respondents were not aware of any situations in which a third party funder provided funding against a competitor or against a defendant on whom the funder is dependant (Figures 14, 15 and 16 in Annex 9). In light of the built-in safeguards and the scrutiny of the financial capacity of the qualified entity, the costs of introducing measure B would be insignificant for compliant traders and the costs for traders engaging in cross-border trade would be lowered due to further harmonisation among the national procedures. Furthermore, in case of infringements, non-compliant traders would benefit from enhanced legal certainty and the ability to resolve all aspects of their liability in mass harm situations through a single collective procedure.

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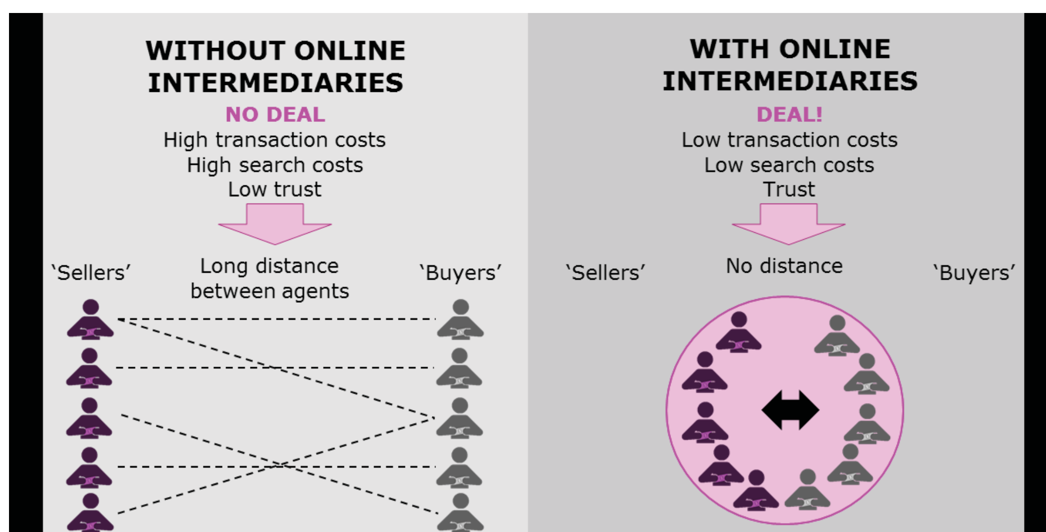
Annex 10: Additional data on transparency of online marketplaces

1. Detailed problem description

Online marketplaces execute transactions between two parties via electronic channels. They allow consumers to shop from many different suppliers using the same infrastructure.[258] This leads to the "network effect", attracting more users on several sides of the market: more consumers attract more suppliers and vice versa.[259]

Figure 1: Description of the network effect[260]



Over the last years, those marketplaces have experienced substantial growth. They play a prominent role in creating 'digital value' that underpins future economic growth in the EU. They are a major contributor in creating a Digital Single Market (DSM).[261]

Specifically, 30% of internet users use online marketplaces at least once a week.[262] In the EU in 2015, online marketplaces represented 19.6% of total online retail, up from 6.9% in 2006. In the same year, online marketplaces occupied positions 1 (Amazon) and 3 (ebay) of the top 25 online retailers in the EU. The number of online marketplaces ranked among the top EU online retailers passed from 2 in 2006 to 17 in 2015.[263] The Platform Transparency Study indicates that when buying online, preferred sources are those online marketplaces allowing to buy from the

[258] The term 'online marketplace' is defined in Article 4(1)(f) of Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, as a service provider allowing consumers and traders to conclude online sales and service contracts on the online marketplace's website.

[259] Bertin Martens (2016) An Economic Policy Perspective on Online Platforms. Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05. JRC101501, p. 3, 6, 8.

[260] Study on Online Intermediaries: Impact on the EU economy, Copenhagen Economics for Edima, October 2015, p. 12.

[261] Communication on Online Platforms and the DSM, COM(2016) 288 final, SWD(2016) 172 final.

[262] Special Eurobarometer 447, p. 12.

[263] Néstor Duch-Brown, The Competitive Landscape of Online Platforms, JRC,2017, pages 10-13. Moreover, the total value of goods and services purchased through online intermediaries by private households and the public sector was estimated to be more than 270bn in 2014, with annual growth more than 10% (Study on Online Intermediaries: Impact on the EU economy, Copenhagen Economics for Edima, October 2015, p. 3)

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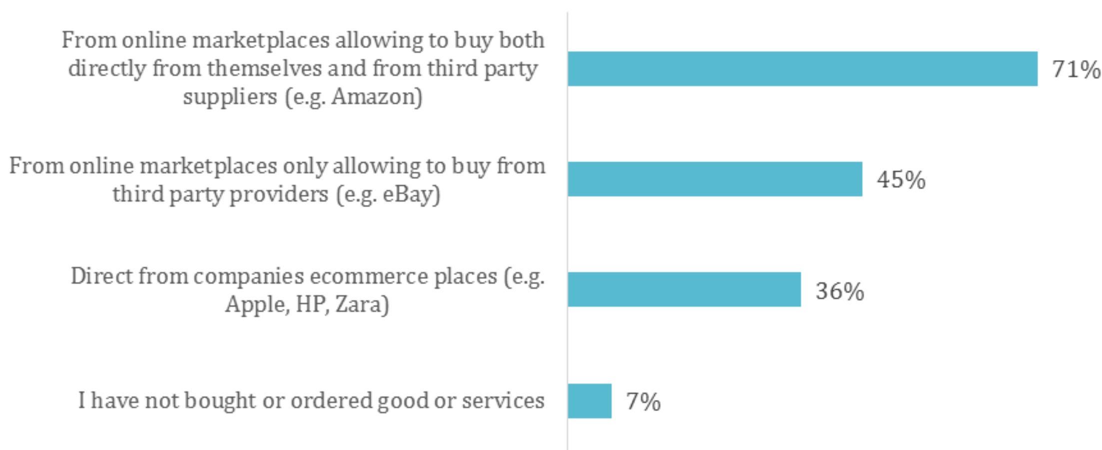
marketplace itself as well as from third party suppliers (e.g. Amazon) (71%), followed by online marketplaces only offering to buy only from third party providers (e.g. eBay) (45%), with traditional corporate online shops (e.g. Zara) only coming third (36%):

Figure 2: Where did you buy or order goods or services for private use over the Internet in the last 12 months? (Platform transparency study, figure 11, n=4802)



Survey data suggests that a great majority of users consider it beneficial that online marketplaces inform them about the variety of available offers.[264] At the same time, however, in a 2017 survey from 10 Member States[265], 55% of respondents report that they had experienced problems during the past year, frequently related to poor quality or incorrect description of goods or services.[266] Consumers who experienced problems with purchases in platform markets[267] rated their personal detriment[268] low to medium (between 2.01 and 3.76 out of 10)[269]. Even though this is lower than in relevant consumer markets overall, focus groups findings indicate that current users take the view that platforms are a higher risk environment, and that volume of detriment remains relatively low because most transactions involve lower amounts than in regular B2C markets.[270]

Data further reveals that almost 60% of consumers are not sure who is responsible when something goes wrong on platform markets.[271] When facing a problem, 46% of consumers did not take any action at all (mostly due to low amount of money involved or too much effort required). Whilst 30% complained to the provider, 18% complained to the platform.[272]

[264] Amongst four countries surveyed from 87% in Germany to 70% in Poland, Study on the Benefits of online platforms, by Oxera prepared for Google in October 2015, technical appendix p. 33.
[265] Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Poland, Slovenia, Spain, UK.
[266] Platform markets study, Final Report p. 116. That study covered so called peer-to-peer platform markets, which provide the possibility of two "peers" entering into contracts with each other via the platform. The study found that on larger peer-to-peer platform markets, consumers can typically buy from other consumers (C2C) as well as from traders (B2C). Where this is the case, they are covered by the definition of "online marketplace".
[267] So-called peer-to-peer platform markets, see previous footnote.
[268] Personal detriment in this case was defined as financial loss or any other type of harm (e.g. loss of time, stress, etc.).
[269] Platform markets study, Final Report, p. 72. Level 0 means “No or negligible detriment” and 10 means “A very significant detriment".
[270] Platform markets study, Final Report, p. 73.
[271] Results from five main peer platform markets. At the same time, just over 60% of consumers do not know or are unsure about the responsibility of the marketplace, see Platform markets study, Final Report, p.77.
[272] Platform markets study, Final Report, p. 95.

When buying from a platform, consumers may face difficulties in identifying who is responsible if something goes wrong, as some platforms act both as a marketplace and a retailer.[273] According to the Joint Research Centre, users may be under the impression that the online marketplace is the supplier, whereas in reality the counterpart is a third party.

Although the practices of many of the larger platforms may give users the impression that the platform assumes responsibility for problems in the transactions, the Terms and Conditions of these platforms systematically and explicitly state that the platform is not a party to the contracts and not liable for any problems between the contractual parties. This leads to a discrepancy between perceived platform practices and their Terms and Conditions.[274] 48% of consumers buying on an online marketplace at least sometimes experienced a lack of clarity whether they entered into a contract with the online marketplace itself or with a third party supplier.[275]

Example of a consumer being confused about the contractual partner

A consumer booked a holiday through an intermediary website, which handled the reservation, payment and contact with the owner of the booked accommodation. When the consumer wanted to cancel his booking, he sent an e-mail to the intermediary. However, the cancellation was not transmitted to the owner and he was therefore charged the full amount. The website later informed the consumer that it was only acting as an intermediary and that, if he had wanted to cancel a reservation, he would have had to contact the owner of the accommodation directly.

Complaint from a Dutch consumer received by the European Commission

The evaluation of the CRD revealed that, out of 38 respondents reporting problems related to the exercise of the right of withdrawal, no less than 16 had experienced problems in contacting the right person.[276] This issue was also confirmed by consumer associations in interviews, particularly with regard to traders using social media platforms to sell products.[277] In particular, the lack of information on the identity of the trader may create difficulties for consumers wishing to withdraw from a contract.[278]

As a result, consumers buying online also suffer mostly hidden detriment where they are not aware that they only benefit from EU consumer rights in transactions with those contractual partners that are traders, rather than other consumers. 12% of consumers report that, when trying to get a faulty product bought through an online marketplace replaced of repaired, they found that the seller was not a trader and because of that they did not have the EU consumer right to a repair or a replacement. 7% report that for the same reason, they could not withdraw from the contract in the two week cooling off period as is standard in online B2C contracts.[279]

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[273] Bertin Martens (2016) An Economic Policy Perspective on Online Platforms. Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05. JRC101501, p. 8. This depends on the way online marketplaces present the offers, see The challenge of protecting EU consumers in global online markets, report by BEUC and VzBv, November 2017, Point 3.4.3 Intermediary sites.

[274] Platform markets study, p. 118.

[275] Platform transparency study, p. 20. Similarly, the study finds that 47% of consumers experienced at least sometimes lack of clarity about who is responsible for the performance of the relevant contracts.

[276] Study on the application of the CRD, Final report, May 2017, Figure 3-28. The report is available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

[277] CRD Evaluation SWD, p.31.

[278] CRD Evaluation SWD, p. 85.

[279] Platform transparency study, page 24.

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In some instances, consumers wrongly believe they can rely on consumer rights, because they were not aware that the third party provider presenting an offer on the marketplace acted as a consumer. The lack of clarity about the legal status of the contractual partner leaves some consumers unknowingly without adequate protection.[280] While about a third of peer consumers reported to know exactly what their rights are focus group research indicated they may incorrectly assume that B2C online rights apply where they do not.[281] Other research also suggests that many consumers wrongly estimate their actual knowledge of consumer rights.[282]

A targeted consultation of Member States authorities confirmed that consumer complaints in this area are significant. Out of the 36 Member States authorities from 25 EU Member States and Norway replying, no less than 31 reported issues in the area of online marketplaces. In particular, 7 reported that consumers often complained about not being able to enjoy their consumer rights when experiencing problems with goods or services bought on online marketplaces. 19 of them reported that such complaints occurred sometimes and five that this happened only rarely, with only one authority not being aware of any complaints.[283]

Example of a consumer being unaware that EU consumer rights do not apply because their contractual partner is not a trader:

A seller advertised 8 different new or used products on an online marketplace. A consumer purchased one of them, but was not satisfied and wanted to withdraw from the contract. However, only at that moment did the consumer learn that the seller did not qualify as a trader under EU consumer rules, and that he therefore had no right withdraw from the contract.[284]

Consumer detriment also follows from sub-optimal consumer trust: data suggest that consumers have concerns but these do not prevent them from using platforms.[285] More specifically, the data shows that European consumers have concerns when using an online marketplace in the purchase process. 38% (Spain) to 56% (Poland) of online buyers have concerns about inadequate information when undertaking a transaction online.[286]

[280] Platform markets study p. 124.
[281] Platform markets study, p. 77.
[282] Study on consumers' attitudes towards terms and conditions, European Commission, 2016, final report, page 50.
[283] CPC/CPN/CMEG survey, question 5: In your Member State, are you aware of complaints from consumers that experience problems with the goods or services they bought through online marketplaces, but are not granted consumer rights (e.g. right of withdrawal, right to free repair/replacement of faulty good) or do not know whom to contact to claim their rights in case of problems?
[284] See reference to the CJEU for a preliminary ruling, Case C-105/17 *Kamenova*.
[285] Even the above-mentioned study that highlights users' benefits goes on in finding that among the four sample countries 83% of respondents (PL) to 89% (ES) raise at least one concern about online platforms in general, In particular, consumers' trust in platforms is limited by concerns over inadequate information with the highest number of concerns found with confusing, inappropriate, offensive or untrustworthy information (68% of total survey respondents in PL and DE, 76% in FR and 77% in ES), leaving concerns about privacy and security second place. see Study on the Benefits of online platforms, by Oxera prepared for Google in October 2015, fig. 3.10 consumer concerns and technical appendix p. 24.
[286] Study on the Benefits of online platforms, by Oxera prepared for Google in October 2015 technical appendix p. 35. Another source reports that while 89% of consumers state that when buying directly on a brand website, they experience complete trust that the items ordered online would meet their expectations, they only report this in 74% when buying through online marketplaces, see Global Online Shopping Survey 2017 – Consumer Goods, MarkMonitor Online Barometer, Report, p. 12. This is confirmed by a 2016 Eurobarometer survey, where respondents who had heard of or had visited internet-based platforms that enable transactions between people providing and using a service, listed as the main disadvantages of using those services: not knowing who is responsible in the event of a problem (41%), not being able to trust the provider or seller 27%, the risk of being disappointed because the services and goods do not meet expectations (27%), and not having enough information on the service provided (17%), see Flash Eurobarometer 438 (March 2016), "The use of collaborative platforms", 14,500 respondents in 28 EU Member States.

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Thus, while current users may accept the risk of transactions on online marketplaces, for many other consumers the lack of transparency and clarity about rights and responsibilities, and a lack of trust in the reliability of providers and product information, is an obstacle to shopping.[287]

Data also suggests that confidence is lower in cross-border transactions than domestically.[288] The 2017 Consumer Conditions Scoreboard reports that 72.4% of consumers are confident shopping online domestically, while only 57.8% are confident shopping online cross-border.[289]

Businesses, too, face problems. Online marketplaces are subject to different national requirements on platform transparency. Authorities in 17 Member States report that they require online marketplaces to indicate whether the contract is concluded with the online marketplace itself or with third party suppliers.[290] Indicating whether the third party supplier is acting as a trader or not is required in 15 Member States. 12 Member States require indicating to the consumer whether consumer law applies to the contract. For example, the recently adopted French legislation requires, as from 1 January 2018, online marketplaces to indicate the capacity of the third party supplier, namely whether the offer is made by a trader or a consumer, according to the declared status of the latter. When a good or service is being offered by a consumer on an online marketplace, the latter has to indicate the existence or absence of two key consumer rights, namely the right of withdrawal from distance contracts and the right to a legal guarantee in case of non-conformity of the good with the contract[291]. In Italy, the obligation for online marketplaces to clearly indicate the identity of the trader was confirmed in case law.[292]

The European Commission has sought to ensure that the existing general transparency and professional diligence rules under the UCPD[293] are applied in a way that increases transparency on online marketplaces. However, analyses on national level indicate only little compliance with this guidance.[294] Consumer organisations confirm that there is no improvement of transparency of online marketplaces[295] and that the application of EU consumer law when facilitating contracts on platforms is still unclear, leading to a low legal standard for ensuring the correctness and validity of information provided.[296] Several businesses associations also take the view that the fragmented nature of the EU market for (digital) goods, content and services is still a stumbling block for consumers and businesses.[297]

[287] More generally, a report suggests that some consumers do not buy online as opposed to offline because they feel they cannot trust the quality of the items: Global Online Shopping Survey 2017 – Consumer Goods, MarkMonitor Online Barometer, Report, p. 13.

[288] As reported in the Fitness Check, also the 2015 Digital Single Market Strategy stressed the yet untapped potential for further growth within the EU, noting EU consumers' difference in confidence about purchasing online from a retailer in their own Member State or from a retailer in another EU Member State.

[289] Consumer Conditions Scoreboard 2017, p. 89. In fact, most users purchase over the Internet from national sellers (88% of respondents in the survey of the platform transparency study). Less common are transactions with other countries: slightly more than one in four respondents had bought or ordered from a seller in a different EU country (28%), and slightly less than one in four respondents had bought or ordered from a seller in a non-EU country (23%).

[290] CPC/CPN/CMEG survey. Where there are less than 28 replies, some respondents either gave no or no unequivocal answer.

[291] (*Loi pour une République numérique* of 7 October 2016, Article 49, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&dateTexte=20161212#LEGISCTA000033205027 and *Décret no 2017-1434 du 29 septembre 2017 relatif aux obligations d'information des opérateurs de plateformes numériques*, Article D. 111-8, available at: https://www.legifrance.gouv.fr/eli/decret/2017/9/29/ECOC1716647D/jo/texte.

[292] Case PS9353 of the Italian Competition Authority against Amazon.

[293] European Commission Guidance on the implementation/application of the UCPD, SWD(2016) 163 final.

[294] Platform transparency study.

[295] Position paper of VzBv in the public consultation.

[296] Position paper of BEUC in the public consultation.

[297] They observe significant differences in Member State implementation of the CRD and the UCPD. While they also consider fully harmonized rules to address this, they prefer adopting further guidelines and recommendations. See position paper of BusinessEurope and EDiMA.

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Table 1: National requirements on transparency of online marketplaces[298]

	Obligation to indicate to the consumer buying a good or service on the online marketplace whether the contract is concluded with the online marketplace itself or with third party suppliers	Obligation to indicate to the consumer whether a third party supplier is acting as a trader or not	Obligation to indicate to the consumer the applicability of consumer law to the contract
Austria	No	No	No
Belgium	Yes	Yes	Yes
Bulgaria	No	No	No
Cyprus	Yes	Yes	Yes
Czech Republic	No	No	No
Denmark	No	Yes	Yes
Estonia	Yes	Yes	No
Finland	Yes		No
France	Yes	Yes	Yes
Hungary	Yes	No	No
Ireland	Yes	Yes	
Italy	Yes		
Latvia	Yes	Yes	No
Lithuania	Yes	Yes	Yes
Luxembourg	No	No	No
Malta	Yes	Yes	Yes
Netherlands	No	No	No
Poland	Yes	Yes	No
Portugal	Yes	Yes	Yes
Romania	Yes	Yes	Yes
Slovak Republic	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain		Yes	Yes
Sweden	Yes		Yes

Member States also provide for different consequences of situations where online marketplaces do not make it sufficiently clear to consumers that they enter into a contract with a third party supplier. Thus, in 11 countries the platform becomes the only party liable for the correct performance of the contract and in 9 countries the platform becomes jointly liable with the third party supplier

[298] Replies to the CPC/CPC/CMEG survey Q7: "In your Member State, which information obligations are online marketplaces currently subject to (based on all possible legal sources, including case-law)?". Where no reply is listed, respondents either gave no or no unequivocal answer.

Table 2: Legal consequences in the Member States in case of insufficient clarity of intermediaries[299]

	The third party supplier remains the only party liable for the correct performance of the contract	The intermediary becomes the only party liable for the correct performance of the contract	The intermediary becomes jointly liable with the third party supplier for the correct performance of the contract
Austria		Yes	
Belgium	No	Yes	Yes
Bulgaria	Yes	No	No
Croatia	No	Yes	No
Czech Republic	No	Yes	No
Denmark	No	Yes	No
Estonia	Yes	No	No
Finland	No	No	Yes
France	Yes	Yes	Yes
Hungary	Yes	No	No
Ireland		Yes	
Italy	Yes	No	No
Latvia	No	Yes	Yes
Lithuania	Yes	Yes	No
Luxembourg	Yes	No	No
Malta	No	Yes	Yes
Netherlands	No		
Poland	Yes	Yes	Yes
Portugal			Yes
Romania	Yes	No	No
Slovak Republic	No	No	Yes
Sweden			Yes

Moreover, even where marketplaces are present in the same Member States, they seem to have different perceptions of what they are required to do under the applicable law. In the public consultation, two major online marketplaces that are active throughout Europe had opposing views of the applicable legal framework: while the first found it very clear and not presenting any barrier to provide services in EU member states, the other was of the opinion that the rules are very complicated and being enforced differently in certain jurisdictions. Similarly, while some online marketplaces thought to be subject to specific information obligations on the identity and legal status of third party suppliers and the applicability of consumer law, some others did not.[300] The platform markets study reveals that also 40% of the third party providers on platforms did not know or were unsure about their rights and responsibilities, and only 30% thought they knew more or less.[301]

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[299] CPC/CPN/CMEG survey, question 9: "In your Member State, where an intermediary (like for example an online marketplace acting for a third party supplier) fails to make it sufficiently clear to the consumer that they do not enter into a contract with the intermediary, but with a third party supplier, what are the legal consequences of non-compliance (based on all possible legal sources, including case-law)?" Where no reply is listed, respondent either gave no or no unequivocal answer.

[300] Questionnaire targeted at platforms, question: In the Member States in which you offer goods and services through your online marketplace, which information obligations are online marketplaces currently subject to (based on all possible legal sources, including case-law)?

[301] Platform Markets Study, p. 117.

Two out of five major online marketplaces replying to the targeted consultation[302] and three out of five online marketplaces in the public consultation stated that, due to the varying national requirements, they incur compliance costs to some extent. This is confirmed by companies and business associations.[303] Online marketplaces report that these costs include time to differentiate the product design as well as legal costs to ensure compliance and adapt terms and conditions. They find it difficult to quantify these costs separately from their general costs.[304]

On one-off costs to adapt to those different national rules, in the public consultation only 10 respondents[305] gave an estimate, ranging for responding companies from 1% to 15% of turnover and from EUR 1 000 to EUR 30 000. Business associations estimated between zero costs and 1% of turnover.

Running costs were estimated by 12 respondents[306]. The estimates of companies ranged from 1% to 25% of turnover (for a self-employed) and from EUR 500 to EUR 20 000 in absolute costs. A European-level business association estimated costs of zero, another one costs of 1% of turnover.

In the SME panel consultation 29% of responding SMEs incur costs from differing national information requirements about the trader with whom consumers are concluding their contracts with and whether consumer law applies.[307] Costs result from working time spent by staff (including training, management and promotion), legal consultations as well as tailor made contracting.[308] While 48 out of 90 respondents said these costs have no significant impact on their decision to enter other EU markets or not, 12 stated they discouraged their enterprise from entering other EU markets.[309]

In addition to the costs due to the legal differences between Member States, the lack of clarity of rules creates further costs for businesses because the consumer may often wrongly contact the platform about a problem with his or her transaction and the platform will then have to individually assess and reply to such complaints.

The SME panel consultation reveals that 1 in 4 respondents incur costs when replying to enquiries from consumers. While 24% of respondents[310] incurred costs by informing consumers who their contracting partner is and whether consumer law applies, 29% do so when explaining whether it is the online marketplace or the third party provider who is liable for the performance of the contracts and for ensuring consumer rights[311]. This may even occur in cases where the online marketplace has no possibilities to intervene in favour of the consumer. In fact, 46% of surveyed consumers stated

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[302] Targeted consultation of online marketplaces, question: "Do you currently incur compliance costs when trading cross-border due to different national laws related to information obligations on online marketplaces?"
[303] Data from the public consultation. When asked whether they incur compliance costs when trading cross-border due to different national laws, 9 out of 23 companies and 10 out of 42 business associations report that this is the case for the obligation to state whether the contract is concluded with the online marketplace or with the third party supplier. 9 out of 22 companies and 9 out of 42 business associations report costs stemming from requirements to indicate whether a third party supplier is acting as a trader or not. The obligation to indicate the applicability of consumer law to contracts created costs for 11 out of 21 companies and 15 out of 43 business associations.
[304] Based on replies to the targeted consultation of online marketplaces.
[305] Four of which active as online marketplaces.
[306] Two of which active as online marketplaces.
[307] Amongst the replies, 2 out of 5 online marketplaces reported costs. The question was as follows: Does your enterprise incur costs when trading or considering to trade with consumers cross-border due to costs in complying with national rules requiring your enterprise to disclose to consumers with whom they are concluding their contracts and whether consumer law applies.
[308] Determining legal obligations as one of the cost factors was also highlighted in the position paper of AIM submitted in this IA.
[309] Question: Do the costs in complying with national rules requiring your enterprise to disclose to consumers with whom they are concluding their contracts and whether consumer law applies have an impact on your enterprise's decision to enter other EU markets or not?
[310] Out of which, three out of five online marketplaces replying to this specific question reported costs.
[311] Out of which, two out of five online marketplaces replying to this specific question reported costs.

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that when buying or ordering goods or services over the internet, complaints and redress were sometimes difficult or there was no satisfactory response after the complaint.[312]

Currently, in case of problems with products and services sold by third party suppliers, some big online marketplaces offer consumers to step in, and this without regard of whether a complaint is justified or not. This can lead to small third party suppliers having to shoulder the burden for complaints that are not genuine. It can also lead to reduced choice, as only traders with a certain financial weight can enter the market place. In any event, it can potentially push social issues elsewhere and although seemingly beneficial for consumers at first glance, cause problems for consumers later down the line.[313]

Example of overly complicated communication with online marketplace:

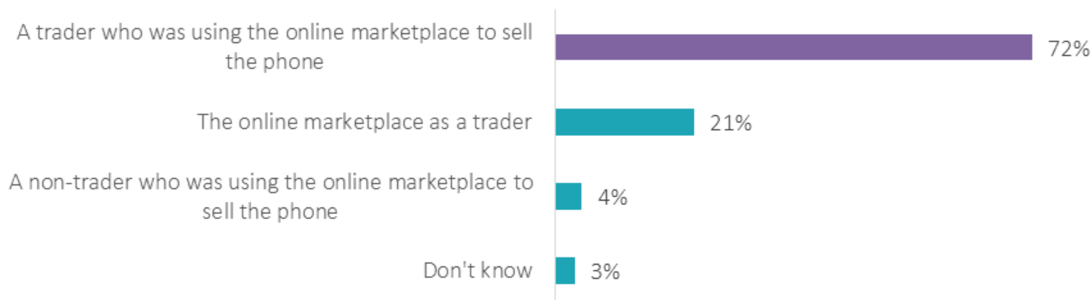
A consumer bought an item on an online marketplace that did not correspond to the description on the website. When the seller did not react to the return of the product, there followed an exchange of e-mails with the online marketplace, which led to no result, because the marketplace could not ascertain whether the item had arrived at the seller's.

Consumer complaint from a Bulgarian consumer received by the European Commission.

As a result of the problems for businesses, despite the advantages of the network effect explained above, many businesses still prefer to sell their products in direct e-commerce: whereas almost nine in ten companies selling on the internet use their commercial website to sell products and/or services (88%), less than half of all companies use online marketplaces to sell their products and services (42%).[314]

2. Additional data

Figure 3: Contractual parties: Who was selling the product? (n=1188)[315]



[312] Platform transparency study, page 20.

[313] The challenge of protecting EU consumers in global online markets, report by BEUC and VzBv, November 2017, Point 8.3.4 Online platforms.

[314] Flash EB 439, p. 4.

[315] Platform transparency study, p. 44. In the experiment respondents visited a mock-up online marketplace selling smartphones. The name and legal status (trader or not) of the third party supplier was indicated on the website. Respondents were later on asked whether or not they could remember who was indicated as the real seller on the website. Out of 1601 respondents, around 74% stated that they could remember who was selling the product. From those making such a claim, around 72% remembered it accurately (i.e. A trader who was using the online market place to sell the phone). While one may argue that 856 out of 1601 respondents (53 %) positively indicating the right contractual partner still includes a high potential for detriment when the contractual partner is not the one that consumer thought it to be, that number has to be put into perspective. As reported in the problem description, around 60 % of consumers entering into transactions on platform markets are unsure about who is responsible for the contract. This shows that the information provided clearly increases awareness of the identity of the contractual partner.

Figure 4: Contractual parties: Knowing who was actually selling the product on the platform… (n=1188)[316]

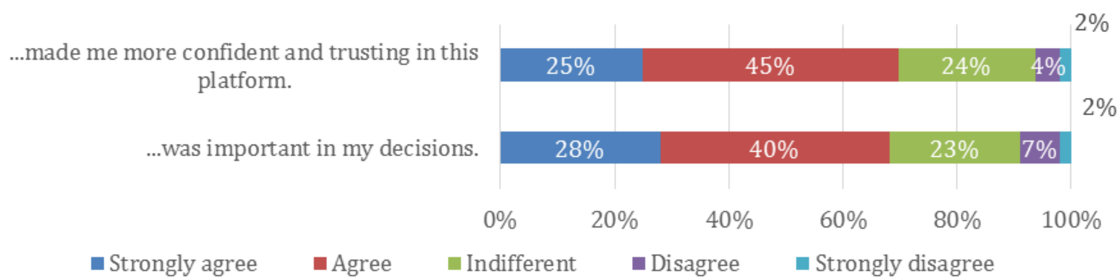
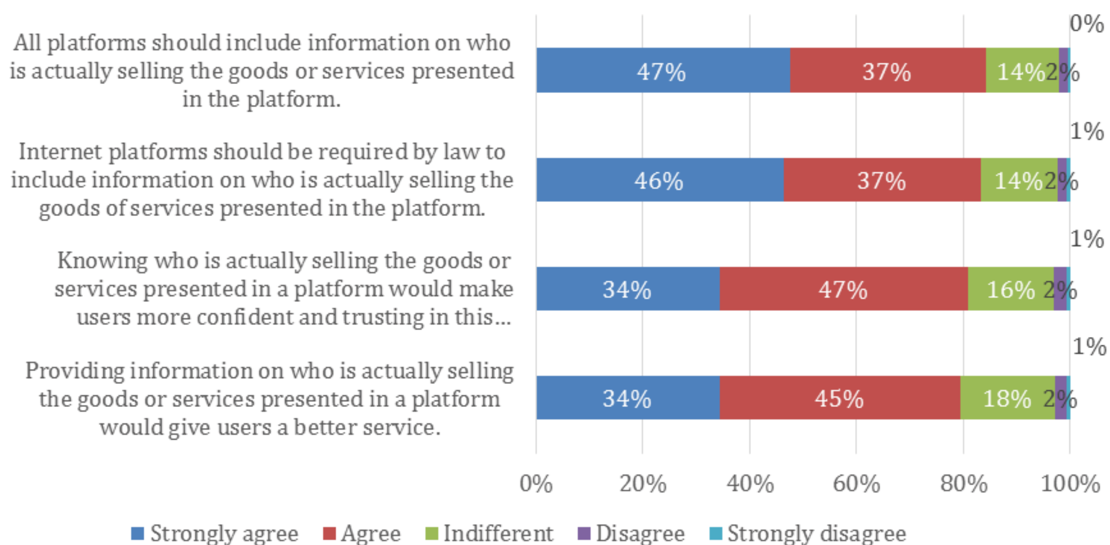


Figure 5: Views on platform transparency ("Please indicate whether you agree or disagree with the following statements" (n=1601))[317]



Question 6 in section C.2 of the SME panel consultation: "Do you agree that, across the EU, consumers buying on online marketplaces should be informed about a.) whether they buy from the online marketplace itself or from someone else, b.) whether the contracting party declares to be a trader or not c.) whether EU consumer rights apply to their transaction."

Question 77 in the public consultation: In your view, would the costs of complying with the information obligations as set out in the previous question be reasonable?

[316] Platform transparency study, p. 44.
[317] Platform transparency study, p. 45.

Brussels, 11.4.2018
SWD(2018) 96 final

PART 3/3

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

Proposals for

DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

(1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of teh European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules

and

(2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC

{COM(2018) 184 final} - {SWD(2018) 98 final}

www.parlament.gv.at

Table of contents

Annex 11: Additional data on "free" digital services 2

1. Detailed problem description 2
2. Additional data 6
3. Stakeholder views 16

Annex 12: Additional data on information requirements 27

Annex 13: Additional data on rules on the right to withdraw 29

Annex 14 JRC Technical Report: "An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems" 31

Acknowledgements 2

Executive summary 3

1 Introduction 4

2 Estimation approach 5

2.1 Influence of penalties intensity on remedies implementation 5

3 Data 7

4 Results and interpretation 9

5 Further extensions 12

List of figures 13

List of tables 14

Annex 11: Additional data on "free" digital services

1. Detailed problem description

The EU is one of the largest e-commerce markets in the world and the percentage of consumers aged between 16 and 74 that have ordered goods or services over the internet has grown year-on-year from 30% in 2007 to 55% in 2016.[1] Furthermore, the 2015 DSM consumer survey revealed that 93% of EU28 online respondents had used "free" digital services at least once in the previous year (2014)[2] and 75% of the 91 respondents in the public consultation reported having used "free" digital services over the last 3 years (2015-2017).

However, the existing EU consumer law does not yet offer adequate protection in all digital transactions. In its current form, the CRD applies to contracts for the supply of digital content[3], regardless of whether the consumer pays a price in money (paid digital content) or provides personal data ("free" digital content), as explained in the CRD Guidance Document.[4] Digital content includes, for example, computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming from a tangible medium or through any other means.[5] If a contract for the supply of digital content is concluded the CRD provides consumers with EU-level rights to pre-contractual information and to withdraw from the contract. The CRD does not apply if a contract is not formed, for instance in case a consumer merely accesses a website, uses a search engine or downloads digital content from a website without providing anything in return.[6]

In its current form, the CRD fails to offer adequate protection for contracts that do not concern a specific piece of digital content, but which involve digital services of a certain duration. Digital services include, for example, accessing, creating, processing, storing or sharing of data in digital form, such as subscription contracts to content platforms (e.g. iTunes, GooglePlay), cloud storage (e.g. Dropbox, iCloud), webmail (e.g. Hotmail, Gmail) and social media (Facebook, Instagram). The CRD only applies to digital service contracts supplied against the payment of a price in money (paid digital service), but it is silent on the applicable rights for contracts where the consumer provides personal data ("free" digital service).

It is challenging to justify the existence of this legal gap of consumer protection given the similarities between digital content and digital service contracts, as well as the substantive interchangeability of paid digital services and "free" digital services.

The CRD Report found that it is often difficult to distinguish between what qualifies as "free" digital content or a "free" digital service in practice.[7] As only one of these categories is currently covered by the CRD, there is significant legal uncertainty about the applicable rules and the legal protection afforded to the consumers that entered into such contracts differs dramatically.

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[1] See 2016 Eurostat Community Survey on ICT usage in households and by individuals, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals

[2] These were a) Communication services (e.g. Hotmail, Gmail, Whatsapp, Viber, Skype), b) Participation in social networks (e.g. Facebook, Twitter, Instagram), 3) Storage and transfer of files (e.g. Dropbox, iCloud) and 4) Web-based software applications (e.g. Google Docs) (see subsection 2 in this Annex).

[3] 'Digital content' means data produced and supplied in digital form.

[4] Section 2.3 and 12.1 of DG Justice Guidance Document on the CRD.

[5] Recital 19 CRD.

[6] See page 64 of the DG Justice Guidance Document on the CRD.

[7] CRD Report, p. 9.

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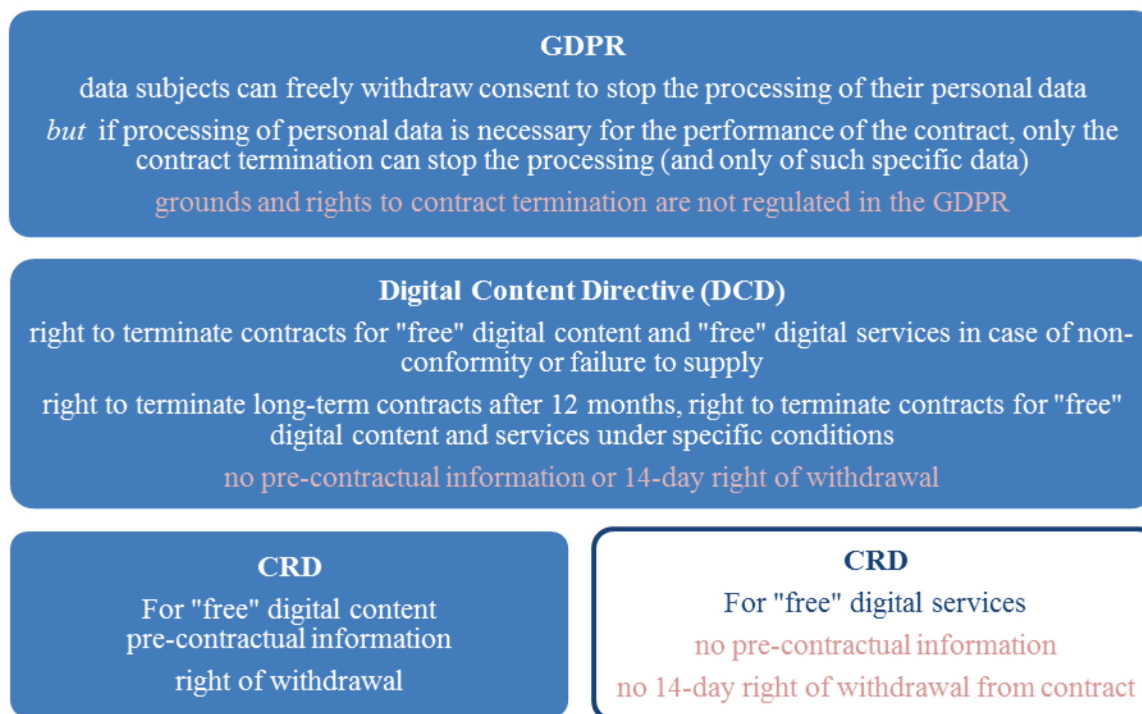
These problems will be magnified by the upcoming Digital Content Directive (DCD), which, once adopted, will provide contractual remedies for consumers in case there has been a failure to supply or a lack of conformity with the digital content or digital services, as well as a right to terminate long term contracts after 12 months. In situations where the consumer provides personal data for "free" digital content and "free" digital services, the remedies provided for in the DCD would apply in parallel with the new General Data Protection Regulation[8], which will be applicable as from 25 May 2018.

The interplay between the CRD, the DCD and the GDPR can be illustrated as follows:



A detailed overview of the DCD and GDPR is included in subsection 2 of this Annex.

Next to the problems that will emerge with the CRD once the DCD comes into force, the current situation already poses unnecessary costs for traders due to diverging national rules and an unclear legal framework. Replies to the targeted consultations indicate that the rules on pre-contractual information and/or the right of withdrawal apply also to "free" digital services in at least three Member States.[9] Latvia and Portugal have extended both the pre-contractual information requirements and the right of withdrawal to "free" digital services, whereas France applied only the pre-contractual information requirements to online marketplaces by the means of the Digital Republic Bill[10], which requires online marketplaces to provide consumers with fair, clear and transparent information, including on general conditions of use of the proposed intermediation service.

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[8] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR).

[9] LV, PT and FR replies to the CPC/CPN/CMEG survey.

[10] *Loi pour une République numérique* of 7 October 2016, Article 49, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&dateTexte=20161212#LEGISCTA000033205027

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As a result of the fragmentation of national consumer laws, a trader wishing to sell cross-border to the consumers of another Member State will have to incur legal and other compliance costs in order to make sure he is complying with the consumer protection rules of the Member State of the consumer, as required under the Rome I Regulation.[11] These barriers impede the provision of and the access to digital services for traders and consumers, and ultimately hinder the completion of the DSM.

The relevance of such barriers was confirmed in the public consultation, where around 60% of business associations[12] reported that companies incur costs to some or significant extent when trading cross-border due to a need to adapt to current different national laws related to pre-contractual information or right of withdrawal.[13] 7 out of 10 responding business associations consider these costs to be unreasonable. Moreover, in the SME panel consultation, 10 out of 58 respondents[14] reported being discouraged from entering other EU markets due to these costs, while 28 respondents did not consider these costs to have significant impact on their decision-making. SMEs offering "free" digital services report costs when trading cross-border due to (1) replying to complaints and enquiries from consumers that did not get information about the service before concluding the contract (3 of 14 responding companies), (2) would like to cancel the service (6 of 15) and (3) due to complying with rules other countries' national legislation on pre-contractual information and right of withdrawal (6 of 15)[15]. In the SME test panel SMEs gave estimates regarding one-off costs between zero and EUR 48 000 (up to 16% in terms of turnover). Estimates for annual costs ranged from zero to EUR 20 000 (up to 6.67% in terms of turnover). The two responding large enterprises stated zero and EUR 299 respectively, both one-off and annual costs.[16]

These costs are likely to increase in the future, as the targeted consultation points to ongoing discussions in a number of Member States about introducing new rules concerning the provision of personal data under the notion of "payment of a price", as laid down in the CRD in relation to the definition of service contracts.

Furthermore, the current situation leads to a unfair competition between traders. Depending on whether they supply the exact same digital service against personal data or against payment of a price, traders are subject to different rules. Similarly, traders that supply digital content for "free"

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[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations. Article 6(2) of Rome I states that the choice of law made by the parties to the contract may not have the result of depriving the consumer of the protection afforded to him by such provisions that cannot be derogated from by contract by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1 (this law, under certain conditions, is the law of the country where the consumer has his residence). The Regulation hence allows contracting parties to choose which law applies to their contract and determines which law applies in the absence of choice. A trader who "directs his activities" to consumers in another country may either apply the consumer's national law or choose another law (in practice almost always the trader's national law). In this latter case, however, the trader must also respect the mandatory consumer contract law rules of the consumer's country to the extent that those rules provide a higher level of consumer protection. When the trader does not direct his activities to consumers in a specific Member State but agrees to enter into a contract at the consumer's own initiative, consumers do not benefit from the more protective rules of their national law.

[12] 10 out of 17 for both pre-contractual information and the right of withdrawal.

[13] A precise quantification of the costs faced by traders was not possible due to the low level of responses.

[14] SMEs operating online in business to consumer transactions; figures are similar when considering the overall respondents: 57 out of the 113 respondents consider that current costs due to legal fragmentation do not have an impact on their decision to enter other EU markets, while for 16 respondents these costs represent an obstacle.

[15] SME panel: "*Does your enterprise incur costs when trading cross-border due to the following?*" The responses to these questions included five "not applicable to my enterprise" responses.

[16] Question was: One-off costs: Please estimate the one-off resources you need to invest in order to enter a new EU market, on average per Member State (e.g. checking compliance with national rules and adjusting business practices as a result (e.g. update your website), costs of legal/technical advice). Regular costs: Please estimate the resources you need to invest on a regular basis to comply with different national rules, on average per country (e.g. handling consumer complaints/ enquiries, monitoring national rules). Note: Please indicate staff time in working days, whereby 1 working day = 8 hours of staff time. Please do not consider staff time for translation. If no staff time is involved, indicate '0'

have to comply with the CRD rules, unlike traders that supply digital services for "free". Furthermore, these divergences create difficulties for compliance with consumer law if the business model combines elements of "free" and paid digital services. For example, the so-called "freemium" model enables consumers to use an app without payment (e.g. play a game) but subsequently have the ability to buy paid elements through "in-app" purchases.[17]

The lack of protection for "free" digital services also leads to tangible detriment for consumers. The CRD study found that 48% of the surveyed consumers experienced difficulties with unsubscribing from such services. Similarly, in the public consultation almost 70% of individuals indicated that the lack of pre-contractual information and the right of withdrawal is problematic and can create harm for consumers when using "free" digital services cross-border[18]. In particular, 23 out of 67 individuals reported having experienced detriment in the last three years when using "free" digital services due to the lack of pre-contractual information (33%), while 13 reported such harm due to the lack of a right of withdrawal (17%).[19]

The IA for the DCD proposal estimated that almost 1 in 3 consumers across the EU (36%) had experienced at least one problem in the previous 12 months with contracts for digital products, including contracts for "free" digital services (such as cloud storage with which 30% reported problems) [20]. In the public consultation, almost 100% of the respondent consumer associations agreed that consumers suffer harm when using "free" digital services due to the lack of pre-contractual information and the right of withdrawal, whereas over 2/3 of them consider that this lack of rights discourages consumers from acquiring such services[21]. In contrast, over 50% of business associations[22] and traders[23] replying to the public consultation rather disagreed that consumers suffer detriment when using "free" digital services due to lack of rights. In the CPC/CPN/CMEG targeted consultation, Member State authorities did not provide considerable evidence of consumers suffering harm when using "free" services; however, some of the responding Member States underlined that this lack of evidence could be due to the consumers' lower expectations about digital services that are offered for "free" and due to difficulties in assessing to whom a complaint can be addressed.

Finally, in reply to the public consultation, no less than 48% of individuals[24] reported that they would use "free" digital services even more often, if they had the right to pre-contractual information and to withdraw. This view is confirmed by more than 80% of the consumer associations[25] and more than 30% of MS authorities.[26]

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[17] Economic Study on Consumers Digital Content Products, p. 100.

[18] 68% of individuals (58 out of 85 respondents) strongly/tend to agree that lack of pre-contractual information is problematic and creates harm when using "free" digital services cross-border; similar percentage applies for lack of a withdrawal right: 66% of individuals (57 out of 86 respondents) strongly/tend to agree this being problematic.

[19] Specific examples of potential consumer problems due to lack of protection in contracts for "free" digital services are also included in subsection 2 of this Annex.

[20] Consumer survey conducted in 2015 in 15 sample countries within the framework of the Economic Study on Consumer Digital Content Product. See DCD IA, p. 15 and the Economic Study on Consumer Digital Content Products, p. 222.

[21] 24 out of 27 and 20 out of 27 responding consumer authorities strongly/tend to agree that respectively lack of pre-contractual information and right of withdrawal discourage consumers from acquiring "free" digital services.

[22] 32 out of 62 and 32 out of 57 responding business associations strongly/tend to disagree that consumers suffer detriment due to respectively lack of pre-contractual information and withdrawal right.

[23] 18 out of 54 and 18 out of 53 responding companies strongly/tend to disagree that consumers suffer detriment due to respectively lack of pre-contractual information and withdrawal right.

[24] 42 out of 88 responding individuals indicated they would use more "free" digitals services if they had a right to be informed, while 43 out of 89 respondents think this would happen if a right to withdraw from the contract was granted.

[25] 22 out of 25 responding **consumer associations** indicated that **consumers would use "free" digital services more often** if they had pre-contractual information, while 22 out of 26 of them consider this would happen if a right to cancel the contract within 14 days was granted.

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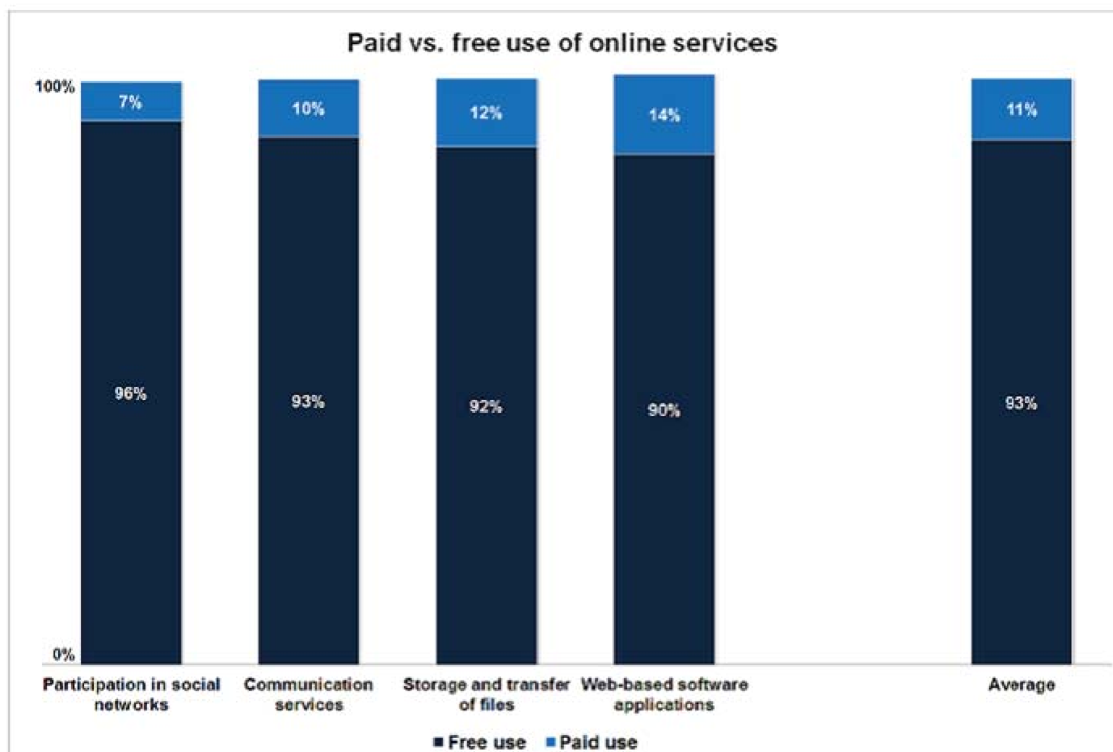
2. Additional data

Table 1: From the 2015 DSM consumer survey:

Overall, 93% of EU28 online respondents (sample N =22,848, 2015 data) had used at least one of the concerned four online services during the past year (2014).

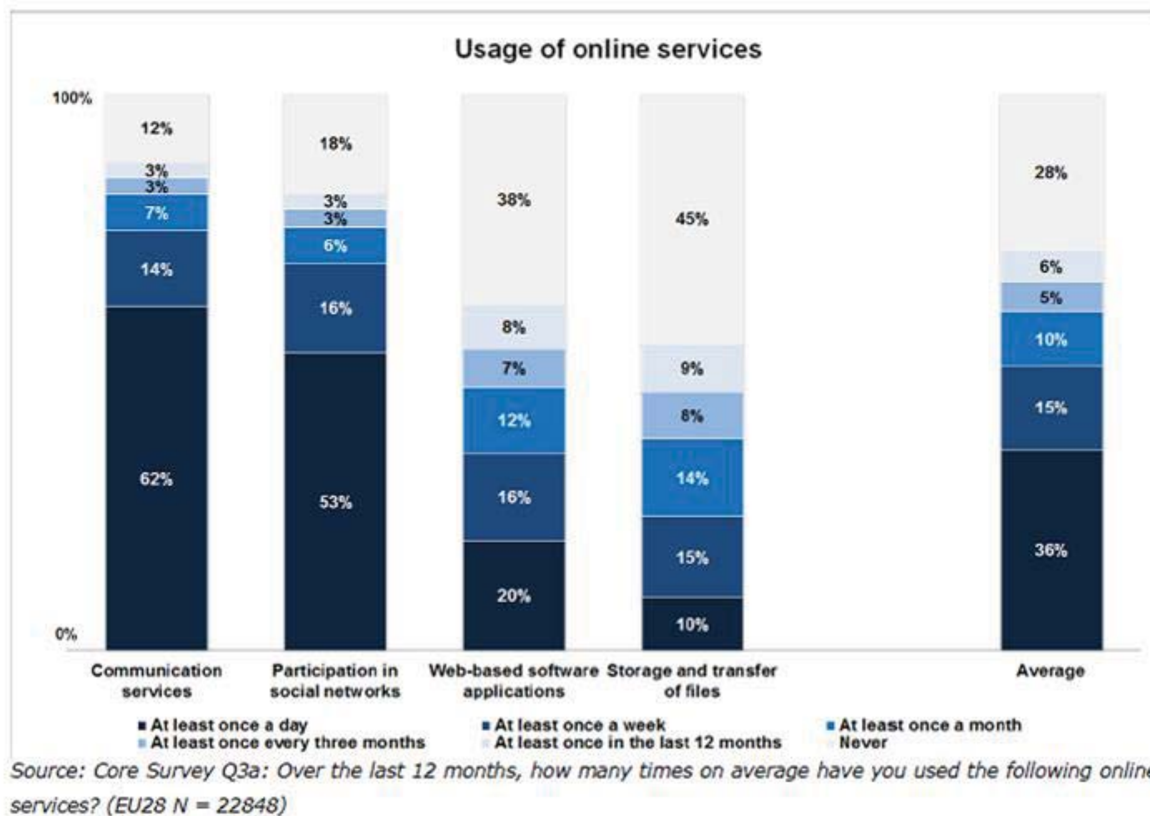
Figure 1: Paid versus free usage of online services over the past year, by market



Source: Core survey Q3b: How did you use these online services? (EU28 N= variable per category, from 20762 for communication services to 12604 for other online services)

[26] 11 out of 27 responding MS authorities consider that consumers would use more "free digital services" if a right to be informed was granted, while 13 out of 28 consider this would happen if a right to withdraw from the contract was granted.

Figure 2: Usage frequency of online services over the past year, by market



Source: Core Survey Q3a: Over the last 12 months, how many times on average have you used the following online services? (EU28 N = 22848)

I) Economic Study on Consumer Digital Content Products:

NOTE: The data for the market analysis section are based on the DSM consumer survey

A) Market analysis

The market analysis of seven types of digital content and services (music, games, film and TV content, e-books/audiobooks, cloud storage, software/apps and streaming of sports events) showed that the vast majority of consumers who access these types of digital content and services online do not pay a price. The incidence of 'free' business models is predominant both for digital content (e.g. a download of a specific music track) and digital services (e.g. a subscription for online music streaming). 90 to 92% of consumers who access software & apps or store digital content do it without paying with money; 77% of consumers who stream events do it without paying with money; and more than 50% of consumers who download music, film and television content, games and digital books do it without paying with money.[27]

In particular:

-Music (p. 68): Free downloading is still the most common channel to access digital music formats in Europe; more than half (58%) of EU consumers who accessed music online reported downloading music for free. Free streaming of music is also widespread; 44% of EU consumers

[27] This is supported by results from the consumer survey undertaken as part of this study, where on average, 67% of consumers using intangible music content did so for free (in comparison to 39% who paid), 62% of those using intangible games content did so for free, and 62% of those using anti-virus software did so for free. The one exception was cloud storage, with an equal split between consumers paying and accessing for free, amongst those using cloud storage.

who accessed music online reported free streaming of music. The study estimates that only between 13% and 25% of European consumers accessing music online pay for music in digital format.

-Film and TV content: (p. 85) Free streaming and free downloading are the most common channels to access digital film and television content formats in Europe; 53 and 49% respectively of European consumers who accessed films and TV series online reported downloading or streaming films and TV series for free. Only 14% of European consumers who accessed film and television content online pay for downloading videos and 18% pay for streaming videos.

-Games: (p. 99) Free download of games is the preferred mode of access in Europe among users of digital games. 66% of EU consumers who accessed games online downloaded games for free and 32% reported streaming games for free. Only 21% reported paying for downloading and 11% paying for streaming a game online.

-E-books and audiobooks (p. 107):

65% of EU consumers that accessed e-books online downloaded them for free;

26% of EU consumers that accessed e-books online streamed them for free;

Only 28% of EU consumers that accessed e-books online paid to download them, and 12% paid to stream them.

-Software-apps: (p.123):

Free downloading is still the most common channel to access software and apps in Europe. Between 90 and 91% of EU consumers that bought or accessed software and apps online reported downloading software and apps for free, while only between 21 and 23% of them pay for software and apps in digital format.

P.130: Concerning antivirus software, a survey found that in Western Europe, 26% of users pay for antivirus programs (the 74% others choose a free solution)[28] which is in line with the estimated figures for software and apps market based on the DSM consumer survey. Users tend to think that free solutions provide sufficient security.

- Storage: (p.133)

92% of European internet users who use storage services access these services for free

Overall, the storage of digital content has been experiencing high growth in recent years, but most of the consumers access these services for free. As such, in terms of sales, online web services that provide server space for individuals to store data, photos, videos and other files, generate little revenues directly from consumers.

p.136: Based on the DSM consumer survey, 92% of EU consumers who access storage of digital content online do so for free. Only 12 % of those who accessed digital content storage online reported paying for this service. This trend is confirmed by Eurostat's annual model questionnaires on ICT (Information and Communication Technologies) reporting that only one in ten cloud users paid for internet storage space to save or share their files.

- Sport events: (p.141)

77% of EU consumers who stream sports events do so without paying with money.

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[28] Kaspersky Lab. 2012. Perception and knowledge of IT threats: the consumer's point of view. https://www.kaspersky.com/downloads/pdf/kaspersky-lab_ok-consumer-survey-report_eng_final.pdf

B) Consumer Survey

A consumer survey was conducted by Ipsos MediaCT in 15 sample countries. 1 000 consumers in each of the 15 Member States were asked about the type of problems they encountered when purchasing or otherwise accessing digital content.

Problems with free digital content/services:

On average across all content types, almost 1 in 3 online users of digital content have experienced at least one problem with the digital content or service they used during the 12-month period preceding the survey. It is estimated that at least 70 million consumers[29] across the EU have experienced one or the other problem with just the four types of digital content covered by the study.

Although the incidence of reported problems was higher among consumers who paid for digital content or services, the percentage of consumers reporting problems with "free" digital content or services was also very significant. In particular 49% of consumers who accessed digital content/services reported facing a problem with digital content/ services they paid for. At the same time 36% of consumers who accessed digital content/services reported facing a problem with digital content/ services which they accessed without paying a price.[30]

The problems consumers faced with 'free' digital content or services related to three areas: quality, access and terms and conditions.

Quality-related problems included issues such as:

- damage to computers, mobile phones or other devices caused by the digital content;
- digital content not working properly and/or of poor quality compared to what was promised by the supplier;
- the digital content being incompatible with hardware/software, when information suggested it would be compatible;
- poor levels of quality compared to what one would normally expect from similar digital content;
- not receiving updates for the content as promised by the supplier; and
- receiving different/older versions of the content, rather than the one promised by the supplier.

The incidence of quality-related problems with 'free" digital content or services was significant: 20% of consumers who accessed music online had "quality related problems" with music they accessed without paying (p. 224), 22% of consumers who accessed games online had "quality related problems" with games they accessed without paying (p. 225), 18% of consumers who accessed antivirus software online had "quality related problems" with free antivirus (p. 225) and 16% of consumers who accessed cloud storage had "quality related problems" with free cloud storage (p. 226)

Access-related problems included issues such as:

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[29] There exists potential overlap in consumers between product categories, therefore the estimate is derived from 'games – intangible medium', which is the maximum number of consumers affected in one category. It is likely the number will exceed 70 million - however it is not possible to deduce the precise number from the information available.

[30] Annex 3 p. 214 Table 60.

- difficulties downloading or accessing the digital content because of unclear or incomplete instructions;
- unexpected interruptions (e.g. crashes, unannounced maintenance) which prevented full use / access;
- inability to access the content or digital service in one or more countries where the supplier had promised that access would be available;
- not being able to access or retrieve data (e.g. photos) after ending contracts;
- more limited access to a service or content than had been expected given the information received from the supplier; and
- not being able to download or access the digital content because of poor internet connections.

The incidence of quality-related problems with 'free" digital content or services was significant: 25% of consumers who accessed music online had "access-related problems" with free music (p. 231), 27% of consumers who accessed games online had "quality related problems" with free games (p. 232), 19% of consumers who accessed antivirus online had "quality related problems" with free antivirus and 18% of consumers who accessed cloud storage online had "quality related problems" with free cloud storage.

Problems related to terms & conditions of digital content products and services include issues such as:

- terms and conditions being too long and not being read;
- consumers not understanding their rights because the terms and conditions were unclear;
- terms and conditions excluding the supplier from most or all of any responsibility for problems arising with the digital service or content;
- terms and conditions giving the provider the right to remove or amend services or content without providing notice;
- terms and conditions entitling the supplier to close accounts without giving consumers the opportunity to retrieve their data; and
- long term subscriptions that bind consumers to digital content or services (of more than one year) and cannot be terminated before the expiration of the term.

The incidence of T&C-related problems with 'free" digital content or services was even higher than the other categories: 24% of consumers who accessed music online had "T&C related problems" with free music (p. 238), 27% of consumers who accessed games online had "T&C related problems" with free games, 24% of consumers who accessed antivirus online had "T&C related problems" with free antivirus and 25% of consumers who accessed cloud storage online had "T&C related problems" with free cloud storage.

Costs Resulting From Problems With Free Digital Content/Services: (p.310 -321)

Although consumers had accessed digital content or services without paying money, they reported costs as a result of the problems they encountered. In particular, the net cost incurred by consumers averaged EUR 5.79 per consumer for ‘free’ music, EUR 6.42 for "free" games, EUR 8.80 for "free" antivirus and EUR 5.59 for "free" cloud storage. Although these costs were significantly lower than the ones reported as a result of problems with paid digital content/services (EUR 12.19, EUR 14.28, EUR 20.49 and EUR 32.99 respectively) it is important to note that consumers incur costs as a result of a problem also when no money was paid in exchange for the digital content or service. The costs reported by consumers included, among others:

- Cost of telephone calls, postage or stationery
- Travel costs
- Costs of any legal matters or for legal advice
- Costs of getting any other type of expert advice or assistance
- Costs of any knock-on / consequential damage or inconvenience caused to you or any of your possessions as a result of the problem
- Cost of lost earnings by not being able to work while taking time to resolve the problem

II) Flash Eurobarometer 411 "Cross-border access to online content" (2015)

This survey was carried out by TNS Political & Social network in the 28 Member States of the European Union between 7 and 15 January 2015. Some 26,586 respondents from different social and demographic groups were interviewed via telephone

- Key Findings

Access to the Internet

- 82% of respondents use the Internet. The countries with the highest proportion of Internet users are located in northern and western areas of the EU.
- 69% of respondents use the Internet daily or almost daily.
- Respondents are most likely to access the Internet from a personal computer (desktop computer, laptop or netbook) (90%), a mobile device (tablet, mobile phone or e-reader) (73%) or a home entertainment device (Smart TV or game console) (21%).

Access to digital content online

- Respondents are most likely to have accessed or downloaded music (60%) and audio-visual content (59%), followed by video games (37%), sports (35%) and e-books (27%) in the last twelve months.
- Music and audio-visual content are the most likely to be downloaded or streamed on a daily or weekly basis.

- Incidence of "free" digital content or services

  - Audio-visual content, p. 23-24

The large majority (80%) of consumers who accessed or downloaded audio-visual content online did so without paying a price, while 15% pay per item and 20% pay for an online subscription.

In all Member States, the majority of respondents who had accessed or downloaded audio-visual content said the content was free; in fact in 27 Member States at least two thirds did so.

  - Sports content p. 32

The large majority (82%) of consumers who accessed or downloaded sports content online did so without paying a price, while 19% paid in some way (paying a subscription was more common than paying per item, 14% vs. 7% respectively).

  - Music p. 36:

In all Member States at least half of all Internet users say they have accessed or downloaded music at least once in the last 12 months, with those in Romania (79%), Cyprus (74%), and Greece and Slovenia (both 73%) the most likely to do so.

p.40: The large majority (77%) of consumers who accessed or downloaded music are most likely to have done so for free (77%), while 19% paid per item and 12% paid a subscription. Overall, 29% paid in some way to access or download music.

- Digital books p. 44

Just over a quarter of Internet users have downloaded or accessed an e-book at least once in the past 12 months (27%), although most had done so less than once a month (11%). Few (2%) accessed or downloaded e-books daily or almost daily, while 5% did so at least once a week and 9% at least once a month.

p.47: Compared with the other kinds of content discussed, e-books are more likely to be paid for in some way (46%), generally per item rather than by subscription (39% vs. 8%). In spite of this, the majority (64%) still access or download e-books free of charge.

- Video games p. 51

More than one-third of Internet users have accessed or downloaded a video game online in the past 12 months (37%), although once again access is not as frequent as for other content types, such as sports or audio-visual. Almost one in ten (9%) say they access video games online every day or almost every day, while 9% do so at least once a week and 8% at least once a month. Just over one in ten (11%) access video games less than once a month.

p.54: Just over one-third of those who access video games online say they have paid in some way (34%): payment per item (20%) or the purchase of items related to the video game (16%) are both more common than payment by subscription (8%).

Just over three-quarters (76%) have accessed or downloaded the content they wanted free of charge.

- *Consumers who access paid digital content/services often also access "free" content/services and vice versa* Data from Flash EB 411: -p. 26: 16% of respondents who have accessed free audio-visual content online have also paid for this type of content (16%). And 43% of those who paid for audio-visual content have also accessed free audio-visual content. -p. 34: 6% of the respondents who accessed free sports content also paid for this type of content. And 27% of those who paid for sports in some way shows that 27% also accessed free sports content -p.42: Just over one in ten of those who accessed free music online also paid for music (11%). And 28% of those who paid for music in some way also accessed free music online. -p.49: 22% of respondents accessing free e-books online have also paid for eBooks. And 30% of those who paid for e-books in some way also accessed free eBooks -p.56: 18% of respondents who accessed free video games also paid for video games. And 40% of those who paid for video games in some way also accessed free games online.
Also, business models often combine elements of "free" and "paid" models, e.g. when consumers start playing a game without payment but subsequently start buying elements

related to the game.

Data from Economic Study on Consumer Digital Content Products:

-Freemium is currently one of the predominant business models especially for video games, software and applications.

p. 100-101: In this model, software, media, games or web services are provided free of charge, but money (i.e. a premium) is charged for proprietary features and functionality (e.g. virtual goods, time reduction).

The freemium model has become a widely-adopted pricing strategy in the industry. Two types of freemium games have emerged in the process: (1) "pay-to-entertain" games, whereby premium content is purely decorative and serves as a way for consumers to individualise the game according to their preferences; and (2) "pay-to-progress" / "pay-to-win" games, whereby additional content is functional and allows premium consumers to progress faster in the game (e.g. by enhancing the performance of their in-game character);

Trialware is also a predominant business model especially for software and cloud storage.

P.130: Trialware (for software in general): users can try out software during a trial period and when it is over they need to pay a licence fee to continue to access the software. According to Kaspersky Labs, Trialware is commonly used as a pricing model for antivirus software. Many computers and laptops are sold with a pre-installed trial version of an antivirus program. It is estimated that about 60% of respondents use these programs, but that only 13% purchase the licence one the trial period is over.[31].

For cloud storage (p.137):

The main types of pricing models are:

14 to 30 days free trials followed by paid subscription based on storage capacity;

Free service limiting storage capacity to 2 and 15 Gigabytes (GB)[32] and paid subscription fee for larger storage capacity.

Examples of consumer problems due to lack of protection in contracts for "free" digital services

The absence of rights to pre-contractual information when subscribing to "free" digital services has the potential to lead to consumer detriment. For instance, a consumer who has not been informed about the duration of his contract for "free" email services might one day discover that he can no longer access his email account because the contract has lapsed. Hence, his time and effort invested in that service could be lost together with previous communication and contacts.

A Commission study on terms and conditions found contractual rights of the supplier to remove or amend content without notice, or to close accounts without giving users the opportunity to

[31] Kaspersky Lab. 2012. Perception and knowledge of IT threats: the consumer's point of view. https://www.kaspersky.com/downloads/pdf/kaspersky-lab_ok-consumer-survey-report_eng_final.pdf

[32] NetworkComputing, 2013. 8 Great Cloud Storage Services. Available: http://www.networkcomputing.com/cloud-infrastructure/8-great-cloud-storage-services/d/d-id/1109155?

retrieve data, as one of the major problems encountered by consumers. This is more likely to happen to consumers entering into contracts for "free" digital services due to the lack of pre contractual information obligations for the traders. This is also in line with the results of the Economic Study on Consumer Digital Content Products, whose consumer survey showed that the most often cited type of problem

Another example of consumer detriment can be inferred from a concrete case regarding terms and conditions used in "free" digital services. In 2017, the Italian Competition Authority (ICA) fined WhatsApp EUR 3 million for having forced its users to share their personal data with Facebook. In particular, the ICA found that: *WhatsApp de facto forced the users of its service WhatsApp Messenger to accept in full the new Terms of Use, and specifically a requirement to share their personal data with Facebook, by inducing them to believe that without granting such consent they would not have been able to use the service anymore.* Furthermore, the ICA assessed as illicit some contractual clauses included in WhatsApp Messenger's "Terms of Use", such as the possibility for the trader to unilaterally interrupt the service without reason or advance notice[33]. Clearly this is a case of use of unfair terms, in breach of the UCTD, that are not binding on consumers. However, enforcing this right in a dispute with a trader may require time and resources. Therefore, ideally the consumers should refrain from engaging with traders who impose unfair contract terms. In this context, they obviously need to understand the terms and conditions. However, many consumers do not read the T&Cs in particular because they are too voluminous and difficult to read, this is why pre-contractual information is essential for consumers even when they conclude contracts for "free" digital services, since such information has to be provided upfront to the consumer and in an easily and comprehensible manner.

In addition, in the framework of the Economic study on the consumer digital content products, it was found that roughly three per cent of all users said the digital content caused damage to their computer, mobile phone or other device: this might occur due to lack or improper information about the functionality and operability of the digital content or service, and is more likely to happen when using digital free services for which consumers do not have a EU wide right to be informed about the characteristics of the free digital service they subscribe for.

Consumer detriment can also occur in social media. Here, consumers are usually not informed when they subscribe about main functions of the service, such as how social media operators intend to use their "likes" (endorsements) of posts, brands and products for their own commercial purposes. "Likes" are often re used by operators to be displayed together with new ad posts from the brand that the consumer has endorsed, but the consumer is usually not made aware of this. In this way, a consumer's endorsements may be presented to his or her friends on the social media out of the context of the original "like". This may lead the consumer's friends to believe that the friend has endorsed posts, brands or products that the consumer has not really endorsed. Such situation can be embarrassing for the first consumer. It can also lead his or her friends to buy products they would not have bought if they had not been misled by the re-used endorsement.

Recent research also found that consumers experience detriment due to a refusal of the right to withdraw from dating services[34].

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[33] http://www.agcm.it/en/newsroom/press-releases/2380-whatsapp-fined-for-3-million-euro-for-having-forced-its-users-to-share-their-personal-data-with-facebook.html

[34] https://ssl.marktwaechter.de/pressemeldung/online-dating-abzocke-fakes-und-schlechter-datenschutz

Relevant provisions of the Digital Content Directive (DCD) and the General Data Protection Regulation

The DCD will provide contractual remedies for consumers in case there has been a failure to supply or a lack of conformity with the digital content or digital services, such as getting a new copy of the content, a reduction of the price or the termination of the contract against a refund; the proposal also gives consumers the possibility to terminate long term contracts after 12 months. In situations where the consumer provides personal data to the supplier to access digital content or services, the remedies provided for in the DCD apply in parallel with the rules on the lawful processing of personal data under EU data protection legislation. As regards non-personal data, the Proposal aims to introduce similar rules to ensure that the supplier shall also refrain from the use of such data and that the consumer shall be entitled to retrieve the data. (Non-paper of the Commission services on the relationship between the Proposal for a Directive on certain aspects concerning contracts for the supply of Digital content and EU Data protection. WK 680/2016 INIT).

The European Commission put forward its EU Data Protection Reform in January 2012. The reform consists of two instruments published in the EU Official Journal on 4 May 2016: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. The Regulation will replace the Data Protection directive 95/46/EC, and will be applicable as from 25 May 2018; it includes, inter alia, the right to receive information on the collected data in concise and transparent form, and in clear and plain language; the right to access collected personal data, and obtain the rectification of inaccurate personal data without undue delay, and the possibility to "be forgotten", namely to have personal data erased if they are no longer needed for the purposes for which they were collected; the GDPR also includes a right to data portability.

The EU data protection law provides an exhaustive list of legal grounds for processing personal data. Processing can be based, for instance, on the consent of the data subject or where it is necessary for the performance of the contract:

1) Article 6(1)(a) GDPR allows for processing of personal data where the data subject (the consumer) has given consent to the processing of his or her personal data for one or more specific purposes. In the event that the legal basis for processing consumer' personal data is the consent, such consent should be clearly distinguished and separate from the agreement necessary for the conclusion of a contract.[35]

The consumer can at any time terminate such processing of his personal data by specific withdrawal of consent (Art. 7(3) GDPR), which shall not affect the lawfulness of processing based on consent before its withdrawal. However, the GDPR does not provide for the

[35] "When assessing whether consent is freely given, one shall take into account as one out of several aspects whether consent is a condition for the performance of a contract (Article 7(4) Regulation (EU) 2016/679). In that regard, consent is presumed not to be freely given if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance". Non-paper of the Commission services on the relationship between the Proposal for a Directive on certain aspects concerning contracts for the supply of Digital content and EU Data protection, 2015/0287 (COD).

consequences of such withdrawal of consent on the contract that may exist between the data controller and the data subject, such as a contract for the supply of digital content or services. For instance, when a consumer opens a social media account, his name and e-mail address may be necessary for the supplier to create and maintain the user's account. The consumer may at the same time give his consent for the supplier to use this personal data also for other reasons, e.g. for direct marketing purposes. If the consumer withdraws his consent, the supplier will only still be able to process the personal data as far as this is necessary for the performance of the contract, i.e. for giving the consumer access to his account. Therefore, in the event of withdrawal of consent the contract for the supply of digital content or services would not be automatically terminated, and such situations would be subject to interpretation under national general contract law rules.

2) Personal data can also be processed where its processing is necessary for the performance of a contract pursuant to Article 6(1)(b) GDPR. In such cases the GDPR does not provide for a general right of the data subject to terminate the processing of personal data as long as the contract remains in force. The consumer can of course terminate the contract based on what the applicable legislation and the contract itself lays down for its termination. If the consumer withdraws from or otherwise terminates the contract, the trader can no longer process such data, since the contract as legal basis for processing of the personal data will no longer exist.

3. Stakeholder views

In the public consultation almost 70% of individuals (58 out of 87) indicated that the lack of pre-contractual information and the right of withdrawal is problematic and can create harm for consumers when using "free" digital services cross-border.[36] This was also strongly confirmed by 27 respondent consumer associations in the same consultation, where almost 100% of them strongly/tend to agree that consumers suffer harm when using "free" digital services, due to lack of pre-contractual information and right of withdrawal.[37] 19 of 27 MS authorities (70,4%) and 16 of 26 MS authorities (61,5%) strongly/tend to agree that consumers suffer harm when using "free" digital services, due to lack of pre-contractual information and right of withdrawal. Business associations were not supportive, while companies expressed mixed views: 32 out of 62 and 32 out of 57 responding business associations strongly/tend to disagree that consumers suffer detriment due to respectively lack of pre-contractual information and withdrawal right. 18 out of 54 and 18 out of 53 responding companies strongly/tend to disagree that consumers suffer detriment due to respectively lack of pre-contractual information and withdrawal right (respectively 16 and 17 (tend/strongly) agree).

In the OPC 48% of individuals (42 and 43 respectively), over 80% (22) of consumer associations and over 40% (11 and 13 respectively) of national authorities reported that "free" digital services would be used more often if consumers had the right to pre-contractual information and to withdraw from such contracts.

In the public consultation 7 out of 10 of responding business associations considered the current costs due to diverging national requirements as unreasonable.[38] In the SME test panel, SMEs gave

[36] Question 36: 68% of individuals (58 out of 85 respondents) strongly/tend to agree that lack of pre-contractual information is problematic and creates harm when using "free" digital services cross-border; similar percentage applies for lack of a withdrawal right: 66% of individuals (57 out of 86 respondents) strongly/tend to agree this being problematic.
[37] Questions 36 and 40 in the public consultation. Please see figures 3-6.
[38] Question 92 of the public consultation. The only responding company also considered these costs unreasonable.

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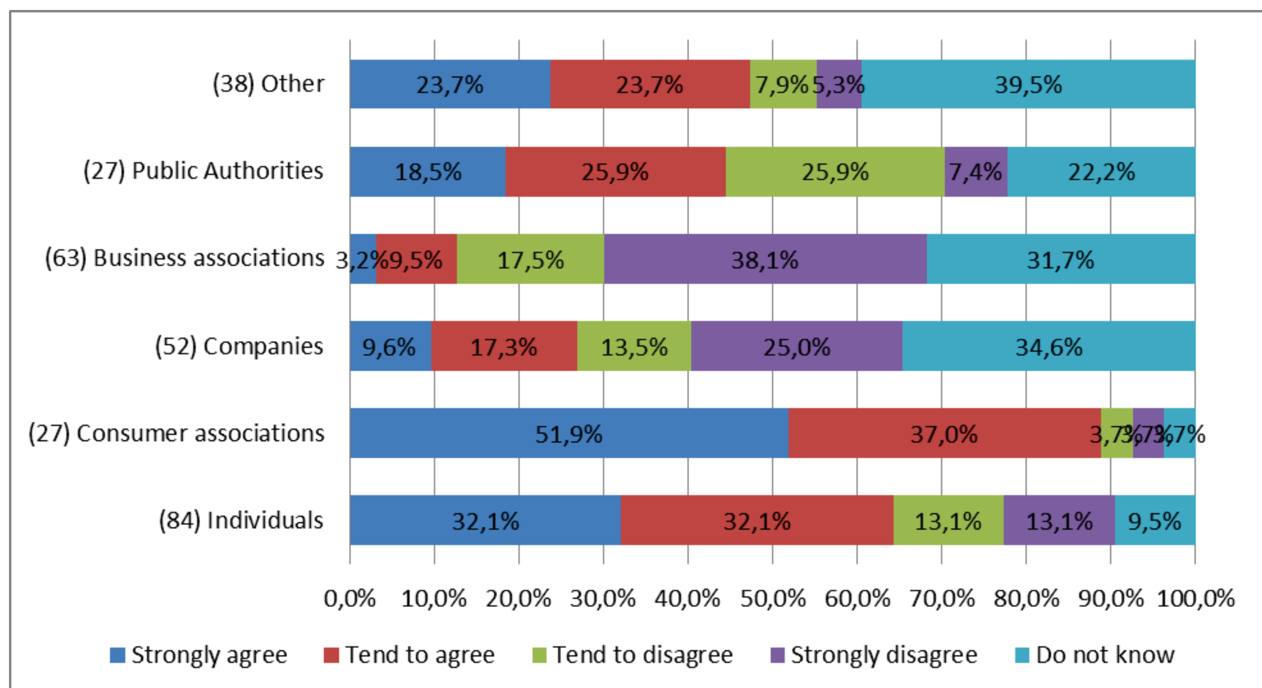
estimates regarding current one-off cost between zero and EUR 48 000 (up to 16% in terms of turnover). In the same consultation, estimates for annual regular/running costs due to diverging national requirements ranged from zero to EUR 20 000 (up to 6.67% in terms of turnover).

67% of companies (12 out of 18) and 42% of business associations (19 out 45) agree with the extension of the pre-contractual information requirements, while around 38% of companies (7 out of 18) are in favour of the extension of the right of withdrawal; When asked about the key reasons for introducing pre-contractual information obligations for such services, overall the majority of respondents 82.1% of individuals, 93.8% of consumer organisations, 94.1% of MS authorities, 38.9% of traders, 26.9% of business associations highlighted the better protection of consumers of digital services with similar functionalities. Similarly, 75.9% of individuals, all responding consumer organisations, 81.3% of MS authorities, 35.3% of traders and 19.6% of business associations considered the same benefit for the introduction of the right of withdrawal.

Public Consultation:

Question 36 (291 responses) "In your view, is it problematic that consumers do not have the right to be informed (before acquiring the service) about the main features of "free" online services (e.g. on functionality and interoperability with hardware and software)?: Yes, it discourages consumers from acquiring such online services

Figure 3: lack of pre-contractual information about "free" digital services is problematic



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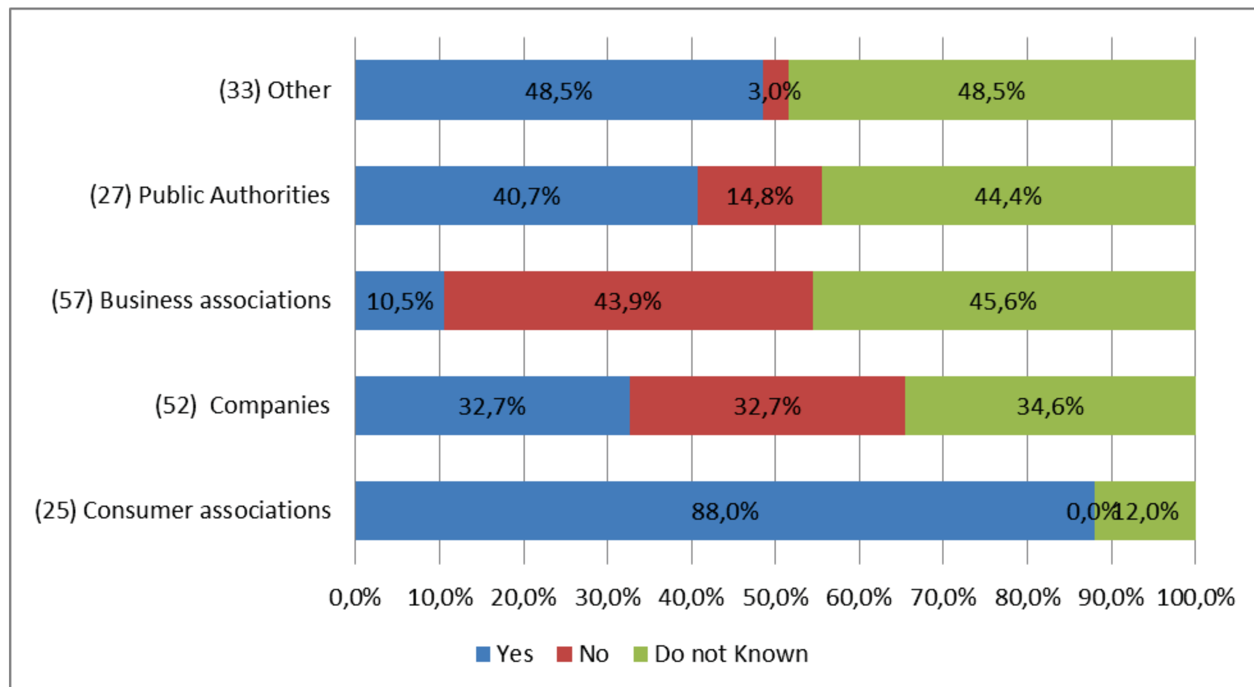
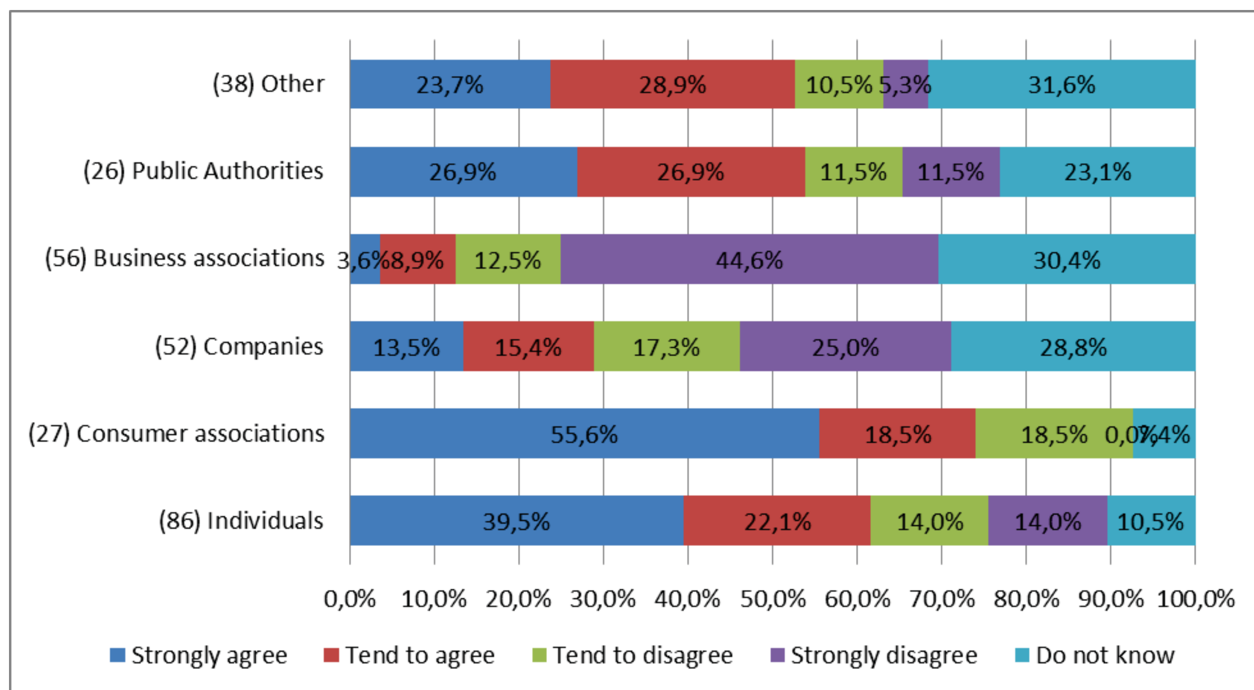
Question 39 (194 responses) "Based on your professional experience, would consumers use "free" online services more often if they had the right to be informed (before acquiring the service) about the main features of the service (e.g. on functionality and interoperability with hardware and software)?"

Figure 4: consumer use of "free" digital services to increase if given pre-contractual information



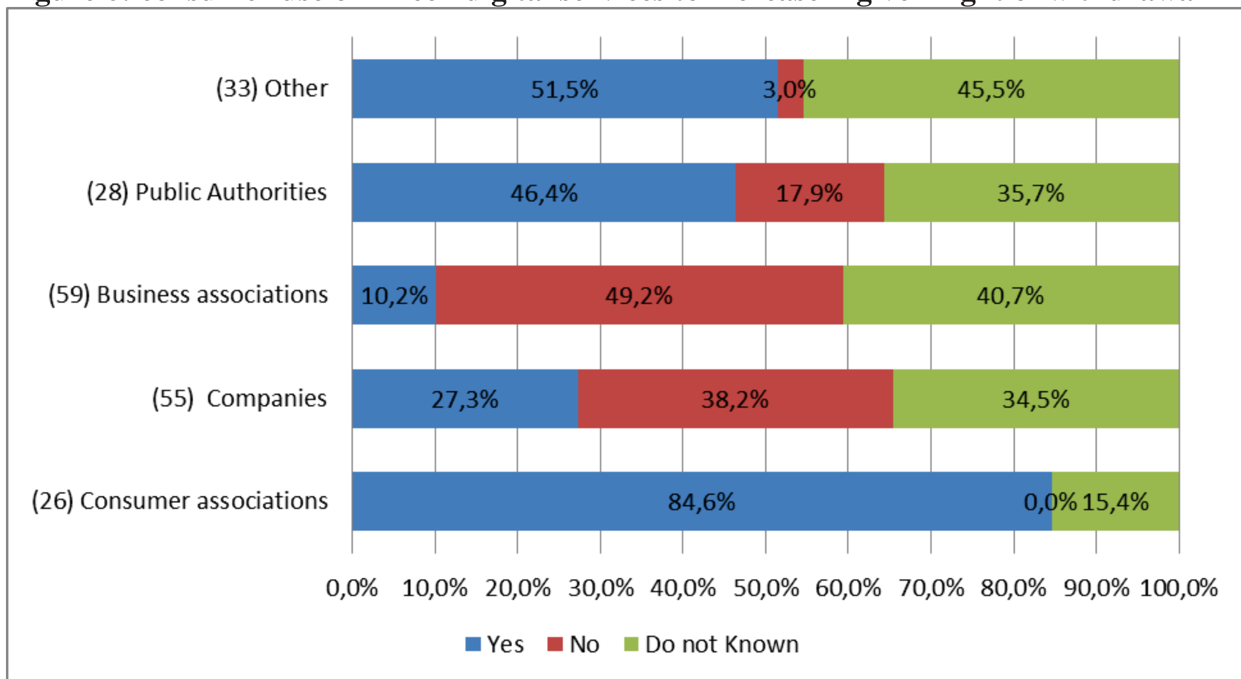
Question 40 (285 responses) "In your view, is it problematic that consumers do not have the right to cancel "free" online services within 14 days?: Yes, it discourages consumers from acquiring such online services"

Figure 5: lack of right of withdrawal for "free" digital services is problematic



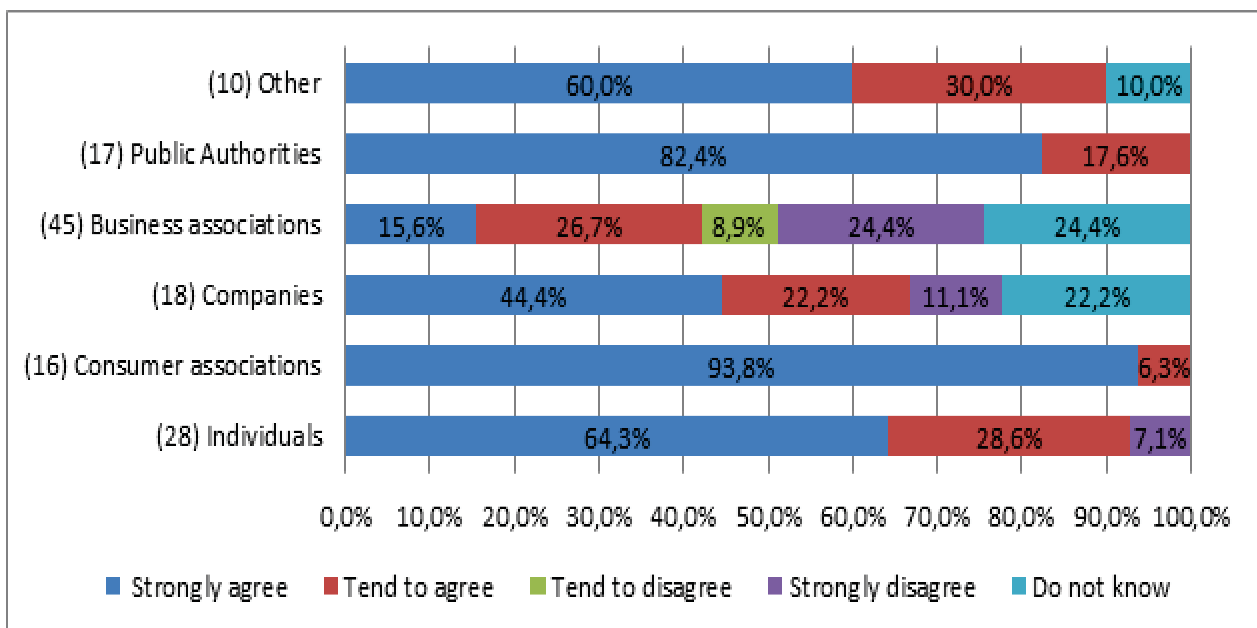
Question 43 (201 responses) "Based on your professional experience, would consumers use "free" online services more often if they had the right to cancel the service within 14 days after acquiring it."

Figure 6: consumer use of "free" digital services to increase if given right of withdrawal



Question 81 (134 responses) "In your opinion, should consumers benefit from the rights listed below when using "free" online services?: The right to pre-contractual information (e.g. about functionality and interoperability of the service with hardware and software)".

Figure 7: should consumers have pre-contractual information about "free" digital services



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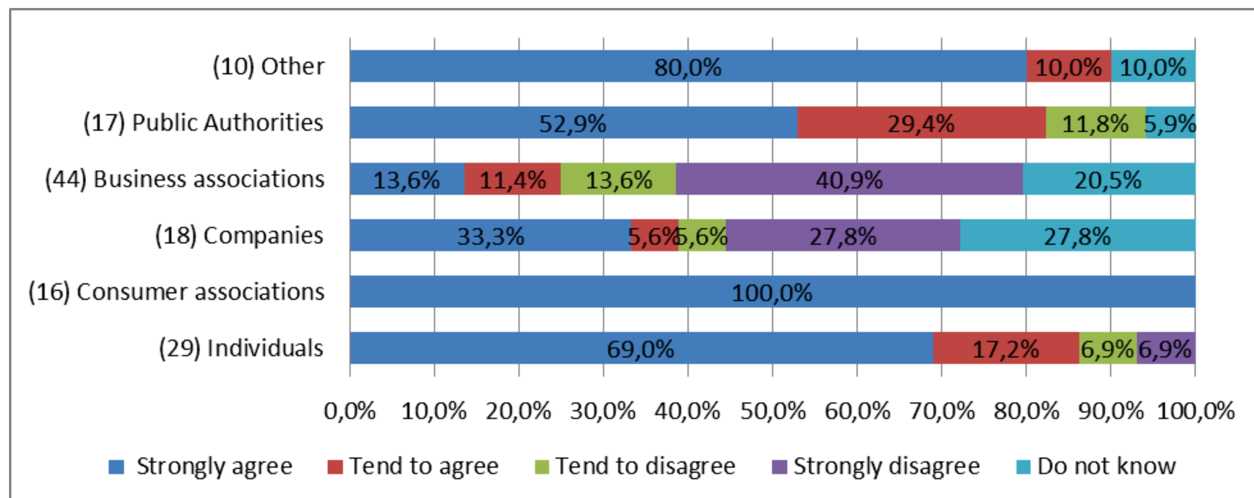
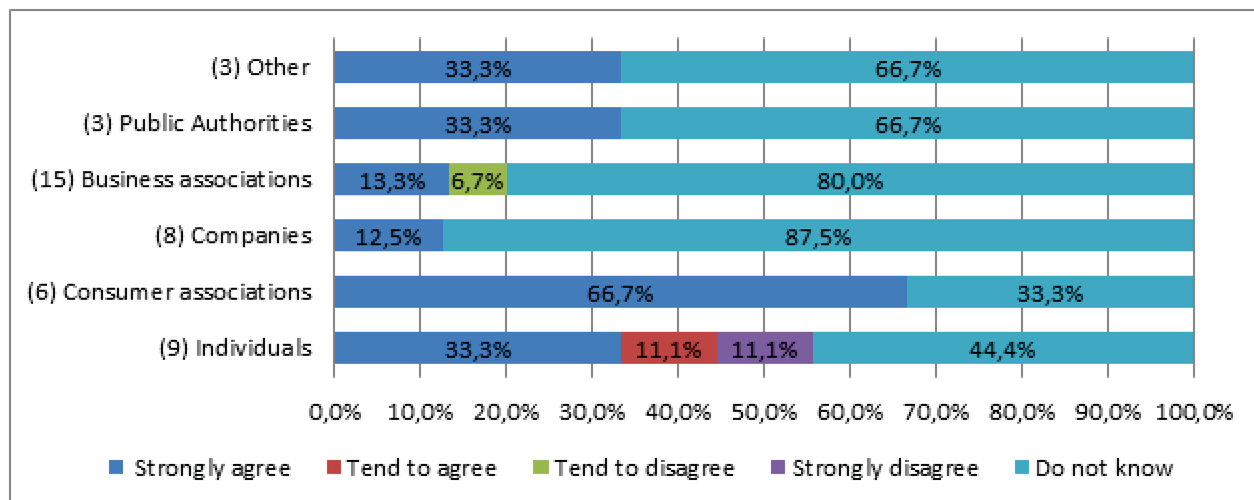
Question 81 (134 responses) "In your opinion, should consumers benefit from the rights listed below when using "free" online services?: The 14-day right of withdrawal (possibility to cancel the contract)".

Figure 8: should consumers have the right of withdrawal for "free" digital services



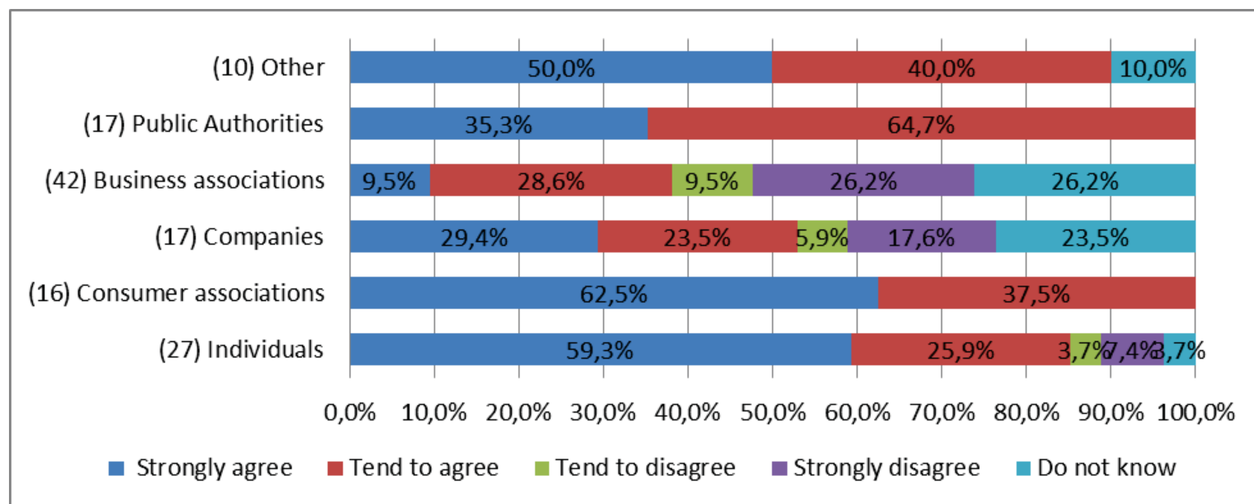
Question 81 (44 responses) "In your opinion, should consumers benefit from the rights listed below when using "free" online services?: Other".

Figure 9: should consumers have other rights for "free" digital services



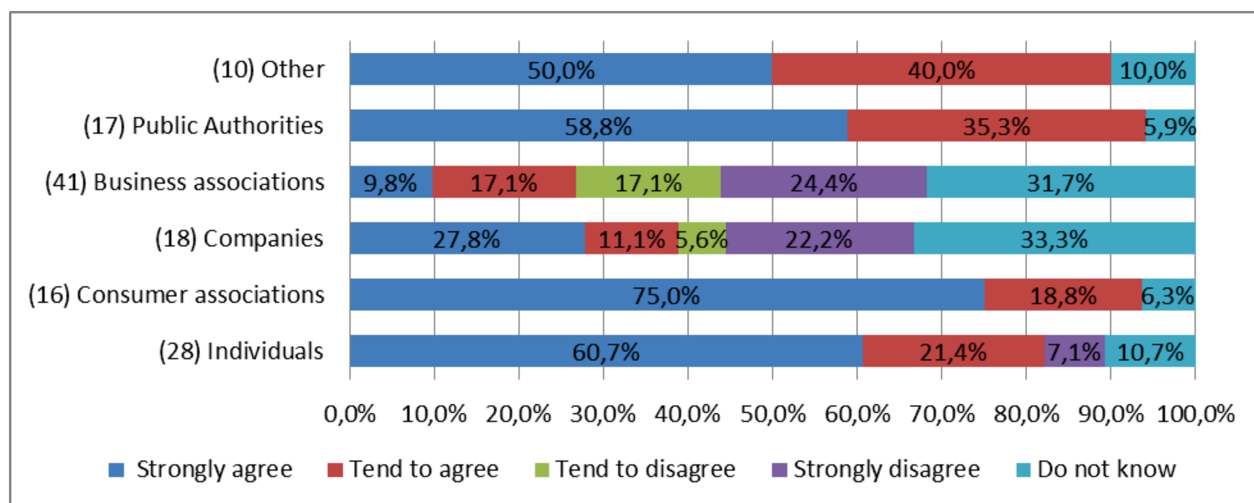
Question 83 (129 responses) "Why would it be important that consumers have a right to pre-contractual information for "free" online services?: To achieve a more level playing field between digital traders using different business models (services provided with or without payment of money)".

Figure 10: impact of pre-contractual information for a more level playing field



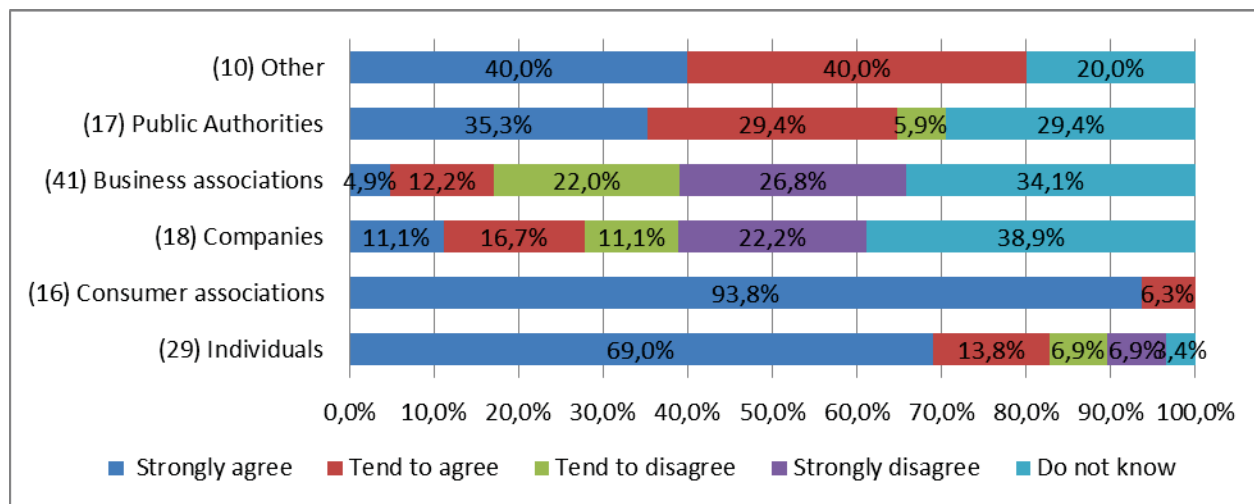
Question 83 (130 responses) "Why would it be important that consumers have a right to pre-contractual information for "free" online services?: To better protect the consumers of services with similar functionalities".

Figure 11: impact of pre-contractual information on consumer protection for services with similar functionalities



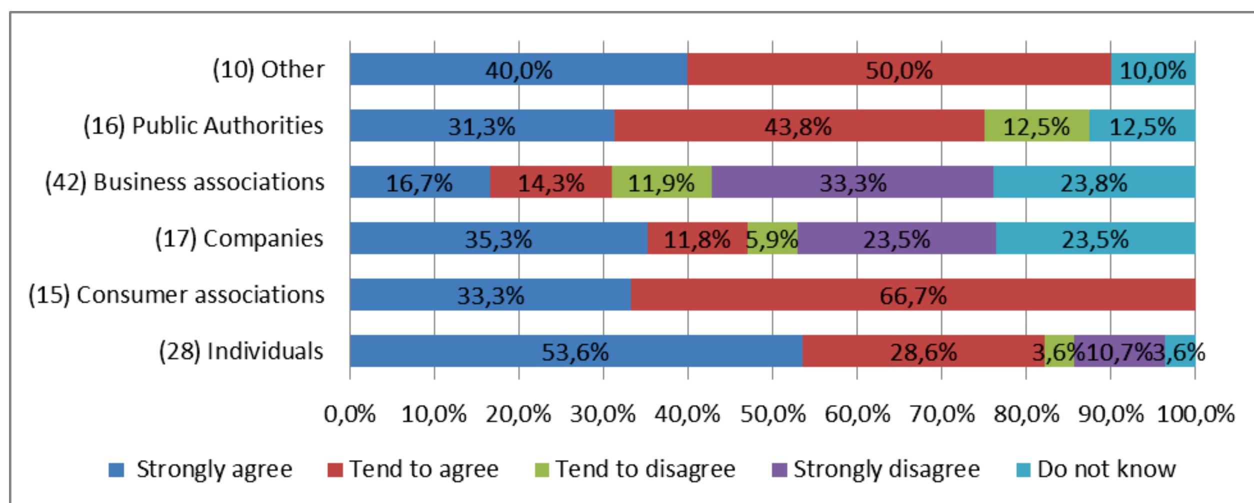
Question 83 (131 responses) "Why would it be important that consumers have a right to pre-contractual information for "free" online services?: To ensure better synergies between EU consumer protection and the new EU personal data protection rules".

Figure 12: impact of pre-contractual information for better synergies with EU consumer protection and data protection rules



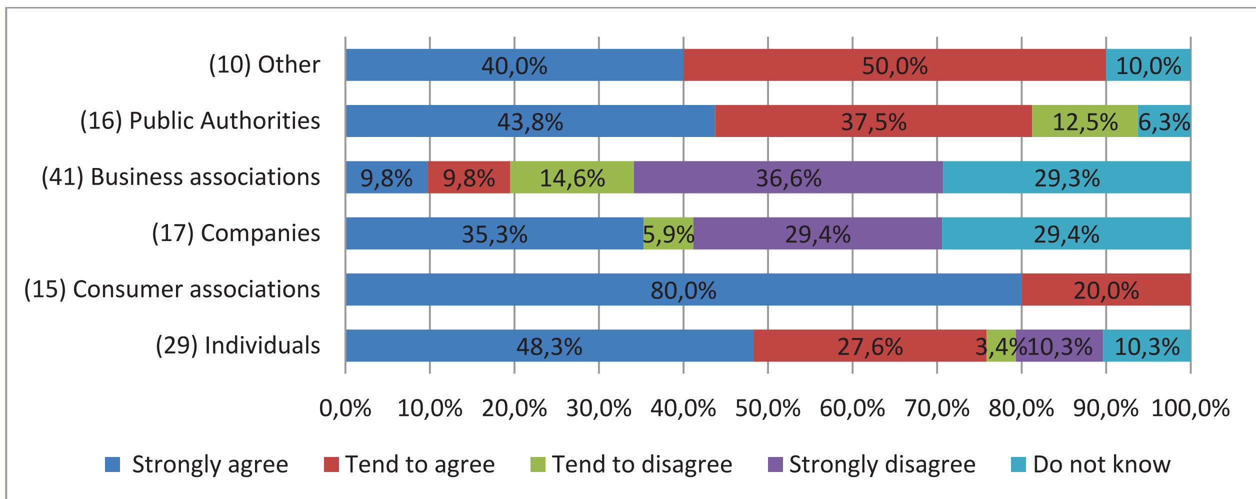
Question 85 (128 responses) "Why would it be important that consumers have a possibility to withdraw from contracts for "free" online services?: To achieve a more level playing field between digital traders using different business models (services provided with or without payment of money)".

Figure 13: impact of right of withdrawal on a more level playing field



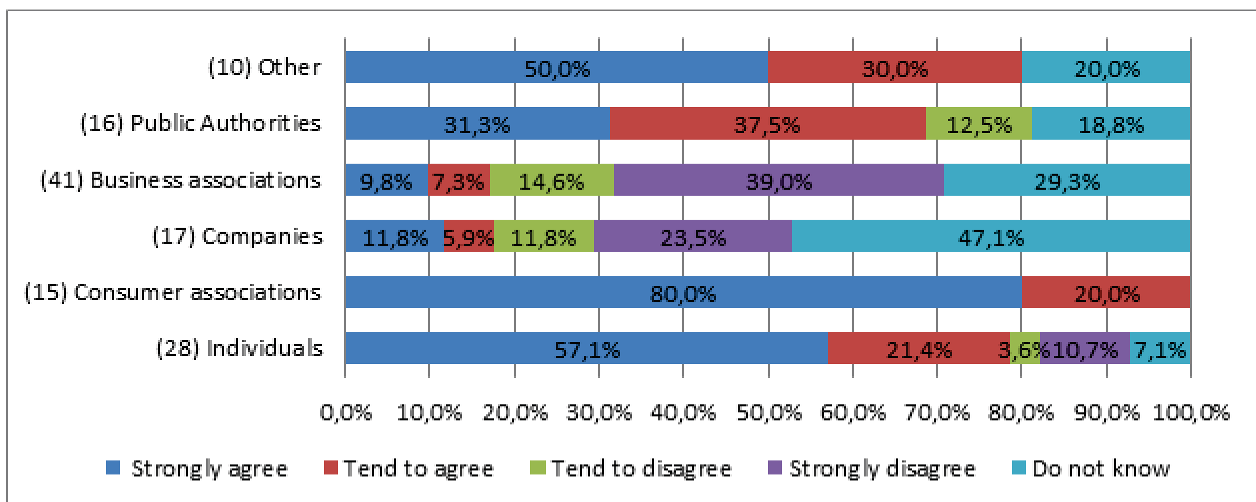
Question 85 (128 responses) "Why would it be important that consumers have a possibility to withdraw from contracts for "free" online services?: To better protect the consumers of services with similar functionalities".

Figure 14: impact of right of withdrawal on consumer protection for services with similar functionalities



Question 85 (127 responses) "Why would it be important that consumers have a possibility to withdraw from contracts for "free" online services?: To ensure better synergies between EU consumer protection and the new EU personal data protection rules".

Figure 15: impact of right of withdrawal for better synergies with EU consumer protection and data protection rules



Question 36 in the public consultation: In your view, is it problematic that consumers do not have the right to be informed (before acquiring the service) about the main features of "free" online services (e.g. on functionality and interoperability with hardware and software)?

[ID142] Yes, it creates harm for consumers including when they use services cross-border

68% of individuals (58 out of 85 respondents) strongly/tend to agree that lack of pre-contractual information is problematic and creates harm when using "free" digital services cross-border; similar percentage applies for lack of a withdrawal right: 66% of individuals (57 out of 86 respondents) strongly/tend to agree this being problematic.

[ID143] Yes, it discourages consumers from acquiring such online services

24 out of 27 responding consumer authorities strongly/tend to agree that lack of pre-contractual information discourage consumers from acquiring "free" digital services.

Question 40 in the public consultation: In your view, is it problematic that consumers do not have the right to cancel "free" online services within 14 days?

[ID210] Yes, it creates harm for consumers including when they use services cross-border.

66% of individuals (57 out of 86 respondents) strongly/tend to agree.

[ID211] Yes, it discourages consumers from acquiring such online services

20 out of 27 responding consumer authorities strongly/tend to agree that lack of right of withdrawal discourage consumers from acquiring "free" digital services.

SME panel consultation

Question 3 in section C.3 of the SME panel consultation: How much staff time or other resources does your enterprise need, when entering another EU country's market, for complying with national rules of the other Member State requiring you to give pre- contractual information to consumers and/or enabling them to withdraw from their "free" online service contracts shortly after having concluded the contact (e.g. within 14 days)?

One-off costs: Please estimate the one-off resources you need to invest in order to enter a new EU market, on average per Member State (e.g. checking compliance with national rules and adjusting business practices as a result (e.g. update your website), costs of legal/technical advice).

Regular costs: Please estimate the resources you need to invest on a regular basis to comply with different national rules, on average per country (e.g. handling consumer complaints/ enquiries, monitoring national rules).

Note: Please indicate staff time in working days, whereby 1 working day = 8 hours of staff time. Please do not consider staff time for translation. If no staff time is involved, indicate ‘0’

Summary of responses:

Costs have been obtained by converting full time equivalents using the standard cost model and the second highest ISCO level (ISCO 2 professionals), adding pecuniary costs estimates:

One-off costs [ID2651 ID2652] pre-contractual information + right of withdrawal

Size class	Range of estimated annual costs in Euro (median/mode)	Number of responses
Micro	0 - 48 000 (0/0)	21
Small	0 – 7 500 (1 146/0)	6
Medium	N/A*	2
Large	N/A	0
SMEs	0 - 48 000 (0/0)	29

Note: (*) 2 estimates were received in this category (EUR 0 and 299 respectively

Annual regular/running costs [ID2661 ID2662] pre-contractual information + right of withdrawal

Size class	Range of estimated resources	Number of

	in Euro (median/mode)	responses
Micro	0 – 20 000 (0/0)	21
Small	0 – 5 782 (1 250/0)	6
Medium	N/A*	2
Large	N/A	0
SMEs	0 – 20 000 (0/0)	29

Note: (*) 2 estimates were received in this category (EUR 0 and 299 respectively)

Question 5 in section C.3 of the SME panel consultation: ID275] If a new EU rule was introduced requiring you to give pre-contractual information to consumers about "free" online service contracts, would this have an impact on your enterprise's decision to enter other EU markets?

48,3% of SMEs operating online (B2C) consider that future costs from pre-contractual information requirements would not have an impact on their decision to enter other EU markets (28 out of 58 respondents).

Question 8 in section C.3 of the SME panel consultation: [ID298] If a new EU rule was introduced to extend the right of withdrawal to "free" online services in all Member States (i.e. consumers would be able to cancel, for any reason, such "free" contracts within 14 days), would this have an impact on your enterprise's decision to enter other EU markets?

44.7% of SMEs operating online (B2C) consider that future costs from a right of withdrawal would not have an impact on their decision to enter other EU markets (21 out of 47 respondents).

Question 1b. in the SME panel consultation: What are your enterprise's estimated losses related to the previously mentioned obligations?:

- Obligation to accept the return of goods bought online which consumers have used more than what they could have done in a brick and mortar shop (e.g. to check the size), thus requiring you to calculate the diminished value of the used good, to resell it as second-hand good and/or to dispose of it as waste.

- Obligation to reimburse the consumer without having the possibility to inspect the returned goods as soon as the consumer has supplied evidence of having sent them back (e.g. goods were never returned back)

Summary of responses:

Costs have been obtained by converting full time equivalents using the standard cost model and the second highest ISCO level (ISCO 2 professionals), adding pecuniary costs estimates:

[ID1811 ID1812] **Obligation to accept the return of goods bought online:**

size class	Range of estimated annual losses in Euro (median/mode)	Number of responses
Micro	0 – 13 500 (50/0)	22
Small	0 – 12 000 (550/0)	6
Medium	0 – 1 000 (0/0)	3
Large	N/A*	2

SMEs	0-13 500 (100/0)	31

Note: (*) Less than three estimates were received in this category

[ID1821 ID1822] **Obligation to reimburse the consumer:**

size class	Range of estimated annual losses in Euro (median/mode)	Number of responses
Micro	0 – 10 000 (0/0)	22
Small	0 – 4 000 (50/0)	4
Medium	0 – 10 000 (0/0)	5
Large	N/A*	1
SMEs	0 - 10 000 (0/0)	31

Note: (*) Less than three estimates were received in this category

Annex 12: Additional data on information requirements

Figure 1: Consumers' views of the redundancy of UCPD information requirements (behavioural experiment)[39]

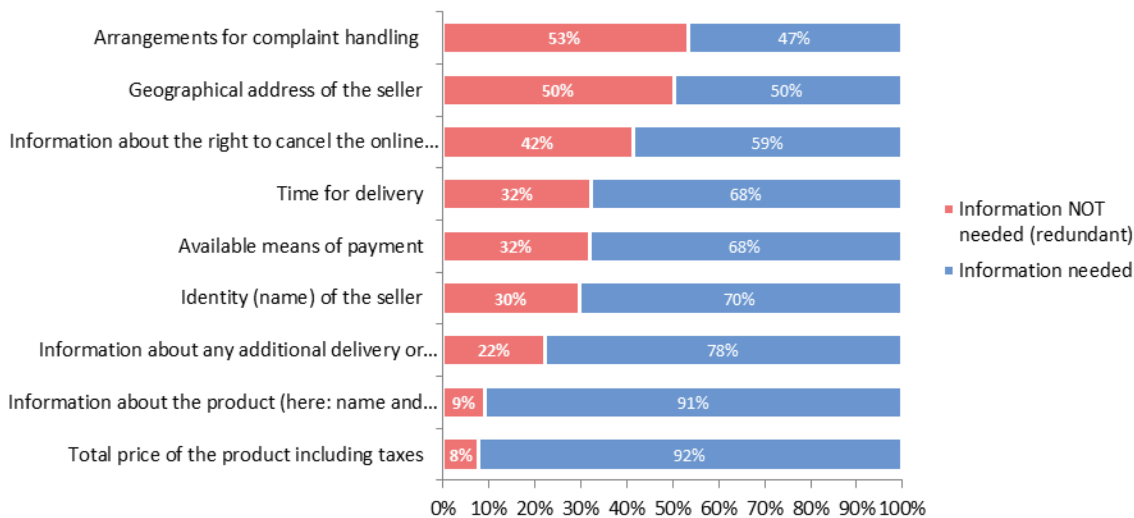
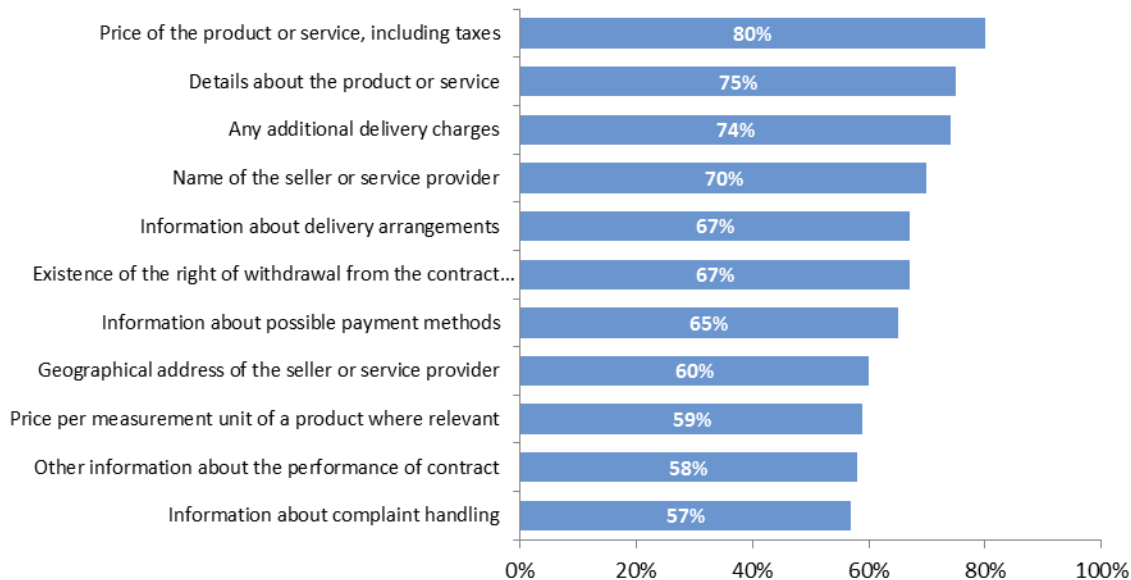


Figure 2: Consumers' views on the importance of information presented in advertisement (respondents considering information as (important' or 'very important'))[40].



Question 162 in the public consultation: Currently, traders are required to provide the following information to consumers at the advertising stage and at the stage before the actual purchase. Do you agree that the following information is necessary already at the advertising stage even though the consumer will also receive this information at a later stage?:

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[39] Behavioural experiment for the Fitness Check. For details see Fitness Check report, p. 65 – 67.

[40] Consumer survey for the Fitness Check, question: '*When you see an online advertisement or advertisement on a poster for a good or a service, how important is it for you to receive the following information already in the advertisement? Note that you will receive all the same and even more information about the product and contract terms when actually visiting the (online) shop concerned*'. For details see Fitness Check report, p. 65 – 67.

Most of the responding business associations considered that these two information elements are not needed at the advertising stage (35 out of 51 regarding the geographical address of the trader and 42 out of 51 respondents regarding the complaint handling). Most of the responding public authorities (11 out of 18) agreed that information about the complaint handling is not needed at the advertising stage. In contrast, a majority of them (13 out of 18) considered the geographical address of the trader as necessary also at the advertising stage. Almost all consumer associations replied in the public consultation that both information elements are required at the advertising stage (16 out of 16 for the geographical address, 15 out of 16 for the complaint handling). 9 of 15 SMEs agreed that information about the geographical address is necessary already at advertising stage but only 2 considered necessary the information about the complaint handling.

Question 103 in the public consultation: Under the Consumer Rights Directive, the fax number and the email address – both if available - are listed as information that must be provided to the consumer before conclusion of the contract ("pre-contractual information obligation"). In view of technological developments, which of the following communication means are for you most relevant when communicating with consumers/traders?:

No business association and only three consumer associations and two public authorities considered fax as a relevant means of communication. In contrast, web-based means of communication were considered by all these stakeholder categories nearly as relevant as e-mail communications. Specifically, the following number of respondents considered these means of communication as relevant: consumer associations – 15 email and 13 web-based; business associations – 40 email and 30 web-based; public authorities – 14 email and 10 web-based. As regards companies, among the 8 responding large companies all considered as relevant web-based tools, 7 chose email, 4 - social media whereas no one chose fax. Among the 15 SME respondents, 14 chose email, 7 – web-based tools, 2 – social media, and 6 – fax.

Annex 13: Additional data on rules on the right to withdraw

Question 1 in section C.1 of the SME panel consultation: Over the last two years, has your enterprise faced unnecessary and/or disproportionate burdens due to the following obligations related to the right of withdrawal (right for the consumer to cancel the contract within 14 days)? 1) Obligation to accept the return of goods bought online which consumers have used more than what they could have done in a brick and mortar shop (e.g. to check the size), thus requiring you to calculate the diminished value of the used good, to resell it as second-hand good and/or to dispose of it as waste); 2) Obligation to reimburse the consumer without having the possibility to inspect the returned goods as soon as the consumer has supplied evidence of having sent them back.

Significant share of respondents selling to consumers online replied that they face disproportionate burden. In particular, the majority of SMEs selling to consumers online replied that they never faced disproportionate burden related to the legal obligation to accept the return of "unduly tested goods" (52%, i.e. 51 out of 99 respondents) or to reimburse the consumer without having the possibility to inspect the returned goods (60%, i.e. 58 out of 97 respondents). Few respondents have 'often' faced disproportionate burden, 4% (4 out of 99 respondents) for used goods, and 5% (5 out of 97 respondents) for early reimbursement.

Question 148 in the public consultation: Do you consider that traders face unnecessary and/or disproportionate burden due to the following obligations related to the right of withdrawal? 1) Obligation to accept the return of goods bought online which consumers have used more than what they could have done in a brick and mortar shop (thus requiring the trader to calculate the diminished value of the used good, to resell it as second-hand goods and/or to dispose of it as waste); 2) Obligation to reimburse the consumer without having the possibility to inspect the returned goods as soon as the consumer has supplied evidence of having sent them back.

Only 16 out of 30 consumer associations replied to these questions. 7 of them acknowledged that the right of withdrawal for unduly tested goods creates disproportionate/unnecessary burden for traders to 'a large' or 'some extent' and 6 replied the same in relation to the early reimbursement obligation. As regards public authorities, 10 out of the 16 agreed that traders may experience burden to 'a large' or 'some extent' for both the return of "unduly tested goods" and "early reimbursement".

In the public consultation, out of the 94 online companies replying to the questions on the right of withdrawal for unduly tested goods, 58% (55 respondents) replied "do not know" to whether they had experienced significant problems to accept the return of such goods. Out of the 91 online companies replying to whether they had experienced significant problems due to the "early reimbursement", 57% (52 respondents) replied "do not know". Around 35% of them[41] declared having experienced significant problems at least 'once'[42]. This is also true for small or micro enterprises operating online: around 34-37% of them[43] replied they had experienced significant problems at least 'once'.

[41] 34 out of the 94 respondents for the unduly tested goods, and 31 out of the 91 respondents for early reimbursement.

[42] Respectively 34% (32 companies) 'often' or 'a few times' for used goods, and 32% (29 companies) 'often' or 'a few times' for early reimbursement. Only two companies experienced such problems 'once'.

[43] 24 out of the 64 responding SMEs for the unduly tested goods and 21 out of the 62 responding SMEs for early reimbursement.

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In the public consultation 10 out of the 16 responding authorities[44] agree that traders may experience burden to 'a large' or 'some extent' for both the return of "unduly tested goods" and "early reimbursement".

However, very few respondents provided quantitative data/estimates. As regards the share of returned used goods, 12 respondents (businesses selling online, two individuals and a national business association) indicated that 20% of goods are "unduly tested" in proportion to all returned goods (median value). At the same time, one should underline that most consumer associations (14 out of the 15 respondents), Member States authorities (12 out of the 16 respondents) and 'others' category (5 out of the 8 respondents) consider the right of withdrawal for "unduly tested goods" and the right to early reimbursement are 'rather'[45] or 'very important'.[46]

Two out of the six submissions received by various stakeholders in the framework of the Refit Platform of the European Commission referred to the CRD rules on the exercise of the right of withdrawal for goods use more than allowed. In particular, the Danish Business Forum pointed to the need to investigate on the CRD rules in question to make it sure that the Directive does not impose unnecessary or disproportionate burdens on businesses, whereas the Detailhandel Nederland considers further clarification on these rules necessary. Overall, the Government group shared the conclusions of the Commission in the CRD Evaluation and whilst one Member State opposed to restricting the right of withdrawal of the consumer, the other contributing Member States supported the Commission's initiative to introduce possible targeted amendments to the rules on the right of withdrawal, if the burden on traders is proved to be disproportionate. In particular, in the opinion issued on 23 November 2017 the REFIT Platform welcomed the initiative by the Commission to analyse possible targeted legislative changes in view of the findings from the CRD evaluation. [47]

[44] Authorities from the following countries: Germany, Romania, United Kingdom, Czech Republic, Netherlands, Luxembourg, Norway, Finland, Cyprus, Italy, Hungary, Austria, Portugal, Latvia.

[45] For 2 consumer associations, 7 MS authorities, 1 of 'other' category right of withdrawal for unduly tested goods is rather important, while 'early reimbursement' is rather important for 1 consumer associations, 8 MS authorities, and 2 of 'other' category.

[46] For 12 consumer associations, 5 MS authorities, 4 of 'other' category Row for unduly tested goods is very important, while 'early reimbursement' is very important for 13 consumer associations, 4 MS authorities, and 4 of 'other' category.

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An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems

Canzian, G., Ferrara, A., Ferraresi, M.

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1 Contents

Acknowledgements 1
Executive summary 2
1 Introduction 3
2 Estimation approach 4
2.1 Influence of penalties intensity on remedies implementation 5
3 Data 6
4 Results and interpretation 8
5 Further extensions 11
List of figures 12
List of tables 13

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Authors

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Executive summary

This technical note reports about the relationship between consumers' behaviour and the implementation of the Unfair Commercial Practices Directive (2005/29/EC), aimed at contrasting illegal processes that can harm consumers' rights and to ease cross-border trading for SMEs and businesses in general.

In particular, it assesses to what extent the implementation by a country of either contractual or extra-contractual remedies is associated to a lower probability – for a consumer – to experience an unfair commercial practice, and how these remedies influence the perception of consumers, measured by several outcomes.

The results presented in the report show a broad range of correlation patterns between the main treatment variable and the outcome of interest. Some particular features of the data do not allow establishing causal relationships between the implementation of remedies and the results of interest.

The results indicate that consumers living in countries where remedies are in place experience a lower probability of both reporting a UCP and experiencing any kind of problem while shopping, when compared to consumers living in other countries without remedies. Moreover, the deterrent effect of remedies is associated with the value of a measure addressing the level of monitoring exerted by Public Administrations on compliance with consumers' legislation; and with the severity of penalties for UCPD infringements envisaged by countries.

Eventually, consumers living in countries where remedies are in place display also a higher likelihood of receiving a satisfying assistance once they complain after having suffered a problem while shopping.

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1 Introduction

Consumers' protection is at the forefront of European Commission interests. In the last decades a number of initiative has been put in place to ensure fair terms of trade for consumers, and among these, it is worth remembering the Unfair Commercial Practice (UCP hereinafter) directive (2005/29/EC).

The analysis presented in this report is related to the implementation of the UCP directive on consumers' behaviour. In particular, it assesses to what extent the implementation by a country of either contractual or extra-contractual remedies is associated to a lower probability – for a consumer – to experience an unfair commercial practice, and how these remedies influence the perception of consumers, measured by several outcomes.

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2 Estimation approach

The UCP directive was adopted to promote consumers' rights protection and to ease cross-border trading for SMEs and businesses in general. In this light, the adoption of either contractual or extra-contractual remedies following the Directive was aimed at lowering the likelihood for consumers to encounter episodes of UCP, while shopping.

For this reason the analysis focuses on three outcomes: the probability of experiencing a UCP; the probability of experiencing any kind of problem when shopping; and the probability of receiving a satisfying assistance after complaining for shopping problems. The outcomes are all expressed in binary (0-1) terms.

The evaluation of how the implementation of remedies is associated to these outcomes is done by means of a Linear Probability Model (LPM). In this framework, the LPM returns estimated coefficients similar to that obtained by using either a logistic or a probabilistic model, but with the main advantage of the coefficients to be interpreted as percentage changes. In particular, the results of the LPM represent the differential in the likelihood of a particular outcome to occur in countries where remedies are in place with respect to countries that do not foresee them.

While the results of the LPM offer a broad range of correlation patterns, they cannot be interpreted as establishing causal relationships between the implementation of remedies and the outcome of interest. Indeed, in this setting, the available data were not enough to tackle all the endogeneity sources that prevent a causal interpretation of the model performed.

Nonetheless, a robust regression analysis has been performed by introducing control variables to account for possible confounding factors related to individual characteristics.

The baseline model is given by the following equation:

$$y_{ic} = \alpha + \beta_1 Remedies_c + \beta_2 PM_c + \beta_3 Remedies_c * PM_c + \gamma X_i + \varepsilon_{ic} \qquad (1)$$

where y_{ic} is one of the outcome variables considered for individual *i* and country *c*; $Remedies_c$ is the main treatment variable that takes the value of one if the country envisages remedies for breaches in consumers' law – either contractual or extra-contractual – and 0 otherwise. PM_c takes into account countries' specific legislative framework, capturing the extent to which retailers in the country believe Public Authorities are effectively monitoring consumer legislation compliance. X_i is a vector of controls that gives reason to possible differences in reporting to the survey related to age, gender, the employment status, the intensity of internet usage, the living area, the mother tongue language (whether it is a European language or not), the number of spoken languages, the degree of financial difficulties experienced, the numerical skills and the degree of self-reported vulnerability with respect to contract terms and offers.

The coefficient of interest is computed deriving equation (1) with respect to the *Remedies* variable, which yields the following expression:

$$\frac{\partial y_{ic}}{\partial Remedies_c} = \beta_1 + \beta_3 * \ PM_C$$

thus, the influence of remedies is the result of the linear combination of the two estimated coefficients, β_1 and β_3, computed for different levels of Public Monitoring. In particular, the combination is evaluated at minimum, mean, median and maximum values of PM.

2.1 Influence of penalties intensity on remedies implementation

European countries envisage the possibility of applying penalties for breaches in consumer protection legislation. The level of penalties is highly heterogeneous across countries. In order to

control for possible contemporaneous effects of remedies and penalties[48] implementation, a different specification of the previous model has been considered:

$$y_{ic} = \alpha + \beta_1 Remedies_c + \beta_2 Penalties_c + \beta_3 Remedies_c * Penalties_c + \beta_4 PM_c + \gamma X_i + \varepsilon_{ic} \qquad (2)$$

where $Penalties_c$ is a categorical variable taking on values ranging from 0 to 3, according to the intensity of sanctions.

As before, the coefficient of interest is computed deriving equation (2) with respect to the *Remedies* variable, which yields the following expression:

$$\frac{\partial y}{\partial Remedies} = \beta_1 + \beta_3 * Penalties$$

The influence of remedies is then evaluated for each level taken by the $Penalties$ variable.

[48] Please note that remedies and penalties are two different legal provisions.

3 Data

The analysis is mainly based on individual consumer data collected in 2017 by the survey on Consumers' attitudes towards cross-border trade and consumer protection (SCA hereinafter)[49]. On the other hand, the information about the implementation of remedies and penalties in each EU country has been provided by DG JUST.03.

As already mentioned, the study focuses on three main outcomes. All of them have been defined on the basis of the information contained in the SCA.

The "probability of experiencing a UCP in domestic countries" is a dummy variable taking the value of one if the consumer has experienced at least one UCP in the last 12 months among those listed in the submitted question (Q13). To focus on domestic UCPs, only answers to the option "Yes, with retailers or service providers located in our (domestic) country" have been considered.

As for the "probability of experiencing a problem" outcome, the variable is based on the question "In the past 12 months, have you experienced any problems when buying or using any goods where you thought you had a legitimate cause for complaint?" (Q9), and it takes the value of one when consumers declare either to have experienced the problem and to have taken action to solve it or to have experienced a problem but to have not taken any action to solve it; 0 otherwise.

The "probability of receiving a satisfying assistance from retailers after having experienced a problem" is referred to the question "In general, how satisfied or dissatisfied were you with the way your complaints were dealt with by the retailer or service provider?" (Q11). The question targets a subsample of the respondents, namely those who declared to have suffered a problem and to have tried to solve it directly referring to the retailer. It takes the value of one if the result of the complaint very satisfied or fairly satisfied the consumer and 0 otherwise.

The country level variable accounting for consumer legislation compliance is derived from the 2016 edition of the survey on Retailers' attitude towards cross-border trade and consumer protection[50]. It is given by the fraction of retailers that strongly agree or agree with the statement "the Public Authorities actively monitor and insure compliance with consumer legislation in your sector".

As already mentioned, a number of additional control variables have been introduced. The age of the consumer when the interview took place can have had an impact on both the willingness to respond to the questionnaire and to the likelihood of reporting UCP experienced. Indeed, it can be argued that the younger, being in general more educated and more keen to ensure their rights are met, are more likely to detect and report UCPs. In order to control for this, an "age" variable has been introduced that recodes consumers' age into 3 main categories: those aged between 18 and 34; those aged between 34 and 54 and those older than 55 years.
Following the same line of reasoning, there could be differences in the likelihood of reporting problems or in the evaluation of the assistance received between men and women. These possible differences are accounted through a dummy variable taking value 1 if the consumer is a female and 0 if he is a male.

[49] See the report "Consumers' attitudes towards cross-border trade and consumer protection 2016" (http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/survey_consumers_retailers/index_en.htm) for a detailed description of the Survey and the survey methodology implemented.
[50] http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/survey_consumers_retailers/index_en.htm

Being unemployed or being a white collar could entail different shopping behaviours, and, eventually, different assessment of UCPs or the assistance received. For this reason, regressions are made robust controlling for the employment status of the respondent. In particular, it has been described according to 7 categories: i) self-employed; ii) white collar; iii) blue collar; iv) unemployed; v) seeking a job; vi) student; vii) retired.
The likelihood to report UCPs could be related to the understanding of the terms of sale by the consumer. An individual whose mother tongue is the one of the country where she lives, will have a better understanding of the terms of sale and would have less probability to experience and report a UCP. The analysis controls for this through a dummy variable equals to 1 when the consumer's mother tongue is an official language of the home country and 0 otherwise. Apart from the mother tongue language, consumers can consider the terms of sale to be so complex that they feel vulnerable when making the purchase: it can be argued that the more vulnerable they feel, the more likely they will experience and report a UCP. In order to account for this effect, the model has been enriched with a variable capturing consumers' self-reported degree of vulnerability. The latter is coded into three categories capturing the degree of vulnerability, namely "Very vulnerable", "Somewhat vulnerable" and "Not vulnerable".

The degree of vulnerability could be influenced by several factors. In principle, the higher the problem solving ability of a consumer, the lower would be the likelihood for him to be exposed to UCPs. The SCA offers two variables to be used in the analysis as proxies for the problem solving ability of the consumers. First, the survey accounts for the number of spoken languages by the consumer (cardinal variable taking values from 1 up to 4); secondly, it evaluates the numerical skills of the respondent through a short numerical test, and it categorised them into a variable whose values range from 1 ("High skills") to 3 ("Low").

Another factor that might affect consumers' purchasing behaviour and experiences is the intensity of internet usage. Given the multidimensional role of the web, worldwide tool to spread out information and huge marketplace, it influences both the awareness of the consumers on their rights and also the number of commercial transactions they could perform. This is a categorical variable, coded into five levels of intensity of the use of internet: daily, weekly, monthly, hardly ever, never.
The financial position of the consumers matter in determining number and entity of their transactions and the effort put to enforce their rights. In order to account for this, the variable "Degree of financial difficulties" has been introduced. This variable, originally coded into four categories (very difficult, fairly difficult, fairly easy, very easy), has been recoded into a dummy variable equal to 1 if the degree of financial difficulties was fairly easy or easy and 0 otherwise.

Along with this more personally related aspects, a variable accounting for the degree of urbanization of the living are has been included. The variable "living area" distinguishes three categories: rural area, small town, large town.

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4 Results and interpretation

When looking at the influence of remedies implementation on the likelihood of experiencing UCP, consumers in countries where remedies are in place experience a 3.99% lower probability of experiencing a UCP with respect to consumers living in other countries (Table 1). Table 2 and figure 1 show that the influence of remedies implementation is associated with the level of Public Monitoring. That is to say, the deterrent effect of remedies on the likelihood of experiencing UCP changes accordingly to the value of the Public Monitoring. In particular, for the minimum level of Public Monitoring, there is no deterrent effect of remedies on the probability of experiencing UCP (the coefficient is positive and statistically significant), while the effects become negative and significant for any levels of Public Monitoring equal or higher than its median value.

Table 1. Baseline coefficient of the "remedies" variable on the likelihood of experiencing at least one UCP in the domestic country. Percentage value.

Baseline coefficient of the remedies variable	
Remedies	-3.99481***
	(0.008647)

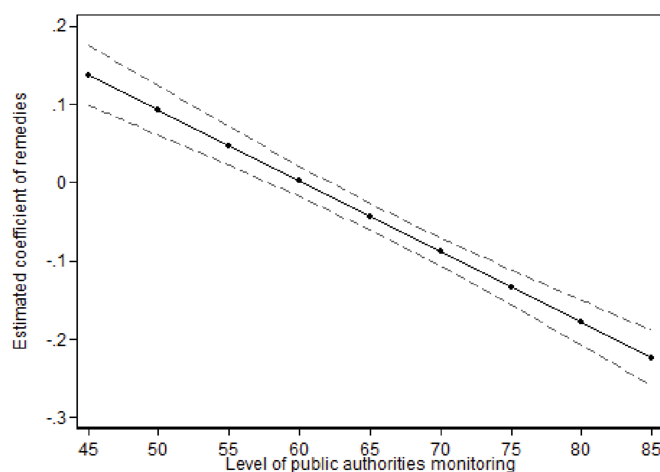
Source: own calculations- LPM regression, robust standard errors in parenthesis.
*** p<0.01, ** p<0.05, * p<0.1

Table 2. Baseline coefficient of the "remedies" variable at different levels (minimum, median, maximum) of "Public Monitoring on Consumer Legislation". Percentage values.

Baseline coefficient of the remedies variable for different values of PM	
Remedies - PM (min level)	15.07004***
	(0.02064)
Remedies - PM (median level)	-5.57152***
	(0.008515)
Remedies - PM (max level)	-21.4358***
	(0.017308)

Source: own calculations- LPM regression, robust standard errors in parenthesis.
*** p<0.01, ** p<0.05, * p<0.1

Figure 1. Baseline coefficient of the "remedies" variable at different levels of "Public Monitoring on Consumer Legislation".



Similar results come up assessing the likelihood of experiencing a problem when shopping. For consumers living in countries where remedies are implemented, the probability of experiencing a problem while shopping is 3.15% lower with respect to those living in other countries (Table 3).

Table 3. Baseline coefficient of the "remedies" variable on the likelihood of experiencing a problem while shopping in the domestic country. Percentage value; standard errors in parenthesis

Baseline coefficient of the remedies variable	
Remedies	-3.15081***
	(0.0079546)

Source: own calculations- LPM regression, robust standard errors in parenthesis.
*** p<0.01, ** p<0.05, * p<0.1

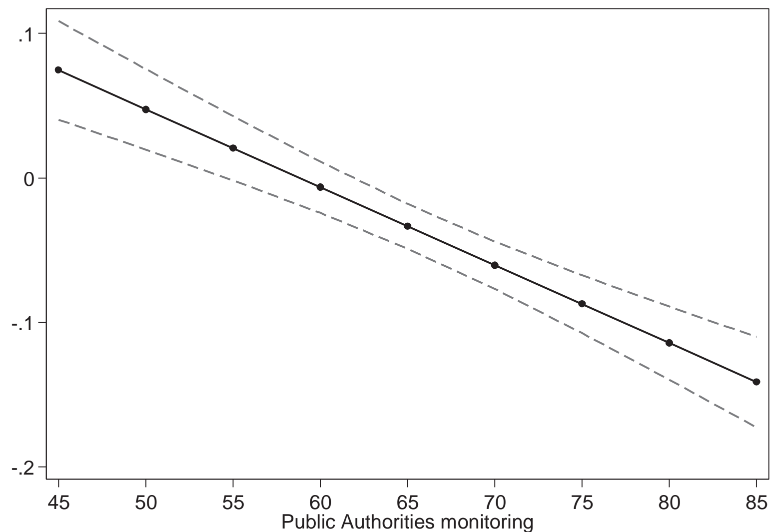
Table 4 and figure 2 confirm the findings on the influence of the level of PM presented in table 1 and figure 1.

Table 4. Baseline coefficient of the "remedies" variable on the likelihood of experiencing a problem while shopping in the domestic country, at different values of "Public Monitoring on Consumer Legislation". Percentage values.

Baseline coefficient of the remedies variable for different values of PM	
Remedies - PM (min level)	8.25197***
	(0.0183917)
Remedies - PM (median level)	-4.0984***
	(0.007857)
Remedies - PM (max level)	-13.59039***
	(0.0153349)

Source: own calculations- LPM regression, robust standard errors in parenthesis.
*** p<0.01, ** p<0.05, * p<0.1

Figure 2. Baseline coefficient of the "remedies" variable at different levels of "Public Monitoring on Consumer Legislation".



On average, where remedies are implemented consumers complaining with retailers after encountering a problem have a higher probability (8.7%, statistically significant at 5%) of receiving a satisfying assistance, compared to countries without remedies.

Eventually, regressions estimates presented in table 5, show that in countries foreseeing higher penalties for UCPD infringements, the introduction of remedies is associated with a decrease of the probability to encounter a UCP that is roughly 3 times larger than in countries with medium or lower penalties.

Table 5. Baseline coefficient of the "remedies" variable for each sanction category. Percentage values.

Baseline coefficient of for each sanction category	
Remedies - Low sanctions	-11.92734***
	(0.0186859)
Remedies - Medium sanctions	-9.29867***
	(0.0180855)
Remedies - High sanctions	-29.35719***
	(0.0279084)

Source: own calculations- LPM regression, robust standard errors in parenthesis.
*** p<0.01, ** p<0.05, * p<0.1

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5 Further extensions

As already mentioned in the previous sections, the results of the analysis cannot be interpreted as establishing causal relationships.

A causal interpretation of the results would only be possible by tackling the endogeneity issues. The latter mainly concerns the fact that remedies may have been implemented in those countries that most needed them.

In this specific problem, setting the endogeneity issue can be addressed in three main ways: panel setting, difference-in-differences strategy and synthetic control approach.

The panel framework, exploiting the longitudinal dimension of country level data, allows controlling for country time invariant characteristics by introducing country fixed effects. Even though it could have been possible to collect annual information for all the countries, the same would have not been feasible for the dependent variable since it is constructed from a survey whose methodology has changed throughout time.

The endogeneity problem can also be tackled exploiting the time dimension of the implementation of remedies. In particular, it is possible to compare a pre-existing situation to the one realized after the implementation of remedies, for the countries that implemented remedies and for the countries that did not (differences-in-differences strategy). The implementation of this strategy relies on the common pre-intervention trend assumption for the outcomes of interest (common trend assumption). As a consequence any deviation of the outcome of those implementing remedies from this trend can be imputed to the intervention itself, and can be interpreted as its net effect.

Clearly, researchers would need information on the outcome variable of interest in pre-intervention periods in order to carry out such an analysis. Unfortunately, the survey from which data have been taken has changed several times in the last years, and this poses not only comparability concerns regarding both the outcome variables and the individual variables that can be used as control in the regressions, but also it reduces the time-span for which it is possible to test the common trend assumption.

A different approach is the synthetic control method. The idea on which the method is based is to evaluate the impact of a treatment implemented at the country level using a set of countries – the so-called donor pool – to build a synthetic unit similar as much as possible to the treated one. Longitudinal data concerning both the reference country and the donor pool are needed. In particular, information referred to a moment prior to the intervention is used to build the weighted average of control units that best reproduces the characteristics of the treated country over time. The comparison between the treated unit and the synthetic outcome trends after the implementation of the policy, informs about its net impact. The condition for the method to work is to have sufficient pre- and post-intervention time points for all the countries involved.

In this context the synthetic control method was not feasible. Indeed, most of the countries decided to adopt remedies for breaches in consumers' law only in recent years (around 2014), thus there is no long enough post-treatment information to run the analysis. The only country for which the implementation of the synthetic was feasible is Luxemburg, since remedies were adopted in 2011. However, Luxemburg is a relatively small and peculiar country, thus any conclusion that could have been drawn from the analysis would have been hardly applicable to the rest of Europe.

Finally, an instrumental variable approach could have been implemented. However, the identification of a valid instrument satisfying the exclusion restriction assumption requires long and in-depth analyses.

List of figures

Figure 1. Baseline coefficient of the "remedies" variable at different levels of "Public Monitoring on Consumer Legislation". 9

Figure 2. Baseline coefficient of the "remedies" variable at different levels of "Public Monitoring on Consumer Legislation". 10

List of tables

Table 1. Baseline coefficient of the “remedies” variable on the likelihood of experiencing at least one UCP in the domestic country. Percentage value. 8

Table 2. Baseline coefficient of the “remedies” variable at different levels (minimum, median, maximum) of “Public Monitoring on Consumer Legislation”. Percentage values. 8

Table 3. Baseline coefficient of the “remedies” variable on the likelihood of experiencing a problem while shopping in the domestic country. Percentage value; standard errors in parenthesis 9

Table 4. Baseline coefficient of the “remedies” variable on the likelihood of experiencing a problem while shopping in the domestic country, at different values of “Public Monitoring on Consumer Legislation”. Percentage values. 9

Table 5. Baseline coefficient of the “remedies” variable for each sanction category. Percentage values. 10

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