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COVER NOTE

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| From: | Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director |
| date of receipt: | 4 October 2024 |
| To: | Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union |
| No. Cion doc.: | SEC(2024) 245 FINAL |
| Subject: | RSB OPINION COMMISSION STAFF WORKING DOCUMENT FITNESS CHECK of EU consumer law on digital fairness |

Delegations will find attached document SEC(2024) 245 FINAL.

Encl.: SEC(2024) 245 FINAL



EUROPEAN COMMISSION

Brussels, 3.10.2024
SEC(2024) 245 final

REGULATORY SCRUTINY BOARD OPINION

Fitness check on Consumer Law of Digital Fairness

{SWD(2024) 230 final}
{SWD(2024) 231 final}



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2024)

Opinion

Title: Fitness check on Consumer Law of Digital Fairness

Overall 2nd opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

EU consumer protection laws aim to empower consumers to play an active role and fully benefit from the Digital Single Market. There are concerns that new technologies and data driven practices are used to undermine consumer choice and to influence them to take decisions that go against their interests. The Fitness Check aims to determine whether the existing key horizontal consumer law instruments remain fit for purpose. It covers: Unfair Commercial Practices Directive 2005/29/EC (UCPD); Consumer Rights Directive 2011/83/EU (CRD); Unfair Contract Terms Directive 93/13/EEC (UCTD) as well as the latest changes to these Directives in 2022 by the Modernisation Directive.

(B) Summary of findings

The Board notes the improvements made to the report.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the Lead Service to remedy the following aspects:

- (1) The limitations of the evidence base are not sufficiently reflected in the conclusions. The lessons learned on the need to improve the monitoring and evidence collection processes are not sufficiently developed.
- (2) The approach and assumptions used to estimate cost to business are not sufficiently justified.

This opinion concerns a draft fitness check which may differ from the final version.

Commission européenne, B-1049 Bruxelles - Belgium. Office: BERL 08/010 E-mail: regulatory-scrutiny-board@ec.europa.eu

(C) What to improve

(1) The report should explicitly acknowledge the limitations and uncertainties of the evidence and the sources of the data in the conclusions. The fact that the quantitative analysis is mainly founded on opinion-based data as well as the difficulties in isolating and attributing the impacts directly to the Directives and how this affects the quantitative results should be explained clearly in the main report. Any conclusions stated should not go beyond what is clearly supported by the empirical analysis. In the absence of credible analysis of attribution, the report should refrain from making statements and conclusions that imply that the attribution was established. Given the limitations, the report should also refrain from stating or suggesting that the evidence base is robust. The report should better explain how efficiency can be considered “positive” in light of “limited” effectiveness.

(2) The lessons learned on the need to improve the monitoring and evidence collection processes should be further developed. The report should state what data will be needed to better monitor, assess and demonstrate causality of impacts. Apart from quantitative data, the report should deepen the need assessment of qualitative data, in particular related to the factors impacting low compliance by businesses and insufficient enforcement by relevant authorities. The lessons learned should also reflect the need for a credible baseline in particular regarding indicators in order to allow for monitoring of developments. The need for evidence regarding identified problematic practices should be better developed.

(3) The report should further explain and better justify the approach to the estimation of the cost to business. It should be clear how companies surveyed have been selected and to what extent it is possible to extrapolate the survey results to the whole digital economy considering its high heterogeneity. The approach to extrapolation should be better developed in particular given that the majority of companies indicate low costs and considering the resources deployed by the companies. The report should justify all the assumptions related to business-as-usual activities which seem to be in contradiction to the business stakeholder evidence. Given the stability of EU consumer law and the absence of reporting requirements, the report should also better explain why companies need to check compliance with consumer Directives annually.

(4) Given that the analysis of the enforcement deficit rests mainly on the Consumer Protection Cooperation network, the report should also assess the links between national consumer protection practice and capacities and the effectiveness of the Directives. The report should analyse the costs to national authorities in particular related to inspections and complaint handling.

(5) Regarding the estimation of consumer detriment, the report should better explain the limitations regarding the use of perceived problems (opinion data) as a proxy for complaint incidence rate.

(D) Conclusion

The Lead Service should revise the report before launching the interservice consultation.

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| Full title | Fitness Check on Consumer Law of Digital Fairness |
| Reference number | PLAN/2022/561 |
| Submitted to RSB on | 1 July 2024 |
| Date of RSB meeting | Written procedure |



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2024)

Opinion

Title: Fitness check on consumer law of digital fairness

Overall opinion: NEGATIVE

(A) Policy context

EU consumer protection laws aim to empower consumers to play an active role and fully benefit from the Digital Single Market. There are concerns that new technologies and data-driven practices are used to undermine consumer choice and to influence them to take decisions that go against their interests.

The Fitness Check aims to determine whether the existing key horizontal consumer law instruments remain fit for purpose. It covers: Unfair Commercial Practices Directive 2005/29/EC (UCPD); Consumer Rights Directive 2011/83/EU (CRD); Unfair Contract Terms Directive 93/13/EEC (UCTD) as well as the latest changes to these Directives in 2022 by the Modernisation Directive.

(B) Key issues

The Board notes the additional information provided and commitments to make changes to the report.

However, the Board gives a negative opinion because the report contains the following serious shortcomings:

- (1) The report is not sufficiently clear about the robustness of the evidence base. Its methodological approach has significant shortcomings in terms of points of comparison and attribution.
- (2) The report is not clear on the existence and size of the gap between existing consumer legislation and the digital acquis nor on the scale and development of problems identified. The report does not sufficiently identify and analyse enforcement deficits and does not address the role that Member States national rules and their administrative capacities play.
- (3) The impacts of consumer law on businesses and SMEs are not sufficiently clear. Cost estimates and the simplification potential are not sufficiently addressed.

The Board considers that in its present form, this report does not provide appropriate input for any forthcoming related impact assessment/policy initiative.

This opinion concerns a draft fitness check which may differ from the final version.

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(C) What to improve

- (1) The description of the evidence base requires significant improvement so that it is clear how robust and representative the evidence is. In this respect, the report should clarify what data is statistically representative and how it was analytically quality assured. The representativeness of the pre-established large-scale panel used for the consumer survey should be better explained. The report should critically assess the limitations and uncertainties of the evidence and the sources of the data, in particular perception based, and how this may affect the quantitative results. Any quantitative analysis and reporting of non-representative data based on small samples should be done with utmost caution and only where appropriate. It should include and compare the perception based data with other types of data, such as complaints data on revealed preferences in actual transactions.
- (2) The report should clearly identify, with concrete evidence where already available, the scale of the remaining gap between the consumer legislation covered by the report and the evolving digital acquis. Where there are gaps in evidence due to the evolving situation, this should be explicitly mentioned, along with the need to undertake further analysis in view of potential new initiatives. It should explain to what extent new obligations imposed under the Digital Markets, Digital Services and other recent Acts may tackle part of the emerging problematic digital practices faced by consumers, for instance via obligations imposed on major gatekeeper platforms. In relevant situations, the report should clearly delineate and analyse the scale of the “residual” problem, e.g., the scale of the problem outside of the major gatekeeper platforms.
- (3) The report should significantly improve the analysis so that it is clear what has happened in the evaluation period (2017-2023). It should identify appropriate points of comparison and explicitly reference how much change has happened relative to those points. It should be clear how much change can be attributed directly to the three Directives in scope and to what extent this change meets the original expectations.
- (4) The estimates of the consumer detriment should be better explained and evidenced including the key assumptions (in particular the assumption of the 30% of EU consumers experienced problematic practices in 2023). The estimated consumer detriment should not be regarded as a cost to consumers due to the legislation, but the analysis should show whether it has increased or decreased (and by how much) in the evaluation period relative to the point of comparison.
- (5) The report should be more explicit on the relative scale and the relative importance of the problems. It should place the estimates of the consumer detriment and the number of consumer complaints in the right context. In doing so, it should assess the scale of the problem relative to the overall consumer spending in the digital economy so that the magnitude of problematic consumer transactions becomes more apparent. It should demonstrate how the problem has evolved over time, for instance, by comparing the growth rate of the e-commerce / services sectors with the share of consumer complaints.
- (6) The report needs to better address the issues of unavailability of robust evidence based on quantitative non-opinion data. Regarding emerging problems, the report should better analyse the severity/harm, e.g. related to mental health and other aspects of consumer detriment beyond direct financial losses. In case relevant data or evidence is not available the report should clearly outline the evidence gaps and could propose steps towards collecting the needed evidence.
- (7) The report should analyse and take into account differences between Member States. It should explain whether the consumer survey results, and other stakeholder feedback showed any significant differences regarding the relative scale of the explored problematic practice and if so, explain the reasons behind (e.g., differences in the national consumer protection

frameworks) and how this may affect the attribution of the observed problematic practices to the three directives in scope.

(8) The report should clarify to what extent insufficient enforcement reduces the effectiveness of existing regulation, including by being clearer on what insufficient enforcement in practice means and what should be considered as sufficient enforcement. In this context, the report should better assess to what extent enforcement issues with the current directives are linked to the administrative capacity issues and whether there are difference across the Member States.

(9) The report should significantly deepen the analysis on the competitiveness and SME dimension. It should explain whether EU-based service providers, in particular SMEs, may experience a competitive disadvantage compared to their third-country competitors. It should assess whether the existing directives have affected the capacity of business to innovate, when compared to practices observed outside the EU.

(10) The cost estimates should be clearly identified indicating the methods used. The simplification potential should be identified precisely. Stakeholder views should be presented in a more balanced manner throughout the report.

(11) The conclusions and lessons learned sections should be revised to accurately and objectively reflect the amended analysis fully taking into account limited robustness of underlying evidence. Overall, the report should refrain from statements about concrete measures to be taken as this is not the purpose of a Fitness Check but rather for a future impact assessment. The report should bring out more clearly lessons learned regarding the evolving EU regulatory landscape in the digital area.

Some more technical comments have been sent directly to the author Service.

(D) Conclusion

The lead Service must revise the report before launching the interservice consultation.

The lead Service may resubmit to the Board a revised version of this report.

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| Full title | Fitness Check of consumer law on digital fairness |
| Reference number | PLAN/2022/561 |
| Submitted to RSB on | 25 March 2024 |
| Date of RSB meeting | 24 April 2024 |