

EC consultation for the Fitness Check of EU consumer and marketing law

A EURELECTRIC response paper

September 2016

EURELECTRIC is the voice of the electricity industry in Europe.

We speak for more than 3,500 companies in power generation, distribution, and supply.

We Stand For:

Carbon-neutral electricity by 2050

We have committed to making Europe's electricity cleaner. To deliver, we need to make use of **all low-carbon technologies**: more renewables, but also clean coal and gas, and nuclear. Efficient electric technologies in **transport and buildings**, combined with the development of smart grids and a major push in **energy efficiency** play a key role in reducing fossil fuel consumption and making our electricity more sustainable.

Competitive electricity for our customers

We support well-functioning, distortion-free **energy and carbon markets** as the best way to produce electricity and reduce emissions cost-efficiently. Integrated EU-wide electricity and gas markets are also crucial to offer our customers the **full benefits of liberalisation**: they ensure the best use of generation resources, improve **security of supply**, allow full EU-wide competition, and increase **customer choice**.

Continent-wide electricity through a coherent European approach

Europe's energy and climate challenges can only be solved by **European – or even global – policies**, not incoherent national measures. Such policies should complement, not contradict each other: coherent and integrated approaches reduce costs. This will encourage **effective investment** to ensure a sustainable and reliable electricity supply for Europe's businesses and consumers.

EURELECTRIC. Electricity for Europe.

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KEY MESSAGES

- EU consumer and marketing rules have been beneficial to consumers overall. They provide adequate remedies for public authorities in charge of consumer protection.
- At the same time, it is timely to take stock of the changes that are sweeping across Europe's retail markets. We support the comprehensive approach of the EU Consumer and Marketing Law Fitness Check. It is indeed important to look at the relevant directives as a whole, not just individually – and also in line with the sectorial directives to avoid overlaps. We would also have included the Consumer Rights Directive, the Alternative Dispute Resolution Directive, the e-Privacy Directive and the Data protection regulation in the fitness check.
- Where there are problems and obstacles to delivering full protection and benefits of the market to consumers, the first step should be correct implementation of existing legislation. If problems persist in some Member States, solutions should be targeted at those countries.
- In line with the principles of better regulation set out by Vice-President Timmermans, the Commission should measure the costs of regulation and limit EU intervention to the “big” areas where Member States cannot act or need advice and guidance on best practice.
- The main aim of the Consumer and Marketing Law REFIT should be to reduce complexity, red tape and administrative burden, correct inconsistencies between the directives and evaluate the directives in view of recent market and technological developments.
- If the fitness check concludes that there is a need to make legislative amendments, this should be done in a targeted manner to remove the most significant hurdles. Such amendments should aim to simplify existing legislation, not come up with new provisions and regulation. Harmonisation of EU Consumer and Marketing Law would generally benefit companies operating in several member states. Existing tools – such as European Consumer Centres (EEC-NET) could also be promoted.
- Consumer and marketing law should set the legal principles and objectives to be respected by companies doing business with consumers, but not prescribe the means to fulfil these objectives. Uniform models or standards should generally not be imposed as they tend to limit innovation and reduce the flexibility necessary to match various and changing consumer needs. Imposing the same information requirements across all sectors might also be difficult in practice.
- It might not always be clear whether a given commercial practice is legal or not. This is particularly true when legislation is not up-to-date with technological development and changes in consumer behaviour. In any case, only a court or an independent administrative authority should be allowed to impose sanctions on companies, not consumer authorities.
- There should be legally rigorous technique to assess the severity of an infringement and the proportionality of a sanction. Turnover might not be the most effective way to set a sanction, as it is not always representative of the ability of a company to pay a fine. In any case, sanctions should be the last instrument to enforce consumer protection legislation. Careful consideration should be given to remedies which are available to consumers in contract law and alternative dispute resolution mechanisms.

Full questionnaire

In your view, to what extent are the following EU consumer and marketing rules beneficial to consumers?

	Very beneficial for consumers	Rather beneficial for consumers	Rather not beneficial for consumers	Not beneficial at all for consumers	No Opinion / don't know
Right to be protected against misleading or aggressive commercial practices	X				
Right to get adequate information about the goods and services offered, i.e. the main characteristics, the total price, the delivery time, etc.	X				
Right to get information also about the unit price of goods (i.e. for one kilogramme, one litre etc.)	X				
Right to cancel a contract concluded at a distance within 14 days from the delivery goods or conclusion of a service contract (the 'right of withdrawal')	X				
Right to get information about the functionality and interoperability of digital content		X			
Right to cancel the contract concluded at a distance for the downloading (or streaming) of digital content before its performance begins (the 'right of withdrawal')		X			
Right to be protected against unfair clauses in the "small print" (the 'right to fair standard contract terms ')	X				
Right to have a defective good repaired or replaced for free or to obtain a price reduction or refund during the legal guarantee period (in most EU countries 2 years from delivery; longer in some EU countries)	X				
Right of consumer organisations and public bodies to take legal actions which can stop infringements of consumers' rights (the right to seek injunctions)		X			

	Very beneficial for consumers	Rather beneficial for consumers	Rather not beneficial for consumers	Not beneficial at all for consumers	No Opinion / don't know
Other (please specify in the box below)					

Please explain your reply, including any other consumer right that wish to highlight (optional)

1500 character(s) maximum

The EU consumer and marketing rules have been beneficial to consumers overall. They provide adequate remedies for public authorities in charge of consumer protection.

How effective are the legal actions ("injunctions") taken by consumer organisations and public bodies to stop infringements of consumers' rights in the following economic sectors?

	Very effective	Rather effective	Rather not effective	Not effective at all	No Opinion / don't know
Online provision of goods, services and digital content					
Communications and internet access services					
Financial services					
Passenger transport					
Tourism and package travel					
Energy		X			
Other (please specify in the box below)					

Please explain your reply (optional)

1500 character(s) maximum

The legal actions taken by public authorities have generally been effective to stop infringements of consumers' rights in the energy sector.

In our view, only a court or an independent administrative authority should be allowed to impose sanctions on companies, not consumer authorities.

In order to provide the right assistance to consumers, it is crucial that the staff of consumer organisations has good knowledge of the sector they're dealing with along with the right skills. This is the reason why many energy suppliers provide information and training sessions on key energy topics.

How important are the following problems for protecting the rights of consumers?

	Very important	Rather important	Rather unimportant	Unimportant at all	No opinion / don't know
Consumers don't know/ don't understand their rights	X				
Traders don't know/don't understand consumer protection rules		X			
Traders don't comply with consumer protection rules		X			
Consumer law is too complex	X				
There are significant differences between national consumer protection rules across EU countries		X			
National administrative authorities lack legal powers to enforce consumer rights					X
National authorities responsible for enforcing consumer rights are not active enough					X
Court proceedings are complex / long / costly		X			
Administrative enforcement proceedings are complex / long / costly		X			
Injunctions proceedings are complex / long		X			
Injunctions proceedings are costly		X			
There are significant differences between national rules on injunctions proceedings across EU countries					X
Other (please specify in the box below)					

Please explain your reply, including any other problem that wish to highlight (optional)

1500 character(s) maximum

The problems identified above are all potentially relevant, but they may not necessarily exist in all Member States. Therefore ticking boxes may not always be straightforward.

It would also be important to be able to justify why one ticked a specific box so as to make sure that responses are not misinterpreted. For instance differences between national consumer protection rules can be an issue for companies doing business in several countries. At the same time, some differences can be justified and they are not always a problem per se. What would be more problematic is if regulation in a given country does not properly protect consumers. In that case, one should focus on improving regulation in that country and not necessarily come up with additional EU regulation to address that specific problem.

Similarly, whilst identifying problems is obviously important, it would be even more relevant to try and understand the reasons behind. For instance it is clear that many consumers may not be aware of their rights but the key question is what can be done to alleviate that issue.

Some of the suggested statements – e.g. “traders don't know/don't understand consumer protection rules” – can obviously be a problem for protecting the rights of consumers. At the same time, in most EU countries if a trader doesn't know/doesn't understand consumer protection rules, he will just fail to stay in business.

There is also evidence that regulation is sometimes the cause of consumers' confusion and complaints. For instance, utilities can be obliged by regulation to use specific wording in their communication material which consumers may have difficulty to understand.

How effective for protecting the rights of consumer are self- and co-regulation initiatives by businesses at national or EU level, under which businesses establish standards as to how they deal with consumers (eg. industry trust marks)?

- very effective
- rather effective
- rather not effective
- not at all effective
- no opinion / don't know

Please provide information on any successful self- and co-regulation initiative and describe what makes it successful (optional)

1500 character(s) maximum

Self- and co-regulation initiatives by businesses at national and EU level can take many forms - e.g. Codes of conduct, recommendations, industry trust mark, customer guides, etc. - and can be very effective to protect consumer rights, while giving businesses enough flexibility to innovate and match consumer needs. To give just a few examples:

- In Finland, the standard terms and conditions of supply, sale and distribution of electricity -recommended by Finnish Energy (the trade association for the Finnish energy industries) - have been jointly negotiated by the trade association (and its members), consumer protection authorities and energy authorities. This has ensured that they are balanced, reasonable and very effective.
- At EU level, industry associations EURELECTRIC, Eurogas and CEDEC have co-signed a joint statement on how to improve comparability of energy offers with European consumer organisation BEUC. Several pre-contractual elements were identified as being key to foster comparability of energy offers - namely name and main features (including, where relevant, a clear description of additional services), price (fixed/variable/discounts) and conditions for price changes, contract duration, notice period, termination fee (where relevant), payment method options, and supplier's contact details. The associations recommend that - when presenting a product - these key elements are provided to consumers by suppliers in one place, in a short, easily understandable, prominent and accessible manner, whilst dismissing the idea of a standard template. In this way, consumers are better empowered and protected and suppliers are still able to innovate and keep the flexibility necessary to match changing needs.

We think that National competition authorities and Courts should give due consideration to these self-regulation initiatives.

What is your opinion regarding the following statements?

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
Businesses can trade across the EU easily thanks to the harmonised EU consumer and marketing rules		X			
Businesses are well protected against misleading marketing practices of other businesses		X			
Businesses are well protected against unfair comparative advertising of other businesses		X			

In your view, what are the **benefits for businesses** from complying with EU consumer and marketing law?

- ☒ Consumers whose rights are respected come back
- ☒ Consumers whose rights are respected bring/attract other consumers (by word of mouth, online endorsements)
- ☒ On the contrary, consumers whose rights are not respected discourage other consumers (damage to reputation)
- ☐ Compliant and hence trusted businesses can sell at higher prices
- ☐ There are no benefits
- ☐ No opinion / don't know

Other

Please specify

100 character(s) maximum

What is your most accurate estimate of the direct costs of compliance with consumer and marketing rules for the companies you represent, e.g. costs of providing legal guarantee for goods, complying with consumer information requirements? (% of annual turnover)

This is very difficult to quantify. Besides as an EU trade association we are not in a position to answer this question.

%

What is your most accurate estimate of the average cost (in EUR) of an enforcement action to bring a trader or traders into compliance with the EU consumer and marketing rules for your authority?

Same as above.

EUR

How positive / negative is the impact of EU consumer and marketing law on the following aspects?

	Very positive impact	Rather positive impact	Neutral	Rather negative impact	Very negative impact	No Opinion / don't know
Amount & relevance of information available to consumers to compare and make informed purchasing choices		X				
A level playing field amongst EU-based businesses	X					
Protection of consumers against unfair commercial practices		X				
Protection of businesses Against misleading marketing and unfair comparative advertising		X				
Availability and choice of products			X			
Lower prices of products			X			
Higher quality and longer durability of products		X				
More customers and revenues for EU-based businesses			X			
Increase of national e-commerce (i.e. within the trader's EU country)		X				
Increase of e-commerce across EU Member States		X				
Competitiveness of EU businesses vis-à-vis non-EU businesses			X			

Please explain your reply (optional)

1500 character(s) maximum

Transparency and clarity of information are key for consumers to engage in the market. However, this does not mean that EU legislation should set the information elements to be provided to consumers at any moment (pre-sale, post-sale) in any sector, since this can produce the opposite effect and increase consumer confusion. In particular, companies should not be required to communicate too much information at the advertising stage, because an overload of information would not be beneficial to consumers. It would be more sensible to communicate detailed information just before the conclusion of the contract. Besides, one should accept that some consumers may deliberately decide not to choose and be active. Introducing additional rules should always be supported by a cost benefit analysis.

Protection against misleading advertising and unfair business practices is crucial since it can lead to consumer distrust and disengagement from the market. Misleading and unfair practices can also distort competition to the detriment of both consumers and companies.

Regulation introducing limitation to what companies can offer and how they can offer it can have negative impact for consumer choice and engagement.

The need to comply with regulation creates costs that are reflected in final prices. Besides non-EU businesses which do not have to comply with the same level of regulatory requirements than EU businesses may have competitive advantage. This should always be taken into consideration.

How effective are the following consumer redress/enforcement mechanisms in protecting consumer rights in case of breach of EU consumer and marketing rules?

	Very effective	Rather effective	Neutral	Rather not effective	Not effective at all	No Opinion / don't know
An individual consumer gets redress through direct negotiations with the trader	X					
An individual consumer gets redress through an alternative dispute resolution mechanism	X					
An individual consumer gets redress through a court action		X				
An individual consumer gets redress through an administrative enforcement decision			X			
An administrative authority issues an injunction which stops an infringement of consumer rights			X			
A court issues an injunction which stops an infringement of consumer rights		X				
Other (please specify in the box below)						

Please explain your reply (optional)

1500 character(s) maximum

Contractual disputes between a consumer and a trader which could not be solved bilaterally should preferably be solved by alternative dispute resolution bodies. Going before a court should be the last option.

How effective are the **injunction actions** sought against the following illegal practices?

	Very effective	Rather effective	Neutral	Rather not effective	Not effective at all	No Opinion / don't know
Use by traders of unfair standard contract terms						X
Use by traders of misleading or aggressive commercial practices						X
Breach of the traders' obligations related to the legal guarantee						X
Breach of the traders' obligations related to the information they are legally required to provide to consumers						X
Breach of the traders' obligation related to the consumers' right of withdrawal (cancellation) for distance and off-premises contracts						X
Other illegal practices (please specify in the box below)						X

Please explain your reply (optional)

1500 character(s) maximum

How strongly do you agree or disagree with the following statements about the **interplay between the Injunctions Directive and the provisions on enforcement of consumer rights** included in other Directives covered by this questionnaire?

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
There is a need for clarification of the interplay between the Injunctions Directive and other provisions on enforcement of consumer rights		X			
There is a need for ensuring coherence between the Injunctions Directive and other provisions on enforcement of consumer rights		X			

Please explain your reply (optional)

1500 character(s) maximum

How strongly do you agree or disagree with the following statements about the **interplay between EU consumer and marketing rules and the EU sector-specific consumer rights in the area of energy supply (electricity and gas)?**

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
EU consumer and marketing rules provide adequate complementary protection regarding issues, which are not expressly regulated by the sector-specific EU rules		X			
Consumers are aware about the complementary application of EU consumer and marketing rules in the specific sector					X
Traders in the relevant sector are aware of the complementary application of these EU rules and comply with them		X			
The competent public enforcement authorities in the relevant sector are aware of the complementary application of these EU rules and enforce them where appropriate		X			
The co-operation between the					

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
various public enforcement authorities in charge of consumer protection should be strengthened		X			

Please explain your reply (optional)

1500 character(s) maximum

It may be important in some countries to strengthen the cooperation between various authorities in charge of consumer protection and clarify their responsibilities (at national level).

How strongly do you agree or disagree with the following statements about the **interplay** between EU consumer and marketing rules and the EU sector-specific consumer rights in the area of **environmental protection - rules on Ecodesign, energy labelling, car labelling, emission limits for vehicles etc.?**

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
EU consumer and marketing rules provide adequate complementary protection regarding issues, which are not expressly regulated by the sector-specific EU rules		X			
Consumers are aware about the complementary application of EU consumer and marketing rules in the specific sector					X
Traders in the relevant sector are aware of the complementary application of these EU rules and comply with them		X			
The competent public enforcement authorities in the relevant sector are aware of the complementary application of these EU rules and enforce them where appropriate		X			
The co-operation between the various public enforcement authorities in charge of consumer protection should be strengthened		X			

Please explain your reply (optional)

1500 character(s) maximum

How strongly do you agree or disagree with each of the following statements about the **potential areas to improve EU consumer and marketing rules** for the benefit of consumers?

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
The marketing/pre-contractual information requirements currently included in the Unfair Commercial Practices Directive, Price Indication Directive and Consumer Rights Directive should be regrouped and streamlined		X			
The information given to consumers at the advertising stage should focus on the essentials whilst more detailed information should be required only at the moment before the contract is concluded	X				
Online platform providers should inform consumers about the criteria used for ranking the information presented to consumers		X			
The presentation of pre-contractual information to consumers should be simplified by applying a uniform model , e.g. using icons				X	
The obligation to display also the price per unit (eg, 1 Kg, 1 l) of the goods should apply to all businesses irrespective of their size		X			
Consumer protection against unfair commercial practices should be strengthened by introducing a right to individual remedies , e.g. compensation and/or invalidity of the contract when the consumer has been misled into signing a disadvantageous contract					X
Consumer protection against unfair contract terms should be strengthened by introducing a "black list" of terms prohibited that are always				X	

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
The presentation of key standard Terms and Conditions to consumers should be improved by applying a uniform model e.g. using icons				X	
Consumer protection against unfair contract terms should be strengthened by incorporating key Court of Justice case law on the ex officio duties of judges to assess the presence of unfair terms				X	
The legal guarantee period for goods should depend on their characteristics (If you agree with this statement please indicate the relevant characteristics in the box below, e.g. the category of the good (such as small/large household appliances, ICT products, cars etc.), price, expected/ advertised lifespan)		X			
The period during which the defect is presumed to have existed already at the time of delivery of the good (reversal of the burden of proof) should be extended. It is 6 months under current EU law but longer in a few EU countries					X
The notion of " vulnerable consumers " should be reviewed/ updated. Under current EU law vulnerable consumers are those that are particularly vulnerable to unfair commercial practices because of their mental or physical infirmity, age or credulity			X		
There should be additional requirements for the protection of "vulnerable consumers" as regards standard contract terms				X	

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	No Opinion / don't know
The notion of " average consumer " should be reviewed/ updated. According to the case law of the EU Court of Justice, the average consumer is defined as reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors			X		
Further criteria should be defined to allow for a clearer distinction between consumers and traders in the collaborative economy					X
EU injunctions proceedings should be made more effective, e.g. by allowing their use for more types of infringements and by reducing their costs and length					X
EU consumer and marketing rules should be further harmonised to make it easier for traders to offer their products/services cross-border and for consumers to rely on the same level of protection across the EU			X		
EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument		X			
Consumer protection should be strengthened by making sure that non-compliant businesses face truly dissuasive sanctions amounting to a significant % of their yearly turnover			X		
Other (please specify in the box below)					

Please explain your reply, including suggestion(s) for other area(s) where the current EU consumer and marketing rules should be improved (optional)

2500 character(s) maximum

Rationalisation and simplification of existing rules and requirements are in line with the need of consumers for less but clearer information, in particular in a complex and fast evolving sector like energy. However simplification should not lead to the introduction of rigid rules or standards - such as those suggested on advertising - because they could hamper competition and negatively impact suppliers' ability to innovate (a principle recently recognized by the CMA in the UK) without bringing true benefits to consumers.

It might not always be clear whether a given commercial practice is legal or not. This is particularly true when legislation is not up-to-date with technological development and changes in consumer behaviour. In any case, only a court or an independent administrative authority should be allowed to impose sanctions on companies, not consumer authorities.

There should be legally rigorous technique to assess the severity of an infringement and the proportionality of a sanction. Turnover might not be the most effective way to set a sanction, as it is not always representative of the ability of a company to pay a fine. In any case, sanctions should be the last instrument to enforce consumer protection legislation. Careful consideration should be given to remedies which are available to consumers in contract law and alternative dispute resolution mechanisms.

Individual remedies are already provided in some MS through national legislation.

Whilst the unfair commercial practices directive indeed stipulates that vulnerable consumers are those that are particularly vulnerable to unfair commercial practices because of their mental or physical infirmity, age or credulity, we think this is potentially very broad and the approach taken in the energy sector is different. The Third Electricity Directive leaves it up to Member States to define the concept of vulnerable consumers. There is a high level of diversity across Member States and vulnerability links back to national social policy. As such, we think national governments should be left to tackle vulnerability with their own, best suited tools and national policies. That said, it is important to stress that where Member States take specific measures to address vulnerability in the energy sector, they should make sure that the concept properly identify those, and only those, in real need of assistance with respect to their energy needs.

Whilst general consumer protection rules are important, it is crucial to stress that energy consumers and energy consumption are very different from country to country and one should be careful not to refer to the "average consumer" as the source of European regulation and obligations on utilities. Not all consumers have the same needs and preferences; this is why companies compete with each other and develop products with different features and prices. EU regulation should not limit economic freedom of businesses and their differentiation capacity (e.g. design of invoices, features and communication channels, types of services, etc.). Finally we need to keep in mind that the willingness, ability and potential of consumers vary. Choice cannot be imposed. A well-made decision e.g. not to switch supplier can also be a consumer's choice.

EURELECTRIC pursues in all its activities the application of the following sustainable development values:

Economic Development

▶ Growth, added-value, efficiency

Environmental Leadership

▶ Commitment, innovation, pro-activeness

Social Responsibility

▶ Transparency, ethics, accountability



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