



Brussels, 11.4.2018
COM(2018) 185 final

2018/0090 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 93/13/EEC of 5 April 1993, 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

(Text with EEA relevance)

{SWD(2018) 96} - {SWD(2018) 98}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Reasons for and objectives of the proposal

This proposal aims at amending four EU directives that protect the economic interests of consumers. Most of the amendments concern the Unfair Commercial Practices Directive 2005/29/EC¹ and the Consumer Rights Directive 2011/83/EU². Each of the other two Directives – the Unfair Contract Terms Directive 93/13/EEC³ and the Price Indication Directive 98/6/EC⁴ – are only amended concerning penalties. This proposal is presented together with a proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC⁵.

The Treaties (Articles 114 and 169 TFEU) and the Charter of Fundamental Rights (Article 38) require a high level of consumer protection in the Union. Union consumer legislation also contributes to the proper functioning of the internal market. It aims to ensure that business-to-consumer relations are fair and transparent, which ultimately supports the overall welfare of European consumers and the Union economy.

This proposal is a follow-up to the REFIT Fitness Check of EU Consumer and Marketing law, published on 23 May 2017 (the 'Fitness Check')⁶ and the evaluation of the Consumer Rights Directive 2011/83/EU, which was conducted in parallel to the Fitness Check and published on that same day (the 'CRD Evaluation')⁷.

The Fitness Check and the CRD evaluation concluded that the substantive EU consumer rules included in the four Directives, which are amended by this proposal, are overall fit for purpose. However, the results also stressed the importance of better applying and enforcing the rules and modernising them in line with developments in the digital sphere. It also stressed the importance of reducing regulatory burden in some areas.

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22).

² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

⁴ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27).

⁵ COM(2018) 184. Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

⁶ The Fitness Check covered the Unfair Contract Terms Directive 93/13/EEC, Consumer Sales and Guarantees Directive 1999/44/EC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC and Injunctions Directive 2009/22/EC. For results, see SWD (2017) 208 final and SWD(2017) 209 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

⁷ For results, see COM(2017) 259 final, SWD(2017)169 final and SWD(2017) 170 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

The evaluation findings have been given more importance by recent cross-border infringements of EU consumer law, in particular, the ‘Dieselgate’ scandal (where car manufacturers installed technology in cars to cheat emissions tests). Such infringements undermine consumer trust in the Single Market. They have also sparked a debate about whether the EU has strong enough mechanisms in place to handle such issues, enforce consumer protection rules and provide redress to victims.

For these reasons, in the 2017 State of the Union Address, Commission President Jean-Claude Juncker announced the 'New Deal for Consumer', which aims at strengthening the enforcement of EU consumer law amid a growing risk of EU-wide infringements. The present proposal, which introduces targeted amendments in four consumer law directives, is a key part of this ‘New Deal’. In summary, the proposal aims at making the improvements outlined below.

- **More effective, proportionate and dissuasive penalties for widespread cross-border infringements.** The recently adopted Regulation (EU) 2017/2394⁸ regulates how national consumer enforcement authorities work together to address cross-border infringements of consumer law. In particular, it focuses on widespread infringements harming consumers in several Member States and widespread infringements with a Union dimension.⁹ For this type of widespread infringement, national authorities may need to impose effective, proportionate and dissuasive penalties in a coordinated manner. However, the available penalties for infringements of consumer law are very different across the EU, and are often set at a low level. Under the proposal, national authorities will have the power to impose a fine of at least up to 4 % of a trader's turnover for such widespread infringements. More generally, the national authorities should decide on the level of penalties based on common parameters, in particular the cross-border nature of the infringement. These strengthened rules on penalties will be inserted in the four directives concerned.
- **Right to individual remedies for consumers.** The proposal envisages that consumers will have the right to individual remedies when they are harmed by unfair commercial practices, such as aggressive marketing. In particular, Member States should make both contractual and non-contractual remedies available. As a minimum, the contractual remedies should include the right to contract termination. Non-contractual remedies should, as a minimum, include the right to compensation for damages. These rights will be added to Directive 2005/29/EC on unfair commercial practices.
- **More transparency for consumers in online marketplaces.** Today, when consumers visit online marketplaces, they are exposed to a variety of offers from third-party suppliers selling on the online marketplace (and offers from the online marketplace itself). Consumers do not always know how the offers they are presented with on the

⁸ 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 (OJ L 345, 27.12.2017, p. 1). This Regulation will make cross-border public enforcement more effective and give the relevant national authorities a uniform set of powers to work more efficiently together against widespread infringements. It also enables the European Commission to launch and coordinate common enforcement actions to address EU-wide infringements.

⁹ 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.

online marketplace have been ranked and from whom they are buying (whether from professional traders or other consumers). Many consumers are under the impression that they are buying from the online marketplace and are thus entering into a contract with it. In reality, they may be buying from a third-party supplier listed on the online marketplace who is not a trader. As a result, consumers may falsely think they are dealing with professional traders (hence benefitting from consumer rights). This confusion can cause problems in case something goes wrong with an online purchase, because it is not always easy to establish who is responsible. The proposal introduces additional information requirements in Directive 2011/83/EU, which require online marketplaces to clearly inform consumers about: (a) the main parameters determining ranking of the different offers, (b) whether the contract is concluded with a trader or an individual, (c) whether consumer protection legislation applies and (d) which trader (third party supplier or online marketplace) is responsible for ensuring consumer rights related to the contract (such as the right of withdrawal or legal guarantee).

- In addition, consumers using digital applications such as online marketplaces, comparison tools, app stores or search engines expect 'natural' or 'organic' search results based on relevance to their search queries, not on payment by third parties. In line with the 2016 Guidance paper¹⁰ on Directive 2005/29/EC, the relevant provisions of that Directive should be clarified to make it clear that online platforms must indicate search results that contain 'paid placements', i.e. where third parties pay for higher ranking, or 'paid inclusion', i.e. where third parties pay to be included in the list of search results.
- **Extending protection of consumers in respect of digital services.** The proposal extends the application of Directive 2011/83/EU to digital services for which consumers do not pay money but provide personal data, such as: cloud storage, social media and e-mail accounts. Given the increasing economic value of personal data, those services cannot be regarded as simply 'free'. Consumers should therefore have the same right to pre-contractual information and to cancel the contract within a 14-day right-of-withdrawal period, regardless of whether they pay for the service with money or provide personal data.
- **Removing burdens for businesses.** The proposal amends Directive 2011/83/EU by granting traders more flexibility in choosing the most appropriate means of communication with consumers. It will allow traders to use new means of online communication, such as web forms or chats as alternative to traditional e-mail as long as the consumer can keep track of the communication with the trader. It also removes two specific obligations on traders about the 14-day right of withdrawal that have proven to constitute a disproportionate burden. The first obligation is the obligation for the trader to accept the right of withdrawal even where a consumer has used an ordered good instead of only trying it out in the same way they could have done in a brick-and-mortar shop. The second obligation is the obligation for the trader to reimburse the consumer even before the trader has received the returned goods back from the consumer.
- **Clarifying Member States' freedom to adopt rules on certain forms and aspects of off-premises sales.** Whilst off-premises sales constitute a legitimate and well established sales channel, the proposal clarifies that Directive 2005/29/EC does not

¹⁰ Commission Staff Working Document "Guidance on the implementation/ application of Directive 2005/29/EC on Unfair Commercial Practices", SWD(2016) 163 final of 25.5.2016.

prevent Member States from adopting rules to protect the legitimate interests of consumers with regard to some particularly aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers, where such restrictions are justified on grounds of public policy or respect for private life.

- **Clarifying the rules on misleading marketing of 'dual quality' products.** The proposal amends Directive 2005/29/EC making it explicit that a commercial practice involving the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics causing or likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, is a misleading commercial practice which competent authorities should assess and address on a case-by-case basis according to the provisions of the Directive.

1.2. Consistency with existing policy provisions in the policy area

This proposal is consistent with several other legislative and non-legislative actions in the consumer protection area. In particular, this proposal is consistent with the recently revised Regulation (EU) 2017/2394 on consumer protection cooperation (CPC), which aims at boosting cross-border public enforcement of consumer protection rules. The strengthened rules on penalties for breaches to EU consumer law provided in this proposal will increase the deterrent effect and effectiveness of the CPC coordinated actions for widespread infringements and widespread infringements with a Union dimension. It was highlighted during the negotiations for the revised CPC Regulation that *'effective, proportionate and dissuasive penalties in all Member States are essential for the success of the Regulation. However, the co-legislators of the CPC Regulation decided that it was more appropriate to address the need for a strengthened level of penalties as part of the possible revision of substantive EU consumer law.'*¹¹

The rules on individual remedies to consumers affected by breaches to the Directive 2005/29/EC will be complementary to the EU efforts to make it easier for consumers to seek redress thanks to the other proposal of the 'New Deal for Consumers' package, i.e. the proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. In addition, individual consumers affected by breaches to Directive 2005/29/EC may rely on the proposed remedies also within the small claims procedure and alternative/online dispute resolution. Under the Directive on consumer alternative dispute resolution (ADR)¹² EU consumers have access to quality-assured out-of-court dispute-resolution systems for both domestic and cross-border contractual disputes. The Commission has also created an online dispute resolution platform (ODR

¹¹ 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.'*

¹² Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.6.2013, p. 63).

platform).¹³ This platform helps consumers and traders resolve their domestic and cross-border disputes over online purchases of goods and services.

This proposal goes hand-in-hand with efforts to ensure better knowledge of EU consumer law among consumers, traders and legal practitioners. There are several activities planned to achieve this as listed below.

- In 2018, the Commission will launch an EU-wide awareness-raising campaign on consumer rights, which will build on the lessons learnt from a 2014-2016 Consumer Rights Campaign.¹⁴
- The Commission is carrying out a pilot project on training small and medium-sized businesses in the digital age (the ‘ConsumerLawReady’ initiative¹⁵)
- The Commission plans to roll out a number of training activities for judges and other legal practitioners under the revamped European Judicial Training Strategy for 2019-2025¹⁶.
- To make it easier for all market players to understand their contractual rights and duties, the Commission is coordinating a self-regulatory initiative within the REFIT stakeholder group. The initiative is aimed at more clearly presenting to consumers both mandatory pre-contractual information and standard terms and conditions.
- To further enhance legal certainty for all market players, the Commission has been working on several guidance documents to ensure better understanding of EU consumer law.¹⁷ It is about to publish a new Consumer Law Database within the E-Justice Portal. This database will contain EU and national case-law and will also allow access to administrative decisions on EU consumer legislation.

1.3. Consistency with other EU policies

The four consumer law directives amended by this proposal apply across all economic sectors. Due to their general scope, they apply to many aspects of business-to-consumer 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. Under this principle, the provisions of the general consumer law directives come into play only when the relevant aspects of business-to-consumer transactions are not disciplined by the provisions of sector-specific EU law. Thus, these general consumer law directives work as a ‘safety net’,

¹³ Available since 15 February 2016, Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165, 18.6.2013, p. 1).

¹⁴ See also: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=30149.

¹⁵ The *ConsumerLawReady* training project is being implemented thanks to the financing granted 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 small and medium-sized businesses started in December 2017 and will continue throughout 2018. A dedicated website was created in November 2017: www.consumerlawready.eu.

¹⁶ Strategy under preparation; a Roadmap is available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247_en.

¹⁷ Guidance on the Unfair Commercial Practices Directive 2005/29/EC, 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 93/13/EEC is planned for the end of 2018 and updated Guidance on the Consumer Rights Directive 2011/83/EU in 2019.

ensuring that a high level of consumer protection can be maintained in all sectors, by complementing and filling gaps in sector-specific Union law.

The proposed amendments that deal with a lack of transparency in business-to-consumer transactions in online marketplaces and of consumer protection for digital services will help complete the Digital Single Market (DSM)¹⁸ and will ensure consistency with another important element of the Digital Single Market Strategy, i.e. the Commission's proposal for a Directive on contracts for the supply of digital content.¹⁹ That proposal defines consumer rights when the digital content and digital services acquired by the consumer do not conform with the contract, covering also contracts which do not include consumer's payment in money. Directive 2011/83/EU also applies to the supply of digital content; however, it currently only applies to services, including digital services, provided against monetary payment. According to the Digital Content proposal there is notably a lack of conformity where the content or services do not correspond to the specifications provided as pre-contractual information, and the pre-contractual information requirements are laid down in Directive 2011/83/EU. For the above reasons, it is necessary to align the scope of application of Directive 2011/83/EU to that of the current Digital Content Directive in respect of the definitions of 'digital content' and 'digital services'. The Justice and Home Affairs Council specifically invited the Commission to ensure consistency between Directive 2011/83/EU and the Digital Content proposal, particularly for the definitions of 'digital content' and 'digital services'.²⁰

The amendment of Directive 2011/83/EU to include digital services irrespective of a monetary payment is complementary to the General Data Protection Regulation 2016/679. Specifically, the right to terminate the contract for digital services within the 14-day right-of-withdrawal period will remove the contractual basis for the processing of personal data under the General Data Protection Regulation. This will in turn trigger the application of the rights provided by the General Data Protection Regulation, e.g. the right to be forgotten and the right to data portability.

On the proposed amendment for online marketplaces, the 2016 Communication on Online Platforms said 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'.²¹ In December 2016, the European Economic and Social Committee suggested adapting the pre-contractual information requirements to the needs of consumer buying from e-commerce platforms in general.²² The European Council,

¹⁸ For further information on Digital Single Market see: https://ec.europa.eu/commission/priorities/digital-single-market_en.

¹⁹ Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)0634 final of 9.12.2015. For further information: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en.

²⁰ Outcome of the Council Meeting 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 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>.

²¹ 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>.

²² 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>.

on 19 October 2017, underlined ‘*the necessity of increased transparency in platforms’ practices and uses*’.²³

This proposal is complementary to the Commission's action on unfair platform-to-business contract terms and trading practices (the platform-to-business initiative), as announced in the May 2017 mid-term review of the Digital Single Market.²⁴ This proposal and the platform-to-business initiative pursue shared goals of greater transparency and fairness in the transactions that take place on online platforms. This proposal deals with specific problems, already identified by the CRD evaluation, namely that consumers often do not know who their contractual counterpart is, when they shop through online marketplaces. As a result, consumers are often unclear as to whether they can exercise their EU consumer rights, and if so who they need to address to ensure these rights are upheld. Another way in which this proposal and the platform-to-business initiative are complementary is that they both seek to ensure transparency of the main parameters determining ranking in, respectively, platform-to-consumer and platform-to-business relations.

Better EU consumer legislation can also be expected to bring benefits to other EU policy areas where business-to-consumer commercial transactions play an important role. One example is the Commission's work on sustainable consumption, including through the Circular Economy Action Plan²⁵, which contains also actions to address misleading environmental claims and planned obsolescence. Although already captured under the UCPD, stronger penalties and tools for redress will allow combating infringements of consumer rights in these areas more effectively.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Consumer protection is a competence shared between the EU and the Member States. As stipulated in Article 169 of the Treaty on the Functioning of the European Union, the EU must contribute to protecting the economic interests of consumers and to promoting their right to information and education in order to safeguard their interests. This proposal is based on Article 114 of the Treaty on the Functioning of the European Union, (which refers to the completion of the internal market), and Article 169 of the Treaty on the Functioning of the European Union.

• Subsidiarity (for non-exclusive competence)

This proposal amends 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 as the internal market deepens, and the number of EU consumer transactions increases between Member States.

From an economic perspective, the behaviour of traders towards consumers is likely to have a large impact on the operation of consumer markets. This is because traders have a very large influence on consumer information and decision-making in such markets. Consumer policy

²³ European Council Conclusions on Migration, Digital Europe, Security and Defence (19 October 2017).

²⁴ 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>.

²⁵ Communication from the Commission 'Closing the loop - An EU action plan for the Circular Economy', COM/2015/0614 final of 2.12.2015: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0614>.

therefore has the potential to improve market forces. This can help foster competition and improve efficiency.

Within the EU, the volume and intensity of cross-border trade are high enough (in fact, they are higher than in any other large trading area in the world)²⁶ to make this cross-border trade vulnerable to inconsistent — or even merely divergent — policy choices by Member States. Moreover, traders can reach consumers across Member States' borders. This can create problems that national lawmakers and regulators are ill-placed to adequately address in isolation.

This proposal amends the existing EU consumer protection rules. Directive 2005/29/EC ensures full harmonisation of national rules on unfair commercial practices harming consumers' economic interests. Directive 2011/83/EU essentially provides fully harmonised rules on pre-contractual information requirements and rights to withdraw for consumer contracts. New national legislation within the scope of these Directives would go against the fully harmonised *acquis* that is already in place.

The EU-wide nature of the problem, requiring appropriate 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, which creates a powerful procedural framework for cooperation between national enforcement authorities. To be fully effective, enforcement across the EU must also be grounded in a common and uniform substantive legal framework. Enforcement of consumer rights and redress opportunities across the EU cannot be made more effective by actions taken exclusively by Member States on their own.

For online trade, it does not seem possible to sufficiently address at national level the problems consumers encounter. In particular, many online marketplaces and providers of digital services trade across Europe and across borders.

The Fitness Check and the CRD evaluation confirmed that the EU consumer and marketing law *acquis* has helped build a high level of consumer protection across the EU. It has also helped the internal market operate better, and helped reduce costs for businesses that sell products and services across borders. 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.

Directive 2005/29/EC, 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. Similarly, Directive 2011/83/EU has contributed significantly to the functioning of the internal market and ensured a high common level of consumer protection by removing differences between national laws relating to business-to-consumer contracts. It has increased legal certainty for traders and consumers, especially those engaged in cross-border trade. In particular, consumer trust has increased significantly in recent years in the growing market of cross-border e-commerce.²⁷

²⁶ World Trade Organization, International Trade Statistics 2015: https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf.

²⁷ According to the 2017 Consumer Conditions Scoreboard, between 2012 and 2016, the proportion of consumers who felt confident purchasing goods or services via the internet from retailers or service providers in another EU country has increased by 24 percentage points to reach 58%.

The Fitness Check Report said that the greatest contribution made by EU consumer law is its common harmonised rules. These rules enable national enforcement authorities to more effectively address cross-border infringements that harm consumers in several Member States. For instance, without further EU-level action to ensure that fines are ‘effective, proportionate and dissuasive’, the existing divergent national systems for fines would likely not be enough to ensure fair competition for compliant traders and would undermine the enforcement cooperation 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 law. Synergies between these three fields, particularly in the coordination of enforcement activities, have been increasingly acknowledged at the EU level.²⁸

It is also in line with the subsidiarity principle to clarify within Directive 2005/29/EC, Member States' freedom to adopt provisions to protect the legitimate interests of consumers from unsolicited visits for direct marketing purposes or commercial excursions, where such restrictions are justified on grounds of public policy or the protection of the respect for private life, as it will ensure that Member States would be allowed to regulate in an area where impact on the Single Market is considered very limited.

- **Proportionality**

The measures in the proposal are proportionate to the objectives of improving compliance with consumer law and modernisation and burden reduction.

On penalties, the proposal harmonises the minimum level of penalties by requiring Member States to introduce fines based on a trader's turnover only for widespread infringements and widespread infringements of a Union dimension where such harmonisation is clearly necessary to ensure the coordination of penalties required by the revised CPC Regulation. For all other infringements, the proposal limits itself to only setting non-exhaustive criteria that should be taken into account in the application of specific penalties. For these other infringements, the proposal does not harmonise these penalties and even makes it clear that these criteria do not necessarily apply to minor infringements.

On the requirement in the area of individual remedies for violations of Directive 2005/29/EU, the proposal gives Member States some freedom of manoeuvre on the specific remedies to be made available. The proposal only requires as a minimum the contractual remedy of contract termination and the non-contractual remedy of compensation of damages. These are the two most common remedies today in the national civil law of the Member States.

The proportionality of the proposed extension of Directive 2011/83/EU to digital services not provided against monetary payment is ensured by aligning the scope of application with that of the future Digital Content Directive, and also exempting the contracts for digital services under which the consumer merely provides personal data from some of the formal requirements of the Directive 2011/83/EU that are only relevant in case of paid-for contracts, i.e. the requirement to obtain the consumer consent for immediate provision of service which

²⁸ 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 responsible for competition, consumer and data protection and 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.

only has consequences in terms of the monetary payment for the services provided during the right of withdrawal period before the exercise of the right of withdrawal.

The proposed changes to the rules on online marketplaces are proportionate in the sense that they do not impose on online marketplaces any obligation to monitor or verify the truthfulness of the information provided by third-party suppliers about their trader or non-trader status. The changes are therefore based on pure self-declaration and the task of the marketplace is only to ensure that third-party suppliers provide this information on the website and then pass it on to the consumer. As regards ranking transparency, the online marketplace has to inform about the main parameters determining ranking of the offers without prescribing any particular default ranking criteria.

The proposal also enhances the proportionality of the legislation by reducing regulatory costs for traders where this would not endanger the objective of the legislation as in the case of the two identified traders' obligations with regards to the right of withdrawal and the proposed burden-reduction measures for information requirements. Such changes eliminating unnecessary burden are expected to be particularly beneficial for small enterprises.

- **Choice of the instrument**

As this proposal amends four existing Directives, the most appropriate instrument is a directive.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

This proposal builds on the findings of the Fitness Check of EU Consumer and Marketing Law and the CRD evaluation, both published in May 2017.

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 many EU sector-specific instruments, the Fitness Check concluded that the general Directives under analysis and EU sector-specific consumer protection legislation complement one another. The Fitness Check also concluded that stakeholders largely agree that the combination of general and sector-specific rules provides a clear and coherent EU legal framework.

However, the Fitness Check concluded that the effectiveness of the rules is hindered by: (a) the fact that traders and consumers are not aware of them, and (b) insufficient enforcement and consumer-redress opportunities. As far as this proposal is concerned, the Fitness Check 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 consumer remedies where consumers have been victims of unfair commercial practices infringing Directive 2005/29/EC. The Fitness Check also recommended modernising the regulatory landscape and reducing regulatory burdens by removing unjustified duplications of information requirements between Directive 2005/29/EC and Directive 2011/83/EU.

The CRD evaluation found that Directive 2011/83/EU has contributed positively to the functioning of the business-to-consumer internal market and ensured a high common level of consumer protection. However, it identified some gaps in the rules, in particular due to the developments in the digital economy. The evaluation highlighted a number of areas where legislative amendments could be relevant, including the following:

- (a) transparency of transactions on online marketplaces;
- (b) alignment of the rules governing digital content contracts with the rules for ‘free’ digital services (such as cloud storage and webmail);
- (c) simplification of some of the information requirements in Directive 2005/29/EC and Directive 2011/83/EU that overlap;
- (d) reduction of the burden on traders, especially small and medium-sized businesses, in the area of the right of withdrawal from distance and off-premises sales regarding: (1) consumer’s right to return also goods that have been used beyond what is strictly necessary and (2) the obligation to reimburse the consumer even before receiving the goods back from the consumer;
- (e) modernisation of the means of communication between traders and consumers.

The evaluation also recommended further awareness-raising activities and guidance documents as follow-up.

- **Stakeholder consultations**

In preparing the proposal, the Commission consulted with stakeholders via:

- the feedback mechanism on the Inception Impact Assessment;
- the online public consultation;
- a targeted panel consultation with small and medium-sized businesses;
- targeted consultations with Member States and other stakeholders through surveys and meetings with Directorate-General for Justice and Consumers' networks of Member State authorities and consumer organisations;
- consultation with consumer and business stakeholders via the REFIT Stakeholder Expert Group.

The objective of the consultations was to collect qualitative and quantitative evidence from relevant stakeholder groups (consumers, consumer associations, businesses, business associations, Member States authorities, legal practitioners) and the general public. It was difficult to reach specific types of businesses, such as online marketplaces and providers of ‘free’ digital services. The consultations were publicised via regular meetings, Twitter, Facebook, and e-mails to the Directorate-General for Justice and Consumers' networks, and via speeches delivered by the Commissioner and other high-level Commission officials.

The proposal also builds on the consultation activities that were carried out as part of the Fitness Check and CRD evaluation.²⁹

The measures included in the proposal 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. However, only a few business associations agreed with this idea. By contrast, in the SME panel, no less than 80 % of the respondents considered that the most proportionate, effective

²⁹ 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 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

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.

In the public consultation, a large majority of responding public authorities, consumer associations and consumers said that an EU-wide right to remedies under Directive 2005/29/EU should be introduced to ensure that traders comply better with consumer protection rules. However, support for this idea was low among business associations (35 %) and individual companies (31 %). In the SME panel consultation, 87 % of respondents were in favour of introducing an EU-wide right to remedies under Directive 2005/29/EU.

Many stakeholders supported new transparency requirements for contracts concluded on online marketplaces. Consumer associations, public authorities, individuals and most companies and business associations agree that consumers buying on online marketplaces should receive the information about the identity and status of the supplier. They also agree that this would increase consumer trust. Also many small and medium-sized businesses are in favour of requirements to inform consumers about the identity and legal status of the contractual partner. There was also support for transparency from business associations. Some major online marketplaces reported that the new rules would reduce costs, while others did not know.

Most stakeholders supported extending Directive 2011/83/EU to cover digital services where no monetary payment is made. Traders supported introducing information requirements to help better inform consumers, but they were divided on introducing a right of withdrawal for these digital services. Business associations did not support introducing a right of withdrawal for digital services where no monetary payment is made.

Business associations supported the deletion of information requirements from Directive 2005/29/EC that overlap with pre-contractual information requirements in Directive 2011/83/EU. Consumer associations were against removing information requirements in these cases. Most of the public authorities considered that providing consumers with information about complaint handling was not important at the advertising stage.

Stakeholders largely supported replacing the current requirement for traders to provide an e-mail address with a technologically neutral reference to means of online communication. Stakeholders also largely supported removing the reference to a fax number in Directive 2011/83/EU.

In the public consultation, 35 % of online companies reported that they encountered significant problems due to the above-mentioned specific obligations for traders related to the right of withdrawal. Most business associations confirmed that traders face a disproportionate/unnecessary burden resulting from these obligations. In the SME panel, close to half of self-employed, micro or small companies selling to consumers online reported disproportionate burdens. However, most consumer associations, public authorities and individuals did not support removing these traders' obligations.

- **Impact assessment**

This proposal is based on an Impact Assessment (IA)³⁰. The Regulatory Scrutiny Board (RSB) first issued a negative opinion with comprehensive comments on 12 January 2018. After a significant revision of the initial draft, the RSB provided a positive opinion with

³⁰ SWD(2018) 96.

further comments on 9 February 2018.³¹ Annex I to the IA explains how the RSB comments were addressed.

The Impact Assessment deals separately with options, on the one hand, to improve compliance with the consumer protection law and, on the other hand, related to modernisation and burden reduction.

To improve compliance, three options were considered besides the baseline scenario:

- (1) an option of only increasing deterrence and proportionality of public enforcement through stronger rules on penalties and a more effective injunctions procedure;
- (2) an option of adding to the measures in (1) the consumer's right to individual remedies;
- (3) an option of adding to the measures in (1) and (2) measures of collective consumer redress.

The preferred option was option 3 which combined all the measures. This proposal addresses parts of the preferred option regarding stronger rules on penalties and rights for consumers to individual remedies for violations of Directive 2005/29/EC. Elements related to injunctions and collective redress are addressed by the parallel proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

On penalties, the proposal will make the application of penalties more consistent across the EU. It will do this through a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones). Enforcement authorities would be required to take these criteria into account when deciding whether to impose penalties, and what the level of penalty should be. If the penalty to be imposed is a fine, the authorities would be required to take into account, when setting the amount of the fine, the infringing trader's turnover, net profits and any fines imposed for the same or similar infringements in other Member States. In cases of 'widespread infringements' and 'widespread infringements with a Union dimension', as defined in the revised CPC Regulation, fines should be introduced as a mandatory element of penalties, and Member States should set the maximum fine for such infringements at a level that is at least 4 % of the trader's annual turnover.

On individual remedies, the proposal requires Member States to ensure that consumers harmed by unfair commercial practices have access to at least the contractual remedy of contract termination and the non-contractual remedy of compensation for damages. In particular, the 'Dieselgate' controversy (where car manufacturers installed technology in cars to cheat emissions tests) 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 the Dieselgate case, many consumers have not been able to claim remedies even in Member States that already provide remedies for victims of unfair commercial practices. This is 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 and not the car manufacturers.

On costs of these measures, there could be some initial familiarisation costs for traders. However, in the SME Panel consultation most respondents indicated that strengthening penalties would have no impact on their costs. For individual remedies the median estimated one-off costs, such as costs for legal advice, reported in the SME Panel consultation were EUR 638. The median estimated annual running costs were EUR 655. In the public

³¹ SEC(2018) 185.

consultation, a majority of the public authorities indicated that costs of administrative and judicial enforcement would increase if rules on penalties are strengthened. There would also be some initial familiarisation costs for national authorities and courts of introducing rights to individual remedies. No public authority provided estimates of increased or decreased enforcement costs. Costs for public enforcement authorities and courts include a possible increase in the number of enforcement and court cases. However, these costs are likely to be off-set by the expected overall reduction in violations of EU consumer law thanks to the increased deterrent effect of stronger penalties and remedies.

The proposal would also bring savings for traders trading cross-border thanks to the increased harmonisation of rules. In particular, there would be increased clarity on the possible consequences for traders in the event of non-compliance. This would lead to lower and more accurate risk-assessment costs.

For modernisation and burden reduction, the IA assessed the options for (a) transparency of online marketplaces, (b) consumer protection in respect of digital services not provided against monetary payment and (c) burden reduction measures that are discussed in the following section on regulatory fitness and simplification.

On the transparency of online marketplaces, the IA assessed the options of promoting self-regulation, co-regulation and legislative amendments to Directive 2011/83/EU imposing additional information requirements on online marketplaces. Very few respondents to the targeted and public consultations provided quantitative cost estimates. Some major online marketplaces reported that new fully harmonised rules on transparency would bring some cost reductions, while others did not know if these rules would bring cost reductions. Out of the four online marketplaces responding to a question on costs, two indicated that the 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.

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. Small and medium-sized businesses estimated that the median of the annual costs that would come from extending Directive 2011/83/EU to cover digital services not provided against payment was EUR 33 for pre-contractual information requirements and EUR 50 for the right of withdrawal.

The amendment of Directive 2005/29/EC stating that Member States may adopt provisions to protect the legitimate interests of consumers with regard to particularly aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers, where such restrictions are justified on grounds of public policy or respect for private life, is necessary to clarify the relationship between the Directive and national rules on such marketing activities.

Some Member States have introduced bans or restrictions on specific types of off-premises selling, such as unsolicited doorstep selling also for reasons of the protection of private life and public policy. Although they go against the fully harmonised nature of Directive 2005/29/EC, such restrictions have no – or very limited – cross-border implications (due to the very nature of off-premises selling). Such restrictions would therefore have no significant impact on the Single Market. The proposed change would recognise the *status quo* that exists in some Member States that have adopted certain restrictions on doorstep selling and/or sales excursions. Any further impact would depend on other Member States making use of this possibility. Therefore, clarifying the possibility for Member States to introduce such restrictions based on public policy or protection of privacy of consumers was deemed not to

have an immediate impact on the Single Market, and is in line with the principle of subsidiarity.

The amendment of Directive 2005/29/EC regarding ‘dual quality’ of products is necessary in order to provide greater legal clarity for the Member State authorities responsible for enforcing the Directive. The Commission had addressed this matter in the Guidance of 25 May 2016 on the application of Directive 2005/29/EC³² and more recently 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'³³. However, the enforcement experience shows that national authorities would benefit from relying on an explicit set of provisions. These are necessary to enable more effective tackling of commercial practices that involve the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics causing or likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

- **Regulatory fitness and simplification**

As this proposal is made as part of the REFIT programme, ascertaining the regulatory burdens was an important part of the underlying evaluations. These showed that the general EU consumer legislation is not particularly burdensome, both in absolute terms and when compared to other areas of EU regulation³⁴. Therefore, in light of the great benefits of EU consumer legislation in protecting consumers and facilitating the Single Market, these evaluations identified only a limited scope in terms of burden reduction.

Because this proposal amends legislation that applies to all traders, including micro-enterprises, there are no substantial reasons to exempt micro-enterprises from the application of this proposal. It is likely that micro-enterprises will benefit in particular from the proposed burden reduction measures related to the right of withdrawal. This is because these businesses may currently have less flexibility in absorbing losses due to the current obligations. Micro-enterprises are likely to be less affected by the proposed strengthening of rules on penalties for widespread infringements and widespread infringements with a Union dimension, since such infringements are typically done by larger companies, which then become the object of coordinated CPC enforcement actions.

The first amendment concerning the right of withdrawal ends a trader's obligation to accept the return of goods even when consumers have used such goods more than permitted. Small and medium-sized businesses reported annual losses on average of EUR 2 223 (median EUR 100) caused by the current obligation to accept such 'unduly tested goods'. The views from business associations and companies also suggest that traders, and small and medium-sized businesses in particular, will benefit from a reduction of this burden. As regards trader's obligation to reimburse consumers before having had the possibility to inspect returned goods, the average estimated annual losses due to current rules reported in the SME Panel consultation were EUR 1 212 (median 0). Views from business associations and companies also suggest that traders, and small and medium-sized businesses in particular, will benefit from a reduction of this burden.

Very limited quantitative data were available on the removal of trader's obligation to provide information about complaint handling at the advertising stage. However, the views expressed

³² SWD(2016) 163 final.

³³ C(2017)6532.

³⁴ For further information, see Chapter 6.2.4. of the Fitness Check Report.

by business associations suggest some to significant savings for companies. On the removal of the obligation on traders to display their fax number and enable more modern means of communication (such as web-form) as alternative to an e-mail address, the fact that many traders already offer these more modern means of communication to consumers (in parallel with an e-mail address) suggests that they are more efficient than e-mail. Removing the obligation to display fax number may not affect costs, as currently it is mandatory information only for those few traders that may still use fax in their communication with consumers.

All the amendments in the proposal are drafted in a technology-neutral way to ensure that they are not rapidly overtaken by technological developments. Thus, the existing definition of 'online marketplaces' in other EU legislation is being updated to remove specific references to a concrete technology, such as 'websites' and ensure that it is future-proof. Extending Directive 2011/83/EU to digital services not provided for monetary payment would address the current situation of digital transactions for consumers through content-neutral and future-proof rules. This would complement EU data protection rules. Changing Directive 2011/83/EU rules on means of communication will be technologically neutral and therefore future-proof. This is because reference will be made to other means of online communication that enables the consumer to retain the content of the communication rather than to a specific technology.

- **Fundamental rights**

The proposal is in accordance with Article 38 of the Charter of Fundamental Rights according to which the EU must ensure a high level of consumer protection. The measures to: (a) improve compliance with consumer protection legislation and (b) modernise the consumer protection rules for online marketplaces and digital services increase the level of consumer protection. The improved individual redress opportunities against unfair commercial practices would also help ensure the right to an effective remedy enshrined in Article 47 of the Charter. Finally, the proposal respects the right to the protection of personal data of individuals enshrined in Article 8 of the Charter and the right of Member States to restrict specific forms and aspects of off-premises sales to ensure the respect for consumers' private life is in accordance with Article 7 of the Charter.

The burden reduction measures for (a) the right of withdrawal, (b) simplification of information requirements and (c) modernisation of the means of communication will contribute to the implementation of Article 16 of the Charter, which guarantees the freedom to conduct a business in accordance with EU law and national laws and practices. At the same time, simplifying information requirements and modernising the means of communication will not result in any substantial reduction of consumer protection. And the measures on the right of withdrawal represent more balanced rights and obligations of traders and consumers. This is because they will remove unjustified burdens while only affecting a minority of consumers.

4. BUDGETARY IMPLICATIONS

There are no budgetary consequences for the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will evaluate the effectiveness, efficiency, relevance, coherence and EU added value of this intervention according to the indicators identified in the Impact

Assessment. 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. 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 with specific groups of stakeholders (consumers, qualified entities, online marketplaces, traders providing digital services without monetary payment). 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.

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 monitoring indicators 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 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.

- **Explanatory documents (for directives)**

As the proposal introduces specific amendments to four existing directives, Member States should either provide the Commission with the text of the specific amendments to national provisions or, in the absence of such amendments, explain which specific national law provision already implements the amendments provided in the proposal.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 – Amendments to Directive 2005/29/EC

Article 1 of the proposal amends Directive 2005/29/EC on two main points: it introduces the right to individual remedies for consumers and strengthens the rules on penalties. The proposal also clarifies the application of the existing rules of the Directive regarding hidden advertising and misleading advertising of 'dual quality' products. Finally, the proposal addresses the issue of national rules concerning specific forms of off-premises sales.

As regards **individual consumer remedies**, a new Article 11a is inserted in Directive 2005/29/EC to require Member States to ensure that certain specific types of contractual and non-contractual remedies for breaches to Directive 2005/29/EC are available under national law. The introduction of rights to individual remedies in that Directive would empower

victims of unfair commercial practices to take action against traders to solve problems created by these traders.

As regards **penalties**, a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones) is introduced in Article 13 of the Directive. 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, net profit as well as any fines imposed for the same infringement in other Member States. In addition, for 'widespread infringements' and 'widespread infringements with a Union dimension', as defined in the revised CPC Regulation (EU) 2017/2395, Member States will be required to provide in their national law for fines the maximum amount of which should be at least 4% of the infringing trader's turnover in the Member State or Member States concerned. This means that where national competent authorities co-operating under a CPC coordinated action designate one competent authority to impose a single fine, the maximum fine available in that case should be at least 4% of the trader's combined turnover in all the Member States concerned.

As regard **hidden advertising**, consumers using digital applications such as online marketplaces, comparison tools, app stores or search engines expect 'natural' or 'organic' search results based on relevance to their search queries, not on payment by third parties. However, as also the 2016 Guidance paper on Directive 2005/29/EC points out, search results often contain 'paid placements', where third parties pay for higher ranking, or 'paid inclusion', where third parties pay to be included in the list of search results. Paid placements and paid inclusions are often not indicated at all, or are only indicated in an ambiguous way not clearly discernible for consumers. The relevant provisions of Directive 2005/29/EC on the prohibition of hidden advertising should therefore be clarified to make it clear that they apply not only to editorial content in media but also to search results in response to the consumer's online search query.

As regards **specific forms of off-premises sales**, an amendment to Article 3 of the Directive authorises Member States to adopt provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home (in other words, visits which are not made at the request of the consumer, for example, through fixing an appointment with the trader) and with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers, where such restrictions are justified on grounds of public policy or the protection of the respect for private life. To ensure full transparency of such measures, Member States will have to notify them to the Commission, which will make such notifications publicly available.

As regards '**dual quality**' products, an amendment to Article 6(2) of the Directive expressly stipulates that a commercial practice involving the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics causing or likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, is a misleading commercial practice which competent authorities should assess and address on a case by case basis according to the provisions of the Directive.

Article 2 – Amendments to the Consumer Rights Directive 2011/83/EU

Article 2 of this proposal amends Directive 2011/83/EU on a number of points.

Amendments to Article 2 of Directive 2011/83/EU provide additional definitions of digital content and digital service and the respective contracts for the provision of these products, which are aligned with the definitions in the [Digital Content Directive]. These definitions bring within the scope of application of Directive 2011/83/EU also contracts for the provision of digital services under which the consumer does not pay with money but provides personal data. In line with the [Digital Content proposal for Directive], the definitions of ‘contract for the supply of digital content’ and ‘digital service contract’ clarify that, in the absence of monetary payment, the rights and obligations of Directive 2011/83/EU will not apply where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content or service or for the trader to comply with legal requirements, and the trader does not process this data for any other purpose. Amendments to Article 2 also introduce a definition of ‘online marketplace’ which is subject to specific additional pre-contractual information requirements under a new Article 6a.

Article 5 of Directive 2011/83/EU on pre-contractual information requirements for contracts other than off-premises and distance contracts is amended for consistency reasons in order to cover the newly defined digital services alongside the already existing notion of digital content as regards the pre-contractual information requirements about interoperability and functionality.

Article 6 of Directive 2011/83/EU on pre-contractual information requirements for off-premises and distance contracts is amended for consistency reasons in order to cover the newly defined digital services alongside the already existing notion of digital content as regards the pre-contractual information requirements about interoperability and functionality. In addition, Article 6 is amended by removing fax from the list of possible means of communication and enabling traders to use other online means of communication as alternative to the traditional e-mail.

A new Article 6a is inserted in Directive 2011/83/EU providing specific additional pre-contractual information requirements for contracts concluded on online marketplaces, namely: (1) description of the main parameters determining ranking of the different offers, (2) whether the third party offering the product is a trader or not, (3) whether consumer rights stemming from EU consumer law apply to the contract and (4) 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.

Article 7 of Directive 2011/83/EU setting specific formal requirements for off-premises contracts is amended to specify that the obligation in paragraph 3 on traders to obtain consumer’s express consent for immediate performance of services only applies to services provided against payment. This amendment is necessary in view of the extension of the scope of the Directive to cover also digital services not provided against monetary payment since the obligation of express consent is only relevant in the calculation of the monetary compensation that the consumer must provide to the trader for the use of the services during the right of withdrawal period if the consumer decides to exercise the right of withdrawal.

Article 8 of Directive 2011/83/EU setting specific formal requirements for distance contracts is amended on several points. First, in paragraph 4 a provision is made to exclude the model withdrawal form from the information requirements provided on a means of distance communication used for the conclusion of the contract that allows limited space or time for the provision of the information, including telephone calls. This is necessary because the written model withdrawal form cannot be provided to the consumer by means of the telephone call and it can be impossible to provide in a user friendly way over other means of communication covered by Article 8(4). In these cases, it suffices to make the model

withdrawal form available to the consumer through other means, such as trader's website and to include it in the contract confirmation on a durable medium.

Paragraph 8 is amended in a similar way as Article 7(3) described above.

Article 13 of Directive 2011/83/EU dealing with the trader's obligations in the event of withdrawal is amended to delete the trader's obligation to reimburse the consumer even before the trader has received back the returned goods. Consequently, the trader will be always entitled to withhold the reimbursement until the returned goods have arrived and the trader has had a chance to inspect them. References are added to the General Data Protection Regulation and the [Digital Content Directive] as regards the trader's obligations in respect of the use of the consumer's data after the termination of the contract.

Article 14 of Directive 2011/83/EU dealing with the obligations of the consumer in the event of withdrawal is amended by removing the right of consumers to return the goods even where those have been used more than necessary to test them subject to the obligation to pay for the diminished value. A provision similar to the respective Digital Content Directive rule is added regarding the consumer's obligations to refrain from using the digital content or digital services after the termination of the contract. Finally, paragraph 4(b), setting out contractual sanction in the event of trader's non-respect of the information obligations regarding digital content, is amended for consistency reasons by removing from the list of alternative reasons for this sanction the failure to provide confirmation that consumer has expressly consented and acknowledged the loss of the right of withdrawal in accordance with the exception laid down in Article 16(m). Since Article 14 deals with the consequences of the right of withdrawal, this condition is irrelevant since the express consent and acknowledgement result in effective loss of the right of withdrawal under Article 16(m).

Article 16 dealing with exceptions from the right of withdrawal is amended on several points. First, there is amendment in point (a) to ensure consistency with Article 7(3) and 8(7) as regards the trader's obligations when consumer wants immediate performance of services. Second, point (m) providing exemption from the right of withdrawal regarding digital content supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses the right of withdrawal is amended to apply these two conditions only to content provided against payment. This is done in order to ensure consistency with Article 14(4)(b), which provides for a contractual sanction when these requirements are not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment is accordingly only relevant for digital content provided against the payment of a price. Finally, a new point (n) is added to exempt from the right of withdrawal goods that the consumer has used more than necessary to test them.

Article 24 of Directive 2011/83/EU on penalties is amended in similar manner as Article 13 on penalties in Directive 2005/29/EC, described above.

Article 3 – Amendments to the Unfair Contract Terms Directive 93/13/EEC

A new Article on penalties is inserted in Directive 93/13/EEC in similar manner as Article 13 on penalties in Directive 2005/29/EC, described above.

Article 4 – Amendments to the Price Indication Directive 98/6/EC

Article 8 on penalties in Directive 98/6/EC is amended in similar manner as Article 13 on penalties in Directive 2005/29/EC, described above.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 93/13/EEC of 5 April 1993, 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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee³⁵

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.
- (2) Consumer protection legislation should be applied effectively throughout the Union. Yet, the comprehensive Fitness Check of consumer and marketing law directives carried out by the Commission in 2016 and 2017 in the framework of the Regulatory Fitness and Performance (REFIT) programme concluded that the effectiveness of the Union consumer legislation is compromised by lack of awareness both among traders and consumers and by insufficient enforcement and limited consumer redress possibilities.
- (3) The Union has already taken a number of measures to improve awareness among consumers, traders and legal practitioners about consumer rights and to improve enforcement of consumer rights and consumer redress. However, there are remaining gaps, most notably the absence in national laws of truly effective and proportionate penalties to deter and sanction infringements, insufficient individual remedies for consumers harmed by breaches of national legislation transposing Directive

³⁵ OJ C , , p. .

2005/29/EC³⁶ and shortcomings of the injunctions procedure under Directive 2009/22/EC³⁷. Revision of the injunctions procedure should be addressed by a separate instrument amending and replacing Directive 2009/22/EC.

- (4) Directives 98/6/EC³⁸, 2005/29/EC and 2011/83/EU³⁹ include requirements for Member States to provide for effective, proportionate and dissuasive penalties to address infringements of national provisions transposing these directives. Furthermore, Article 21 of Regulation (EU) 2017/2394⁴⁰ on consumer protection cooperation (CPC) requires Member States to take enforcement measures, including imposition of penalties, in an effective, efficient and coordinated manner to bring about the cessation or prohibition of widespread infringements or widespread infringements with a Union dimension.
- (5) Current national rules on penalties differ significantly across the Union. In particular not all Member States ensure that effective, proportionate and dissuasive fines can be imposed on infringing traders for widespread infringements or widespread infringements with a Union dimension. For reasons of consistency between the different Directives on consumer protection, penalties should be addressed in a horizontal manner by revising the existing rules on penalties of Directives 98/6/EC, 2005/29/EC and 2011/83/EU and by introducing new rules on penalties in Directive 93/13/EEC⁴¹.
- (6) To facilitate more consistent application of penalties, in particular in intra-Union infringements, widespread infringements and widespread infringements with a Union dimension referred to in Regulation (EU) 2017/2394, common non-exhaustive criteria should be introduced for the application of fines. These criteria should include the cross-border nature of the infringement, namely whether the infringement has harmed consumers also in other Member States. Any redress provided by the trader to consumers for the harm caused should also be taken into account. Repeated infringements by the same perpetrator shows a propensity to commit such infringements and is therefore a significant indication of the gravity of the conduct and, accordingly, of the need to increase the level of the penalty to achieve effective deterrence. The criterion of financial benefits gained, or losses avoided, due to the infringement is especially relevant where the national law provides for fines as penalties and sets the maximum fine as percentage of the trader's turnover and where

³⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22).

³⁷ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009, p. 30).

³⁸ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27).

³⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

⁴⁰ 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 (OJ L 345, 27.12.2017, p. 1).

⁴¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

the infringement concerns only one or some of the markets in which the trader is operating.

- (7) Furthermore, any fines imposed as penalties should take into account the annual turnover and profits of the infringing trader and any fines that have been imposed on the trader in other Member States for the same infringement in, particular, in the context of the widespread infringements of consumer law and widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement in accordance with Regulation (EU) 2017/2394.
- (8) These common non-exhaustive criteria for the application of penalties may not be relevant in deciding on penalties regarding every infringement, in particular regarding non-serious infringements. Member States should also take account of other general principles of law applicable to the imposition of penalties, such as the principle of *non bis in idem*.
- (9) To ensure that Member State authorities can impose effective, proportionate and dissuasive penalties in relation to widespread infringements of consumer law and to widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement in accordance with Regulation (EU) 2017/2394, fines should be introduced as a mandatory element of penalties for such infringements. In order to ensure deterrence of the fines, Member States should set in their national law the maximum fine for such infringements at a level that is at least 4% of the trader's annual turnover in the Member State concerned.
- (10) Where, as a result of the coordination mechanism under Regulation (EU) 2017/2394, a single national competent authority within the meaning of that Regulation imposes a fine on the trader responsible for the widespread infringement or the widespread infringement with a Union dimension, it should be able to impose a fine of at least 4 % of the trader's annual turnover in all Member States concerned by the coordinated enforcement action.
- (11) Member States should not be prevented from maintaining or introducing in their national law higher maximum turnover-based fines for widespread infringements and widespread infringements with a Union dimension of consumer law, as defined in Regulation EU 2017/2394. The requirement to set the fine at a level of not less than 4 % of the trader's turnover should not apply to any additional rules of the Member States on periodic penalty payments, such as daily fines, for non-compliance with any decision, order, interim measure, trader's commitment or other measure with the aim of stopping the infringement.
- (12) When deciding for which purpose the revenues from fines are used, Member States should take into account the ultimate objective of consumer legislation and its enforcement which is the protection of the general interest of consumers. Member States should therefore consider allocating at least part of the revenues from fines to enhance consumer protection within their jurisdictions, such as supporting consumer movement or activities aimed at empowering consumers.
- (13) Access to individual remedies for consumers harmed by unfair commercial practices should be enhanced in the context of Directive 2005/29/EC to put the consumer into the condition he would have been without the unfair commercial practice. While that Directive was originally designed mainly to regulate the market conduct of traders based on public enforcement, experience from more than ten years of application

demonstrate the shortcomings of the lack of a clear framework setting out rights to individual remedies.

- (14) National rules on individual remedies for consumers harmed by unfair commercial practices are diverging. The current situation, where to a large extent it is left to the Member States to determine if and how remedies should be available, keeps Directive 2005/29/EC from being fully effective. Therefore, that Directive still has potential to fully reach its dual purpose, which is to contribute to the proper functioning of the Internal Market and achieve a high level of consumer protection. 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 that Directive have been breached. Accordingly, introducing a clear framework for individual remedies would facilitate private enforcement and be complementary to the existing requirement for Member States to ensure that adequate and effective means exist to enforce compliance with that Directive. It would also be in line with the approach to individual remedies in other consumer protection Directives, such as Directive 93/13/EEC and Directive 1999/44/EC ensuring a more coherent and consistent application of the consumer acquis.
- (15) Member States should ensure that remedies are available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair practices. In order to meet that objective, Member States should make both contractual and non-contractual remedies available. As a minimum, the contractual remedies provided by the Member States should include the right to contract termination. Non-contractual remedies provided under national law should, as a minimum, include the right to compensation for damages. Member States would not be prevented from maintaining or introducing rights to additional remedies for consumers harmed by unfair commercial practices in order to ensure full removal of the effects of such practices.
- (16) The Fitness Check of consumer and marketing law directives and the parallel evaluation of Directive 2011/83/EU also identified a number of areas where the existing consumer protection rules should be modernised and disproportionate burden on traders reduced.
- (17) When products are offered to consumers in online marketplaces, both the online marketplace and the third party supplier are involved in the provision of the pre-contractual information required by Directive 2011/83/EU. As a result, consumers using the online marketplace may not clearly understand who their contractual partners are and how their rights and obligations are affected.
- (18) Online marketplaces should be defined for the purposes of Directive 2011/83/EU in a similar manner as in Regulation (EU) 524/2013⁴² and Directive 2016/1148/EU⁴³.

⁴² Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165, 18.6.2013, p. 1).

⁴³ Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).

However, the definition should be updated and rendered more technologically neutral in order to cover new technologies. It is therefore appropriate to refer, instead of a 'website', to the notion of an 'online interface' as provided by Regulation (EU) 2018/302⁴⁴.

- (19) Specific transparency requirements for online marketplaces should therefore be provided in Directive 2011/83/EU to inform consumers using online marketplaces about the main parameters determining ranking of offers, whether they enter into a contract with a trader or a non-trader (such as another consumer), whether consumer protection law applies and which trader is responsible for the performance of the contract and for ensuring consumer rights when these rights apply. This information should be provided in a clear and comprehensible manner and not only through a reference in the standard Terms and Conditions or similar contractual document. The information requirements for online marketplaces should be proportionate and need to strike a balance between a high level of consumer protection and the competitiveness of online marketplaces. Online marketplaces should not be required to list specific consumer rights when informing consumers about their applicability or non-applicability. The information to be provided about the responsibility for ensuring consumer rights depends on the contractual arrangements between the online marketplace and the relevant third party traders. Online marketplace may refer to the third party trader as being solely responsible for ensuring consumer rights or describe its specific responsibilities where it assumes the responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal. The obligation to provide information about the main parameters determining ranking of search results is without prejudice to any trade secrets regarding the underlying algorithms. This information should explain the main default parameters used by the marketplace but does not have to be presented in a customized manner for each individual search query.
- (20) In accordance with Article 15(1) of Directive 2000/31/EC⁴⁵, online marketplaces should not be required to verify the legal status of third party suppliers. Instead, the online marketplace should require third party suppliers of products on the online marketplace to indicate their status as traders or non-traders for the purposes of consumer law and to provide this information to the online marketplace.
- (21) Digital content and digital services are often supplied online under contracts where the consumer does not pay a price but provides personal data to the trader. Digital services are characterised by continuous involvement of the trader over the duration of the contract to enable the consumer to make use of the service, for instance, access to, creation, processing, storing or sharing of data in digital form. Examples of digital services are subscription contracts to content platforms, cloud storage, webmail, social media and cloud applications. The continuous involvement of the service provider justifies the application of the rules on the right of withdrawal provided in Directive 2011/83/EU that effectively allow the consumer to test the service and decide, during

⁴⁴ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60 I, 2.3.2018, p. 1).

⁴⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

the 14-day period from the conclusion of the contract, whether to keep it or not. In contrast, contracts for the supply of digital content which is not supplied on a tangible medium are characterised by one-off action by the trader to supply to the consumer a specific piece or pieces of digital content, such as specific music or video files. This one-off nature of the provision of digital content is at the basis of the exception from the right of withdrawal pursuant to Article 16(m) of Directive 2011/83/EU, whereby the consumer loses the right of withdrawal when the performance of the contract is started, such as download or streaming of the specific content.

- (22) Directive 2011/83/EU already applies to contracts for the supply of digital content which is not supplied on a tangible medium (i.e. supply of online digital content) regardless of whether the consumer pays a price in money or provides personal data. In contrast, Directive 2011/83/EU only applies to service contracts, including contracts for digital services, under which the consumer pays or undertakes to pay a price. Consequently, that Directive does not apply to contracts for digital services under which the consumer provides personal data to the trader without paying a price. Given their similarities and the interchangeability of paid digital services and digital services provided in exchange for personal data, they should be subject to the same rules under Directive 2011/83/EU.
- (23) Consistency should be ensured between the scope of application of Directive 2011/83/EU and the [Digital Content Directive], which applies to contracts for the supply of digital content of digital services under which the consumer provides personal data to the trader.
- (24) Therefore, the scope of Directive 2011/83/EU should be extended to cover also contracts under which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data. Similar to contracts for the supply of digital content which is not supplied on a tangible medium, the Directive should apply whenever the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content or digital service, and the trader does not process this data for any other purpose. Any processing of personal data should comply with Regulation (EU) 2016/679.
- (25) Where digital content and digital services are not supplied in exchange for a price, Directive 2011/83/EU should also not apply to situations where the trader collects personal data exclusively to maintain in conformity digital content or a digital service or for the sole purpose of meeting legal requirements. Such situations could include cases where the registration of the consumer is required by applicable laws for security and identification purposes, or cases where the developer of open-source software only collects data from users to ensure the compatibility and interoperability of open-source software.
- (26) Directive 2011/83/EU should also not apply to situations where the trader only collects metadata, such as the IP address, browsing history or other information collected and transmitted for instance by cookies, except where this situation is considered a contract under national law. It should also not apply to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. However, Member States should remain free to extend the application of the rules of Directive

2011/83/EU to such situations or to otherwise regulate such situations which are excluded from the scope of that Directive.

- (27) Article 7(3) and Article 8(8) of Directive 2011/83/EU require traders, for off-premises and distance contracts respectively, to obtain the consumer's prior express consent to begin performance before the expiry of the right of withdrawal period. Article 14(4)(a) provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the services provided. The requirement to obtain consumer's express consent is accordingly only relevant for services, including digital services, which are provided against the payment of the price. It is therefore necessary to amend Article 7(3) and Article 8(8) to the effect that the requirement for traders to obtain the consumer's prior consent only applies to service contracts that place the consumer under an obligation to pay.
- (28) Article 16(m) of Directive 2011/83/EU provides for an exception to the right of withdrawal in respect of digital content that is not supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses the right of withdrawal. Article 14(4)(b) of Directive 2011/83/EU provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment is accordingly only relevant for digital content, which is provided against the payment of the price. It is therefore necessary to amend Article 16(m) to the effect that the requirement for traders to obtain the consumer's prior consent and acknowledgment only applies to contracts that place the consumer under an obligation to pay.
- (29) Article 7(4) of Directive 2005/29/EC sets out information requirements for the 'invitation to purchase' a product at a specific price. These information requirements apply already at the advertising stage, whilst Directive 2011/83/EU imposes the same and other, more detailed information requirements at the later pre-contractual stage (i.e. just before the consumer enters into a contract). Consequently, traders may be required to provide the same information in advertising (e.g. an online ad on a media website) and at the pre-contractual stage (e.g. on the pages of their online web-shops).
- (30) The information requirements under Article 7(4) of Directive 2005/29/EC include informing the consumer about the trader's complaint handling policy. The Fitness Check findings show that this information is most relevant at the pre-contractual stage, which is governed by Directive 2011/83/EU. The requirement to provide this information in invitations to purchase at the advertising stage under Directive 2005/29/EC should therefore be deleted.
- (31) Article 6(1)(h) of Directive 2011/83/EU requires traders to provide consumers with pre-contractual information about the right of withdrawal, including the model withdrawal form set out in Annex I(B) of the Directive. Article 8(4) of Directive 2011/83/EU provides for simpler pre-contractual information requirements if the contract is concluded through a means of distance communication which allows limited space or time to display the information, such as over the telephone or by SMS. The mandatory pre-contractual information requirements to be provided on that particular means of distance communication include information regarding the right of withdrawal as referred to in point (h) of Article 6(1). Accordingly, they include also the provision of the model withdrawal form set out in Annex I(B) of the Directive. However, the provision of the withdrawal form is impossible when contract is

concluded by means such as telephone and it may not be technically feasible in a user-friendly way on other means of distance communication covered by Article 8(4). It is therefore appropriate to exclude the provision of the model withdrawal form from the information that traders have to provide in any case on the particular means of distance communication used for the conclusion of the contract under Article 8(4) of Directive 2011/83/EU.

- (32) Article 16(a) of Directive 2011/83/EU provides for an exception from the right of withdrawal regarding service contracts that have been fully performed if the performance has begun with the consumer's prior express consent and with the acknowledgement that he will lose the right of withdrawal once the contract has been fully performed by the trader. In contrast, Article 7(3) and 8(7) of Directive 2011/83/EU, which deal with the trader's obligations in situations where the performance of the contract is begun before the expiry of the right of withdrawal period, only require traders to obtain consumer's prior express consent but not acknowledgment that the right of withdrawal will be lost when the performance is completed. To ensure consistency between the above-mentioned legal provisions, it is necessary to remove, in Article 16(a), the reference to acknowledgment that the right of withdrawal will be lost once the contract has been fully performed.
- (33) Directive 2011/83/EU provides fully harmonised rules regarding the right of withdrawal from distance and off-premises contracts. In this context, two concrete obligations have been shown to constitute disproportionate burdens on traders and should be deleted.
- (34) The first relates to the consumer right to withdraw from sales contracts concluded at a distance or off-premises even after using goods more than necessary to establish their nature, characteristics and functioning. According to Article 14(2) of Directive 2011/83/EU, a consumer is still able to withdraw from the online/off-premises purchase even if he or she has used the good more than allowed; however, in such a case, the consumer can be held liable for any diminished value of the good.
- (35) The obligation to accept the return of such goods creates difficulties for traders who are required to assess the 'diminished value' of the returned goods and to resell them as second-hand goods or to discard them. It distorts the balance between a high level of consumer protection and the competitiveness of enterprises pursued by Directive 2011/83/EU. The right for consumers to return goods in such situations should therefore be deleted. Annex I of Directive 2011/83/EU 'Information concerning the exercise of the right of withdrawal' should also be adjusted in accordance with this amendment.
- (36) The second obligation concerns Article 13 of Directive 2011/83/EU, 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 traders to reimburse consumers before having received back the returned goods and having had the possibility to inspect them. It distorts the balance between a high level of consumer protection and the competitiveness of enterprises pursued by Directive 2011/83/EU. Therefore, the obligation for traders to reimburse the consumer on the mere basis of the proof that the goods have been sent back to the trader should be deleted. Annex I of Directive 2011/83/EU 'Information concerning the exercise of the right of withdrawal' should also be adjusted in accordance with this amendment.

- (37) Article 14(4) of Directive 2011/83/EU stipulates the conditions under which, in the event of exercising the right of withdrawal, the consumer does not bear the cost for the performance of services, supply of public utilities and supply of digital content which is not supplied on a tangible medium. When any of those conditions is met, the consumer does not have to pay the price of the service, public utilities or digital content received before the exercise of the right of withdrawal. As regards digital content, one of these non-cumulative conditions is a failure to provide the contract confirmation including confirmation of the consumer's prior express consent to begin the performance of the contract before the expiry of the right of withdrawal period and acknowledgement that the right of withdrawal is lost as a result. This condition is not relevant in the context of the exercise of the right of withdrawal since the consumer has been duly informed and has accepted the loss of this right. It should therefore be deleted from Article 14(4)(b) to ensure also consistency with Article 16(m) which defines an exception from the right of withdrawal in case of digital content.
- (38) Considering technological developments, it is necessary to remove the reference to fax number from the list of the means of communication in Article 6(1)(c) of Directive 2011/83/EU since fax is rarely used and largely obsolete. Furthermore, traders should be able to provide, as alternative to an e-mail address, other means of online communication with consumers, for example, online forms and chats, provided that such alternative means enable the consumer to retain the content of the communication on a durable medium in a similar way as e-mail. Annex I of the Directive 'Information concerning the exercise of the right of withdrawal' should also be adjusted in accordance with this amendment.
- (39) A number of additional amendments should be introduced in the instruments amended by this Directive to clarify the application of specific rules.
- (40) No 11 of Annex I to Directive 2005/29/EC that prohibits hidden advertising in editorial content in media should be adjusted in order to make it clear that the same prohibition applies also where a trader provides information to a consumer in the form of search results in response to the consumer's online search query.
- (41) Article 16 of the Charter of Fundamental Rights of the EU guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. However, marketing across Member States of products as being identical when, in reality, they have a significantly different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise.
- (42) Such a practice can therefore be qualified as contrary to Directive 2005/29/EC based on a case by case assessment of relevant elements. In order to facilitate the application of existing law by Member States' consumer and food authorities, guidance on the application of current EU rules to situations of dual quality of food products was provided 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'.⁴⁶ In this context, the Commission's Joint Research Centre is currently developing a common approach to the comparative testing of food products.
- (43) However, the enforcement experience has shown that it may be unclear to consumers, traders and national competent authorities which commercial practices could be

⁴⁶ C(2017)6532.

contrary to the Directive 2005/29/EC in the absence of an explicit provision. Therefore, Directive 2005/29/EC should be amended to ensure legal certainty both for traders and enforcement authorities by addressing explicitly the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics. Competent authorities should assess and address on a case by case basis such practices according to the provisions of the Directive. In undertaking its assessment the competent authority should take into account whether such differentiation is easily identifiable by consumers, a trader's right to adapt products of the same brand for different geographical markets due to legitimate factors, such as availability or seasonality of raw materials, defined consumer preferences or voluntary strategies aimed at improving access to healthy and nutritious food as well as the traders' right to offer products of the same brand in packages of different weight or volume in different geographical markets.

- (44) While off-premises sales constitute a legitimate and well-established sales channel, like sales at a trader's business premises and distance-selling, some particularly aggressive or misleading marketing practices in the context of visits to the consumer's home without the consumer's prior agreement or during commercial excursions can put consumers under pressure to make purchases of goods they would not otherwise buy and/or purchases at excessive prices, often involving immediate payment. Such practices often target elderly or other vulnerable consumers. Some Member States consider those practices undesirable and deem it necessary to restrict certain forms and aspects of off-premises sales within the meaning of Directive 2011/83/EU, such as aggressive and misleading marketing or selling of a product in the context of unsolicited visits to a consumer's home or commercial excursions, on grounds of public policy or the respect for consumers' private life protected by Article 7 of the Charter of Fundamental Rights of the EU. In accordance with the principle of subsidiarity and in order to facilitate enforcement, it should therefore be clarified that Directive 2005/29/EC is without prejudice to Member States' freedom to make arrangements without the need for a case-by-case assessment of the specific practice, to protect the legitimate interests of consumers with regard to unsolicited visits at their private home by a trader in order to offer or sell products or in relation to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers where such arrangements are justified on grounds of public policy or the protection of private life. Any such provisions should be proportionate and not discriminatory. Member States should be required to notify any national provisions adopted in this regard to the Commission so that the Commission can make this information available to all interested parties and monitor the proportionate nature and legality of those measures.
- (45) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁴⁷, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

⁴⁷ OJ C 369, 17.12.2011, p. 14.

- (46) Since the objectives of this Directive of better enforcement and modernisation of the consumer protection legislation cannot be sufficiently achieved by the Member States but can rather, by reason of the Union-wide character of the problem, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2005/29/EC

Directive 2005/29/EC is amended as follows:

- (1) Article 3 is amended as follows:

(a) Paragraph 5 is replaced by the following:

This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home, or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers, provided that such provisions are justified on grounds of public policy or the protection of the respect for private life.

(b) Paragraph 6 is replaced by the following:

Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5 as well as of any subsequent changes. The Commission shall make this information easily accessible to consumers and traders on a dedicated website.

- (2) The following point (c) is inserted in paragraph 2 of Article 6:

(c) Any marketing of a product as being identical to the same product marketed in several other Member States, while those products have significantly different composition or characteristics;

- (3) Point (d) of Article 7(4) is replaced by the following:

(d) the arrangements for payment, delivery and performance, if they depart from the requirements of professional diligence;

- (4) The following Article 11a is inserted:

‘Article 11a

Redress

1. In addition to the requirement to ensure adequate and effective means to enforce compliance in Article 11, Member States shall ensure that contractual and non-contractual remedies are also available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair commercial practices in accordance with their national law.

2. Contractual remedies shall include, as a minimum, the possibility for the consumer to unilaterally terminate the contract.

3. Non-contractual remedies shall include, as a minimum, the possibility of compensation for damages suffered by the consumer.

(5) Article 13 is replaced by the following:

‘Article 13

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

- (a) the nature, gravity and duration or temporal effects of the infringement;
- (b) the number of consumers affected, including those in other Member State(s);
- (c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (d) where appropriate, the intentional or negligent character of the infringement;
- (e) any previous infringements by the trader;
- (f) the financial benefits gained or losses avoided by the trader due to the infringement;
- (g) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. Where the penalty to be imposed is a fine, the infringing trader’s annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4 % of the trader's annual turnover in the Member State or Member States concerned.

5. When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.

6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.’

(6) No. 11 of Annex I is replaced by the following:

11. Using editorial content in the media, or providing information to a consumer’s online search query, to promote a product where a trader has paid for the promotion without making that clear in the content or search results or by images or sounds clearly identifiable by the consumer (advertorial; paid

placement or paid inclusion). This is without prejudice to Directive 2010/13/EU⁴⁸.

Article 2

Amendments to Directive 2011/83/EU

Directive 2011/83/EU is amended as follows:

- (1) Article 2 is amended as follows:
 - (a) The following point (4a) is inserted:

‘(4a) ‘personal data’ means personal data as defined in Article 4(1) of Regulation (EU) 2016/679;’
 - (b) Point (6) is replaced by the following:

‘(6) ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof. Reference to ‘services’ also includes ‘digital services’ and reference to ‘service contract’ also includes ‘digital service contract’;
 - (c) Point (11) is replaced by the following:

‘(11) ‘digital content’ means data which are produced and supplied in digital form, including video files, audio files, applications, digital games and any other software’;
 - (d) The following points are added:

‘(16) ‘contract for the supply of digital content which is not supplied on tangible medium’ means a contract under which a trader supplies or undertakes to supply specific digital content to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital content, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;

(17) ‘digital service’ means (a) a service allowing the consumer the creation, processing or storage of, or access to, data in digital form; or (b) a service allowing the sharing of or any other interaction with data in digital form uploaded or created by the consumer and other users of that service, including video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.

(18) ‘digital service contract’ means a contract under which a trader supplies or undertakes to supply a digital service to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the

⁴⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital service, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;

(19) ‘online marketplace’ means a service provider which allows consumers to conclude online contracts with traders and consumers on the online marketplace’s online interface;

(20) ‘online interface’ means online interface as defined in point (16) of Article 2 of Regulation (EU) 2018/302’

(2) In paragraph 1 of Article 5 points (g) and (h) are replaced by the following:

‘(g) where applicable, the functionality, including applicable technical protection measures, of digital content and digital services.

(h) where applicable, any relevant interoperability of digital content and digital services with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.’

(3) In paragraph 1 of Article 6, points (c), (r) and (s) are replaced by the following:

‘(c) the geographical address at which the trader is established as well as the trader’s telephone number, e-mail address or other means of online communication which guarantee that the consumer can keep the correspondence with the trader on a durable medium, to enable the consumer to contact the trader quickly and communicate with him efficiently. Where applicable, the trader shall also provide the geographical address and identity of the trader on whose behalf he is acting.

(r) where applicable, the functionality, including applicable technical protection measures, of digital content and digital services.

(s) where applicable, any relevant interoperability of digital content and digital services with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.’

(4) The following Article 6a is inserted:

‘Article 6a

Additional information requirements for contracts concluded on online marketplaces

Before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the online marketplace shall in addition provide the following information:

(a) the main parameters determining ranking of offers presented to the consumer as result of his search query on the online marketplace;

(b) whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the online marketplace;

(c) whether consumer rights stemming from Union consumer legislation apply or not to the contract concluded; and

- (d) where the contract is concluded with a trader, which trader is responsible for ensuring the application of consumer rights stemming from Union consumer legislation in relation to the contract. This requirement is without prejudice to the responsibility that the online marketplace may have or may assume with regard to specific elements of the contract.’
- (5) Paragraph 3 in Article 7 is replaced by the following:
- ‘3. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer makes such an express request on a durable medium.’
- (6) Article 8 is amended as follows:
- (a) paragraph 4 is replaced by the following:
- ‘4. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to, respectively, in points (a), (b), (e), (h) and (o) of Article 6(1) except the model withdrawal form set out in Annex I(B) referred to in point (h). The other information referred to in Article 6(1) shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.’
- (b) paragraph 8 is replaced by the following:
- ‘8. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make an express request.’
- (7) Article 13 is amended as follows:
- (a) paragraph 3 is replaced by the following:
- ‘3. Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back.’
- (b) the following paragraphs are added:
- ‘4. In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679.
5. In respect of any digital content to the extent that it does not constitute personal data, which was uploaded or created by the consumer when using the digital content or digital service supplied by the trader the trader shall comply

with the obligations and can exercise the rights provided under [Digital Content Directive].’

(8) Article 14 is amended as follows:

(1) paragraph 2 is replaced by the following:

‘After the termination of the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.’

(2) paragraph 4(b) is amended as follows:

(a) Point (ii) is amended as follows:

‘(ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent’;

(b) Point (iii) is deleted.

(9) Article 16 is amended as follows:

(a) point (a) is replaced by the following:

‘(a) service contracts after the service has been fully performed if the performance has begun with the consumer’s prior express consent’;

(2) point (m) is replaced by the following:

‘(m) contracts for the supply of digital content which is not supplied on tangible medium if the performance has begun and, if the contract places the consumer under an obligation to pay, where the consumer has provided prior express consent to begin the performance during the right of withdrawal period and acknowledged that he thereby loses his right of withdrawal.’

(3) the following point is added:

‘(n) the supply of goods that the consumer has handled, during the right of withdrawal period, other than what is necessary to establish the nature, characteristics and functioning of the goods.’

(10) Article 24 is replaced by the following:

‘Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

(a) the nature, gravity and duration or temporal effects of the infringement;

(b) the number of consumers affected, including those in other Member State(s);

(c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;

(d) where appropriate, the intentional or negligent character of the infringement;

- (e) any previous infringements by the trader;
- (f) the financial benefits gained or losses avoided by the trader due to the infringement;
- (g) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4% of the trader's annual turnover in the Member State or Member States concerned.

5. When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.

6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.'

(11) Annex I is amended as follows:

(1) Point A is amended as follows:

(a) the third paragraph of point A under "Right of withdrawal" is replaced by the following:

“To exercise the right of withdrawal, you must inform us [2] of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post or e-mail). You may use the attached model withdrawal form, but it is not obligatory. [3]”

(b) point 2 under "Instructions for completion" is replaced by the following:

“[2.] Insert your name, geographical address and your telephone number or e-mail address.”

(c) point 4 under "Instructions for completion" is replaced by the following:

“[4.] In the case of sales contracts in which you have not offered to collect the goods in the event of withdrawal insert the following: ‘We may withhold reimbursement until we have received the goods back.’”

(d) Subpoint (c) of point 5 under "Instructions for completion" is deleted.

(2) In point B the first indent is replaced by the following:

“To [here the trader's name, geographical address and, where available, his e-mail address are to be inserted by the trader]:”

Article 3

Amendments to Directive 93/13/EC

Directive 93/13/EEC is amended as follows:

The following Article 8b is inserted:

‘Article 8b

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

- (b) the nature, gravity and duration or temporal effects of the infringement;
- (c) the number of consumers affected, including those in other Member State(s);
- (d) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (e) where appropriate, the intentional or negligent character of the infringement;
- (f) any previous infringements by the trader;
- (g) the financial benefits gained or losses avoided by the trader due to the infringement;
- (h) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. Where the penalty to be imposed is a fine, the infringing trader’s annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4% of the trader's annual turnover in the Member State or Member States concerned.

5. When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.

6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.’

Article 4

Amendments to Directive 98/6/EC

Directive 98/6/EC is amended as follows:

Article 8 is replaced by the following:

‘Article 8

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

- (i) the nature, gravity and duration or temporal effects of the infringement;
- (j) the number of consumers affected, including those in other Member State(s);
- (k) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (l) where appropriate, the intentional or negligent character of the infringement;
- (m) any previous infringements by the trader;
- (n) the financial benefits gained or losses avoided by the trader due to the infringement;
- (o) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. Where the penalty to be imposed is a fine, the infringing trader’s annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4 % of the trader’s annual turnover in the Member State or Member States concerned.

5. When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.

6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.’

Article 5

Transposition

1. Member States shall adopt and publish, by 18 months after adoption at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 6 months after transposition deadline.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 6

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Article 7

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

COM (2018) 185 final

Information Note

1. Proposal

Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, 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

2. Date of Commission document

11/04/2018

3. Number of Commission document

COM (2018) 185 final

4. Number of Council document

2018/0090 (COD)

5. Dealt with in Brussels by

Working Party on Consumer Protection and Information
Internal Market and Consumer Protection Committee of European Parliament

6. Department with primary responsibility

Department of Business, Enterprise and Innovation

7. Other Departments involved

Justice and Equality; Communication, Climate Action and Environment; Finance; and other Departments as required

8. Background to, short summary and aim of the proposal

In May 2017 the European Commission published the results of its Fitness Check of a number of the most important pieces of consumer protection legislation, including Directive 93/13/EEC on unfair terms in consumer contracts and Directive 2005/29/EC on unfair business-to-consumer commercial practices {SWD (2017) 2018 final}. A separate evaluation report on Directive 2011/83/EU on consumer rights was published at the same time {COM 2017 259 final}. The evaluations found that while EU consumer law overall was fit for purpose, there was a need for targeted legislative changes to address certain identified shortcomings in the Directives and to take account of developments in the digital sphere. There was a requirement in particular for improved enforcement and enhanced redress options for consumers. The evaluations concluded also that there was a need to reduce the regulatory burden on traders in some areas.

The proposed Directive is a follow-up to the Fitness Check and the evaluation of the Consumer Rights Directive and forms part of the 'New Deal for Consumers' announced by the European Commission on 11 April 2018. It provides for a number of substantive amendments to Directive 2005/29/EC on unfair consumer practices and

Directive 2011/83/EU on consumer rights as well as for more effective, proportionate and dissuasive penalties for infringements of these two Directives, Directive 93/13/EEC on unfair contract terms and Directive 98/6/EC on the indication of the prices of products offered to consumers.

Penalties Provisions Applicable to All Four Directives

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

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

Amendments to Directive 2005/29/EC on Unfair Commercial Practices

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

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

to address concerns about food products that are marketed as identical but which are of different quality in some Member States.

Enhanced scope for Member States to regulate off-premises transactions

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

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

The proposal provides that it will be a prohibited commercial practice to provide information in response to a consumer's online search query in order to promote a product where a trader has paid for the promotion without making that fact clear in the search results.

Right to individual remedies for consumers

The proposal provides that consumers harmed by unfair commercial practices should have the right to individual contractual and non-contractual remedies. At a minimum, the contractual remedies should include the right to contract termination. Non-contractual remedies should, as a minimum, include the right to compensation for damages.

Amendments to Directive 2011/83/EU on Consumer Rights

Extending protection of consumers to 'free' digital services

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

Greater transparency in online marketplaces

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

Reducing burdens for businesses

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

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

9. Legal basis of the proposal

Article 114 of the Treaty on the Functioning of the European Union.

10. Voting Method

QMV.

11. Role of the European Parliament

Co-decision.

12. Category of proposal

The proposal is an important element of the New Deal for Consumers which forms part of the European Commission's 2018 Work Programme.

13. Implications for Ireland & Ireland's Initial View'

While the aim of ensuring more effective enforcement of EU consumer protection legislation merits support, the proposed penalties provisions will require careful consideration in view of their possible implications for existing national policy and practice in respect of penalties. There is a need also to assess whether the proposed restrictions on aspects of the exercise of the right to withdraw from distance and off-premises contracts strike a reasonable balance between the interests of consumers and of traders.

14. Are there any subsidiarity issues for Ireland?

The proposed penalties provisions are more prescriptive than those under existing EU consumer protection legislation and as such may give rise to subsidiarity issues.

15. Impact on the public

Overall the impact of the proposal on consumers should be positive. It should not give rise to significant additional burdens on responsible businesses and may reduce existing burdens in certain areas.

16. Have any consultations with Stakeholders taken place or are there any plans to do so?

The Department will shortly undertake a public consultation on the proposal and will also engage as necessary in targeted discussions with relevant Government Departments, enforcement authorities and consumer and business groups.

17. Anticipated negotiating period

Q2 2018 to Q2 2019.

18. Proposed implementation date

The proposal provides that Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive within 18 months from the date of entry into force of the Directive at the latest and that Member States shall apply those provisions within 6 months thereafter.

19. Consequences for national legislation

See points 13 and 14 above.

20. Method of Transposition into Irish law

The method of transposition will depend on the provisions of the final text.

21. Anticipated Transposition date

Given the time frames currently proposed, the anticipated transposition date is late 2020 or early 2021.

22. Consequences for the EU budget in Euros annually

There are no budgetary consequences for the EU budget.

23. Contact name, telephone number and e-mail address of official in Department with primary responsibility

Kieran Grace
Principal Officer
Competition & Consumer Policy Section
01-631 2676
kieran.grace@djei.ie

Bill Cox
Assistant Principal Officer
Competition & Consumer Policy Section
01-631 2663
bill.cox@djei.ie

Date

2 May 2018