

DIGITALEUROPE recommends policymakers to recalibrate the Omnibus proposal

Brussels, 25 July 2018

DIGITALEUROPE welcomes the European Commission's proposal for better enforcement and modernisation of EU consumer protection rules to the digital age.

However, e-Commerce in Europe can only reach its full potential if we find the right balance between consumer protection and businesses' ability to offer innovative products and services to consumers. EU citizens already benefit from a strong framework of consumer rules. DIGITALEUROPE always encourages policymakers to take stock and make use of the existing rules before proposing new ones, which must be based on the evidence that current practices really hamper consumers or society as a whole. There are positive aspects introduced in the proposal, which we will support, and others where we urge caution.

In this context, DIGITALEUROPE believes that amendments to consumer legislation should take into account the following:

1. Penalties (Amendments to Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC, and Directive 2011/83/EU)

DIGITALEUROPE members are concerned about a framework where penalties are based on annual turnover. Penalties need to be assessed on a case-by-case basis, be proportionate to the level of the violation and should only be applied in the Member State where the violation took place. Basing penalties on the annual turnover of a company risks including other parts of the business that may not be related to consumer services and products, or other entities of the group that are not related to the infringement. It will also create a disproportionate burden on small companies.

Additionally, we believe that maximum penalties should be imposed only as a last resort and limited to extreme cases. Penalties need to be warranted and the evidence of an infraction must be indisputable. DIGITALEUROPE suggests including a mechanism to ensure impartiality and proportionality for these cases. It is crucial that regulators first seek cooperation with companies to prevent or rectify any arising issues that may cause consumer harm. Therefore, we recommend that the level of cooperation of the company with relevant authorities is inserted as an additional criteria for the determination of the fine. We also suggest that other criteria, such as actions taken by the trader to mitigate or remedy the damage suffered by consumers and the intentional or negligent character of the infringement, shall be taken into account when determining the proportionate level of the penalty.

DIGITALEUROPE supports the Commission's proposal to align the definition of 'widespread infringements' with the Regulation on Consumer Protection Cooperation (2017/2394) to ensure consistency of consumer legislation.

2. Right of Withdrawal (Article 2(7))

Although the Right of Withdrawal (RoW) has improved consumer trust in e-Commerce, the current legislation also facilitates consumers to withdraw from contracts even after the goods have been used more than what is allowed in an offline situation, i.e. being ‘overused’. This exposes online traders to great financial burdens and creates a high level of uncertainty for both traders and consumers. The online trader is also required to pay the shipping return costs while attempting to re-sell the item. According to a 2016 study conducted by Händlerbund¹, this leads in many cases to abuse by consumers, diminishing the value of the goods in question and forcing traders to sell returned goods as second-hand items due to their ‘overuse’. If these fully functional returned goods cannot be sold nor donated at a reasonable cost by the trader they are often liquidated, thus leading to an unintentional negative environmental impact.

DIGITALEUROPE supports the positive changes brought about in the RoW. The European Commission acknowledges that more abuse takes place for online merchants than in physical stores where goods can be more easily inspected. Online merchants and manufacturers need to dedicate specific resources and/or teams to inspect returned goods before providing reimbursements to consumers, and this in itself entails a significant cost. At the very minimum, DIGITALEUROPE asks that consumers should be liable for the loss in value due to obvious ‘overuse’, including – but not limited to – dirt, marks, scratches or signs of manipulation.

3. Transparency requirements for online marketplaces (Article 2(4))

The 2017 Consumer Conditions Scoreboard highlights that “consumer trust in online shopping surges” but the obstacles that remain are more to do with territoriality of goods rather than issues of trust². Consumers purchasing products or services online have more information available to them than in the off-line world and are able to easily switch to competing traders or to compare prices online. This flexibility has led to a surge in online purchases “in particular for cross-border purchases (...)”³ and increased consumer trust when purchasing cross-border goods and services. Differences between online and offline shopping are accentuated when requirements such as those in the proposal are introduced. While we recognise that differences exist between offline and online, some basic requirements such as providing parameters and explaining how goods are advertised and presented should remain the prerogative of the trader. The offline world is not mandated to provide such parameters, nor should traders operating online.

Online marketplaces rank offers based on a range of criteria including, but not limited to, i) price, ii) consumer reviews, iii) quality of service. It is imperative that these ranking algorithms are protected, even if the main parameters should be disclosed, as they represent a core part of the competitive advantage of each business.

DIGITALEUROPE cautions against algorithmic transparency insofar as it would endanger trade secrets and potentially infringe intellectual property. Disclosing every detailed parameter that makes up rankings may lead to seller competition abuse to achieve top rankings. In addition, algorithmic transparency would unjustly create a discrepancy between the online and offline worlds, where physical stores are not required to explain how products are presented to consumers while online ones have to.

¹ Händlerbund, [Returns-study 2016 on “How fair are customers in online trade?”](#)

² European Commission, [Consumer Conditions Scoreboard 2017](#), page 6

³ European Commission, [Consumer Conditions Scoreboard 2017](#), page 10

Therefore, DIGITALEUROPE calls for the protections under Recital 19 and those included in the proposed Regulation on platform-to-business trading practices (2018/0112(COD), P2B) to be inserted into Article 2(4) to ensure the protection of business confidentiality.

Finally, the requirements to identify a trader’s professional status are already addressed by article 6(1) of the Consumer Rights Directive (2011/83/EU, CRD) as it mandates that contracting parties must identify themselves prior to any binding of the contract. If this is not carried out, the contract is considered null and void. DIGITALEUROPE urges the co-legislators to refrain from introducing further requirements to disclose the identity of the trader in question.

4. Extension to free services (Article 2(1))

DIGITALEUROPE notes that the definition of 'digital service contract' has been extended to include contracts where a consumer provides personal data as a counter performance, instead of a traditional monetary exchange. Fit-for-purpose consumer protection already exists for consumers opting to 'use' their personal data in exchange for free services. Consumers have the power to object to the processing of their personal data, to limit personalisation and advertising, to carry out a data subject access request (DSAR), and the right of erasure of their data. We strongly agree with the EDPS Opinion 4/2017 which cautioned “against any new provision introducing the idea that people can pay with their data the same way as they do with money”⁴.

Overlaps with the General Data Protection Regulation (2016/679, GDPR) must be avoided in order not to duplicate obligations in new legislative proposals.

It is not clear what a right of withdrawal would entail for free content or services. Withdrawal from a contract should not automatically stipulate that a trader must cease all data processing. In compliance with the GDPR, the trader should only halt the processing of personal data if it can no longer rely on one of the legal bases set out under article 6 of the GDPR following the withdrawal from the contract. For example, GDPR’s right to data subject access requests (DSARs) already provides consumers with the ability to request their data on a portable medium. It is also not reasonable to expect that all legal grounds for processing under GDPR would be withdrawn if the right of withdrawal is employed. There are other reasons to keep customer data. For example, certain data must be kept for fraud or crime prevention and the length of keeping this data may vary according to national legislation.

In the digital ecosystem, consumers are already active and willing to exercise their rights under GDPR and we do not see the added value that such an extension to free services may bring.

5. Support the proposal to reduce pre-contractual information requirements in case of distance communication with limited space or time to display (Article 2(6))

DIGITALEUROPE supports the European Commission’s proposal to replace Article 8(4) of the CRD, and corresponding Recitals 31 and 39, to limit the information requirements on a particular medium. Modern distant communication devices often have very limited space to display any information and it would not be

⁴ European Data Protection Supervisor, [Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content](#)

appropriate to oblige traders to show extensive information on these devices. Other available means of communication can provide, in an easily accessible and less burdensome way, the information the consumer needs.

Our organisation supports further tweaks to ensure that if the contract is concluded using multiple devices that as a whole make up a means of distance communication, it is sufficient for this information to be provided using one of these devices. Present and future technologies would then have the flexibility to present information to consumers without necessarily having to demonstrate the information on a screen. This would provide the flexibility to present pre-contractual information to consumers through devices where artificial intelligence is built in. This may include systems like automobiles, white goods such as refrigerators and other essentials, and devices with limited screen space. These changes acknowledge that modern distant communication devices often have very limited space to display any information and that it would not be appropriate to oblige traders to show extensive information on these devices.

6. Dual quality of products (Article 1(2))

DIGITALEUROPE understands the Commission’s aim to address misleading commercial practices involving the marketing of products as being identical in several EU countries, if their composition or characteristics are significantly different. Our members strongly believe that product quality matters to EU consumers and commit to provide them with high quality products that are innovative and that best meet their needs and taste.

Our members express concerns that the branding and marketing of a product would fall under the notion of presentation. This may be extended to electronic products and, given that the definition of marketing is not defined and remains overly broad, would cover the advertising, promotion, and the sale of products. Companies engaging in cross-border e-Commerce would then fall under the scope if their branded goods have differing compositions, even if the trader may not have control over the composition or characteristics of the product in question. For manufacturers, it is important to define terms such as ‘significantly different’ and ‘identical’ given the broad scope of this article. There are differences for why products may differ across Member States – some changes are made to comply with local laws, use local ingredients and resources, and even adapt to consumer tastes and demand. Finally, mandating that any changes to a product must be carried out at the EU-level may restrict innovation in these products as their development would be narrowed. As a matter of fact, existing discussions about the dual quality of products exclusively concern the food sector. DIGITALEUROPE would like to see that reflected in the text of the proposal.

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total over 35,000 ICT Companies in Europe represented by 63 Corporate Members and 39 National Trade Associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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National Trade Associations

Austria: IOÖ

Belarus: INFOPARK

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Croatia: Croatian Chamber of Economy

Cyprus: CITEA

Denmark: DI Digital, IT-BRANCHEN

Estonia: ITL

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Germany: BITKOM, ZVEI

Greece: SEPE

Hungary: IVSZ

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Italy: Anitec-Assinform

Lithuania: INFOBALT

Luxembourg: APSI

Netherlands: Nederland ICT, FIAR

Poland: KIGEIT, PIIT, ZIPSEE

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Slovakia: ITAS

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Sweden: Teknikföretagen, IT&Telekomföretagen

Switzerland: SWICO

Turkey: Digital Turkey Platform, ECID

Ukraine: IT UKRAINE

United Kingdom: techUK