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# Fighting for a consumer-friendly market: stricter rules in the EU

A spate of high-profile cases across the EU has brought the spotlight firmly on how to combat unfair commercial practices and increase consumer protection. The European Commission has been focussing on how to increase consumer protection and reinforce the EU's reputation for being a high quality, safe trading place. The outcome is the EU's "New Deal for Consumers" legislative package which came into force on 7 January 2020. Member States have 24 months to implement it.



A good example of the issues faced was "Dieselgate", the emissions testing scandal, which affected a wide number of consumers. With the EU market marred by allegations of wide-spread unfair practices, If we look at Italy, the Italian Competition Authority recently issued huge fines against three major corporations - Tecnotrade, the HP Group and Tiger - for unfair commercial practices. In those cases, the breaches ranged from selling products that were not actually available, failing pre-contractual requirements, not delivering the promised products and prohibiting reimbursements. It was clear that a strong deterrent was really needed.

On the basis of similar cases, in April 2018 the European Commission proposed a legislative package called "New Deal for Consumers", aimed at providing adequate consumer protection and helping consumers to enforce their rights within the EU. The Directive has been revised by the European Council and Parliament. The final agreed text was signed on 27 November 2019 and resulting **Consumer Directive (Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules)** entered into force on 7 January 2020.

Member States will have 24 months to implement the Directive in domestic legislation, adopting all measures necessary to comply with the new legal provisions.

Unlike with the GDPR, rather than issuing a brand new set of rules, in this case the European Legislator opted to amend the four existing European Directives dedicated to consumer protection.

It is known that EU countries already have some of the most robust rules when it comes to protecting consumer rights. However, those rules needed to be amended to reflect and catch up with recent changes, in particular the new digital economy, and to introduce stronger measures against unfair trade, and so reinforcing the remedies available to consumers when enforcing their rights.

This article looks primarily at the proposed amendments to EU Directive 2005/29/EC relating to unfair business-to-consumer commercial practices in the internal market (referred to as the "Directive").

Before analysing the key principles and the main amendments, let us consider what "unfair commercial practice" means under European law: it is essentially any practice that does not satisfy professional diligence requirements and materially distorts the economic behaviour of consumers with regard

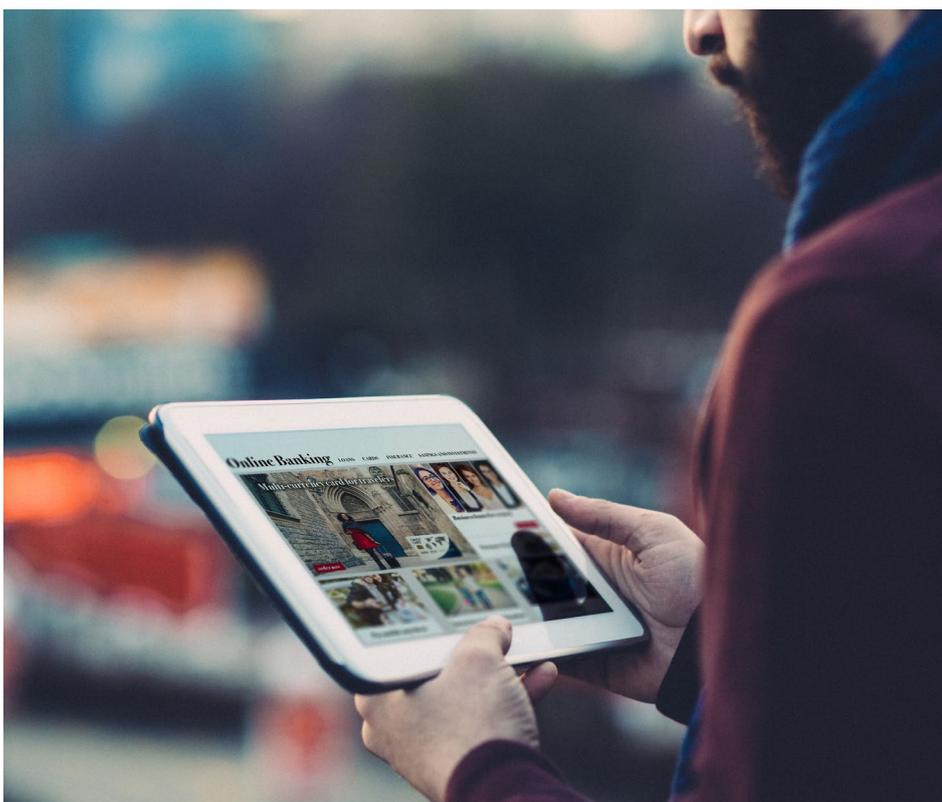
to a specific product. This kind of practice is "misleading" if it entails providing false information, if it is untruthful or if it in any way deceives - or is likely to deceive - the average consumer. Consumer practices are held to be "aggressive" when they significantly impair the average consumer's freedom of choice, through harassment, coercion, physical force or undue influence.

Some of the more interesting changes introduced by the amendments are considered below.

## Remedies and penalties

In relation to remedies available to deal with unfair commercial practices, the New Deal for Consumers will ensure that consumers in all Member States have the right to claim individual remedies (eg financial compensation or termination of contract) when they are affected by unfair commercial practices, such as aggressive or misleading marketing, protection which currently varies greatly across the EU. "A clear framework for individual remedies would facilitate private enforcement. The consumer should have access to compensation for damage and, where relevant, a price reduction or termination of the contract, in a proportionate and effective manner", say the recitals to the Consumer Directive.

A major change concerns the penalty that the Consumer Directive introduces to combat large scale cross-border unfair practice by international companies, affecting a large number of consumers across several EU Member States. Previously, consumers were not always in the position to enforce from companies the penalty due in respect of their unfair practices, or the price or penalty for those companies was not great enough to encourage them to change their ways. Once the new Directive enters into force, representative consumer organisations across the EU will have the power to seek effective, proportionate and dissuasive penalties, aimed at sanctioning - and ultimately deterring - widespread infringement within the European Union. Examples include compensation, replacement or repair. Collective action (more commonly known as class action) is already possible in some Member States but this will now be possible in all. Representative actions will not be open to law firms, but only to entities such as consumer organisations that are non-profit and fulfil strict eligibility criteria, monitored by a public authority.



Member States are free to set the maximum fine for infringement, which must however be at least 4% of the infringing trader's annual turnover, or €2,000,000 if the turnover cannot be established. These new GDPR-style maximum fines are a clear attempt at introducing a serious deterrent of infringement within the EU.

### Increased transparency in the online marketplace

A key amendment relates to transparency requirements for the online marketplace. Online marketplaces will have to make it clear to consumers with whom they are concluding the contract (private individual or commercial trader), whether consumer protection legislation applies to the transaction and if so, who is responsible for ensuring their rights (the online marketplace or the third party supplier). They will also need to disclose the main parameters which determine the ranking of the different offers in response to search queries.

In a bid to stamp out the increasingly concerning phenomenon of 'hidden advertising', all online platforms will have to make it clear where search results are based on payments received from other traders (in order to be included or to receive a higher ranking) as opposed to an organic search result based on relevance to their search. However the recitals of the Consumer Directive state that "Traders should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms. Traders should provide a general description of the main parameters determining the ranking that explains the default main parameters used by the trader and their relative importance as opposed to other parameters, but that description does not have to be presented in a customised manner for each individual search query."

Although we are concentrating on the Unfair Commercial Practices Directive in this article, it is also worth mentioning here that, under amendments to the Consumer Rights Directive (Directive 2011/83/EU), consumers will be informed when the price presented to them online is based on an algorithm that uses their personal consumer behaviour to adjust price, so that they are aware of the risk that the asking price was increased.

The aim here is to address some of the challenges of the new and evolving marketplace, which was a key priority of President Juncker's Commission under its



Digital Single Market Strategy. As part of this strategy the Commission also carried out its E-Commerce sector inquiry under its competition rules, as a result of which it continues to target business practices that have emerged following the growth of e-commerce and have a negative impact on competition. Both at EU and national level regulators are focusing on commercial practices in the digital sector, enforcing competition and/or consumer protection legislation in order to protect consumer interests in the digital world. Just last April for example, the Italian Competition Authority investigated Amazon in relation to the possible abuse of its dominant position: Amazon had allegedly been offering preferential exposure on the website to traders that subscribed to Amazon's logistics service. The Authority held that this practice would have allowed Amazon to unfairly profit from its dominant position in clear detriment of the interests of end consumers.

Another issue that has been attracting attention is that of fake reviews. That same level of transparency has to be guaranteed for product reviews and consumer opinions on products: traders must ensure that these opinions came from consumers who have purchased or used the products.

The Consumer Directive will hopefully bring greater transparency for consumers in online marketplaces, allowing them to make better informed and safer choices.

### Dual quality product

The Consumer Directive has dealt head on the problem of dual quality products ie when a product is marketed in two Member States (substantially with the same trade mark) in a similar way even though the items have a significantly different composition or characteristics.

National authorities will now be able to assess and address this kind of practice to decide whether there is adequate and available information for consumers to easily differentiate between the products. Traders will be entitled to adapt the same item depending on the geographical market for objective reasons, such as national law requirements, seasonality of raw materials or voluntary strategy. They will also be able to change the weight/volume of packaging depending on the new geographical area. However, under the Directive, it is essential that traders provide consumers with adequate information that is easily accessible.

**These are just some of the most significant provisions which the European Union will be introducing to tackle unfair commercial practices in the modern market. It seems that the "New Deal" is effectively trying to put consumer rights and transparency first, however only time will tell if these measures are enough to make the EU market a benchmark for good practice, transparency and consumer protection.**

For the EU's own "fact sheet" on the benefits for consumers get from the new legislation see [here](#).

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**This briefing is part of our Future of Consumer series on upcoming issues affecting the Consumer Sector. For other briefings in this series see the Future of Consumer pages of our website or contact Rachel Montagnon.**



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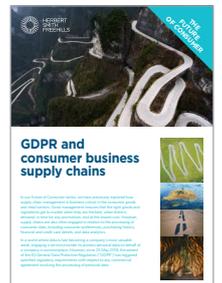
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