

Our position

Better enforcement and modernisation of consumer protection rules

Priorities for ensuring balance and focus in the update of the acquis



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's efforts to modernise EU consumer law through the proposal for a Directive on better enforcement and modernisation of EU consumer protection rules.

We appreciate the Commission's proposal to allow traders to reimburse consumers after receiving a returned product or to use the most appropriate means of communication with consumers, which we believe constitutes a more 'common sense' approach than that which currently exists. However, we are concerned that the proposed harmonisation of maximum penalties is unlikely to remedy the insufficient and uneven enforcement of consumer protection rules in the EU.

As the European Commission recognised in its Fitness Check exercise, the main body of consumer and marketing law is largely fit for purpose but awareness of rights and obligations is low amongst consumers and traders. The European Institutions must devote attention to address this deficiency and avoid introducing measures that address outcomes rather than the real issues at stake.

Our position

A welcome modernisation of existing consumer law

AmCham EU welcomes the Commission's move to create a balance between traders and consumers while exercising the right of withdrawal. This right has proven to be highly beneficial to ensure consumer protection. At the same time it has also been detrimental to the business of many small and medium enterprises (SMEs), who in some cases could be forced to reimburse the consumer without any certainty that goods will be returned. Therefore, allowing traders to withhold reimbursement until after receiving a returned product is likely to prevent abuses of the consumer's right to withdrawal. The broadening of scope to allow businesses to use the most appropriate means of communication with consumers is a step in the right direction. These changes constitute a more 'common sense' approach than that which currently exists.

We also welcome the Commission's intention to help Europeans become more aware of their consumer rights, with a special focus on member states where consumers' knowledge of their rights is at the lowest through awareness campaigns, training and capacity-building programmes.

The introduction of online tools to assist traders' understanding of what they need to do to comply with their obligations is also welcome. AmCham EU members believe these are positive developments.

Encourage remedies, not penalties

AmCham EU shares the Commission's concerns about the insufficient and uneven enforcement of consumer protection rules in the EU. However, our view is that the introduction of harmonised maximum penalties is unlikely to remedy this situation as the main cause of non-compliance is lack of awareness. In line with the Better Regulation Agenda, policymakers should consider avoiding hard law where initiatives to raise awareness and improve enforcement may be more appropriate and successful (e.g. awareness campaigns at consumer, trader and authorities levels, improving coordination between Member States).

Applying a set of common criteria across Member States for deciding financial penalties for breaches of consumer law will not address this situation and is disproportionate. Additional red tape and threats

of punitive sanctions will inevitably chill eCommerce: it will result in higher compliance costs for hundreds of thousands of companies, harming competition and potentially leading to increased prices for consumers.

A more constructive approach could involve encouraging a coordinated remedial action on behalf of traders across the EU. If a breach of rules is continuous, financial penalties could then be envisaged. Punitive fines can jeopardise business operations in a disproportionate and unfair way, especially when non-compliance with existing rules is due to lack of knowledge, as is often the case. Where appropriate, penalties should remain proportionate and be reserved for serious and deliberate violations of consumer rights. When deciding on sanctions, authorities should recognise where violations are minor and committed inadvertently by traders who usually take a good faith approach to compliance and are cooperative.

In addition, the Commission should dedicate extra efforts to ensure effective enforcement of existing rules by the Member States consumer protection authorities. The lack of correct implementation and enforcement is also contributing to allow aggressive and pressure selling methods jeopardizing consumer protection.

Right not to be punished twice

Interactions between representative actions for collective redress, procedures for individual redress (opt-out) and consumer law infringements, as well as other existing sectoral legislation or legislation on small claims and online dispute resolution/alternative dispute resolution must be clarified. A complex legal landscape is likely to cause confusion and, in some cases, duplicative litigation.

Concerning the sale of physical consumer goods, breaching unfair commercial practice rules often coincides with breaching other rules where consumers already have direct redress against traders. For example, if a seller misinforms the consumer about the essential characteristics of the goods prior to sale, this can be both:

- a misleading action under the Unfair Commercial Practices Directive with no harmonised individual remedy for consumers against the seller; and
- the basis for a faulty product claim under the Consumer Guarantees Directive, because the product does not fit the description given by the seller (in which case the consumer would have a direct remedy against the seller).

AmCham EU therefore recommends clarifying the interaction between the above-mentioned legislation and the draft directive to ensure that the principle of *non bis in idem* is upheld.

Free services

Extending the scope of the Consumer Rights Directive to contracts where the consumer 'does not pay with money but provides personal data' creates possible tensions with the GDPR. The wording used in the proposal is misleading as it seems to imply that individuals could simply trade personal data in exchange for a product or service, as an alternative to a monetary payment. This view is contrary to the strict vision of GDPR which requires one of six legal bases for the personal data processing to be lawful. It should be clarified that withdrawal from the contract should not automatically amount to a withdrawal of consent to processing or an exercise of the right to object to processing. It should also be clarified that withdrawal from the contract should not automatically trigger any GDPR data subject rights, which are only applicable when specifically exercised by the consumer and when specific conditions are met. Finally, when it comes to a withdrawal period, it should be clarified when such a period would be deemed to commence for online digital content and digital services contracts.

Online shopping made easy and more trustworthy

AmCham EU welcomes the objective to modernize existing consumer protection rules. New consumption habits and product categories must be taken into account. Simplifying information requirements for online sales and digital content is a step in the right direction.

AmCham EU firmly believes that the commercial relationship between a consumer and a business should be based on transparency and fairness. Providing adequate consumer information is important for building trust online and offline. That is one of the main achievements of the Consumer Rights Directive which provides a comprehensive list of all pre-contractual information. A balanced legislative framework which respects the variety of business models and industries of our times is crucial. In this respect, it is important to understand that obliging online marketplaces to introduce information requirements on their main parameters for ranking offers could impede on trade secrets. Business algorithms should be protected, especially when they concern intellectual property rights. Algorithmic transparency should not go beyond that which is necessary to ensure that consumers understand how products are displayed, for example in the ranking of offers. The proposal's provisions should also include the correction of information about the status of a product or seller, if the online marketplace is informed that the initial information was incorrect.

Dual quality products

AmCham EU members respect all their consumers, which are all equal, and therefore do not place products of inferior quality in any market. We share the Commission's view that 'in a Union of equals, there can be no second-class citizens [...]', as President Juncker stated in his State of the Union speech last year.

Businesses have nothing to gain by putting lower quality products in the market, as this would risk their position compared to the competition and endanger their reputation. Legislators should pay special attention not to cause burdensome, costly and unnecessary restrictions for businesses who provide consistently high-quality products to consumers throughout the EU and cater to food diversity across Europe. There are legitimate reasons for differentiating recipes, such as consumer preferences, availability of raw materials, national legislation and voluntary nutrition reformulation strategies or policies. This is why it is important for the co-legislators to recognise the reasons for justified differences within the context of Art 6 and ensure that any assessment is done on a case by case basis, without penalising the efforts of businesses to better match local taste preferences and expectations for local sourcing.

Door-step selling

According to results of the 2017 Fitness Check of consumer and marketing law, consumer complaints related to doorstep selling and promotional excursions accounted for 5% of all complaints in contrast to 18% for online purchases and 13% for in-store transactions. This data proves that further restriction of doorstep selling would be disproportionate and unnecessary. The proposal in its present form represents a step backwards from the principle of maximum harmonisation in the current legislation. AmCham EU is concerned that national authorities will choose to exploit this resulting in fragmentation of the Single Market.

The Unfair Commercial Practices Directive already bans aggressive and misleading sales tactics in its annex. This Directive is of full harmonisation preventing Member States from establishing further restriction of any distribution method. We consider that amending the scope of the Directive while allowing Member States to enact further unnecessary restrictions of door-step selling represents a

step backwards and will not efficiently address existing pressure tactics used by rogue traders. In addition, it will open the door to additional prohibitions that might heavily impact entire industries.

Conclusion

The adage that ‘if it isn’t broke, don’t fix it’ comes to mind when reading the Commission’s proposal on modernising EU consumer law. While some adjustments and updates might be necessary to adapt rules to the digital age, the punitive approach taken by the European Commission in this proposal is inappropriate for tackling the issues identified in its Fitness Check.

European consumers already benefit from a strong existing legal framework of consumer rules. AmCham EU therefore calls on policymakers to keep this proposal focused on elements in existing legislation that merit amendment and avoid measures that would create additional red tape and compliance costs for businesses without addressing the lack of awareness of consumers and traders or poor enforcement by national authorities.