

Position Paper

EU Commission Fitness Check Consumer and Marketing Law¹

Purpose of this paper

EMOTA's² welcomes and supports the EU Commission initiatives towards ensuring a coherent and functional legislative framework for consumer and marketing law.

This Position is structured as follows:

- Key high level messages in the context of the REFIT
- Replies to the EU Commission questionnaire

Key messages

- EMOTA welcomes¹ the EU Commission commitment ensure that the EU framework for consumer and marketing law is up to date and reflects the technological and other market developments (e.g. the increasing rate of eCommerce out of total retail across the EU – EU Digital Agenda Scoreboard 2015)
- EMOTA welcomes the comprehensive approach taken by the EU Commission but also points to the significant challenges brought by this decision³.
- The EU Commission needs to clarify the use of public consultations and already advanced revision work for some of the Directives contained in this REFIT, for example the 2006 Misleading and Comparative Advertising Directive for which a draft revised text was prepared by the EU Commission in 2014 but never published.
- The Fitness Check should not open the way to new obligations for traders but should focus on clarifying and simplifying the rules. Instead, guidance and industry standards would be welcomed.
- The Fitness check should focus on improving the framework. Given the complexities of such a task, should it involve new legislative proposals, which EMOTA does not deem necessary at this stage, EMOTA would rather point to the usefulness of guidance and industry standards in order to bridge gaps where these exist and help improve enforcement, thus reducing the impact of anticompetitive actions.

¹ EU Commission Fitness Check Consumer and Market Law 2016 http://ec.europa.eu/consumers/consumer_rights/review/index_en.htm

² EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96

³ EMOTA and the EMOTA Members would recommend that such extensive consultations, which include surveys, are carefully scrutinized in order to avoid overlaps both in terms of timing and deadlines for contributions and in terms of content. Over the course of the summer of 2016 several consultancies were tasked by the EU Commission to conduct surveys EU wide on issues which required the input of sellers, this included surveys on consumer rights and contract law, all 7 Directives but also the 2002 ePrivacy Directive.



- EMOTA does not support the adoption of technology specific legislation especially for omni-channel retail (platform/market place specific rules or via the extension of B2C rules to B2B contracts). While some of the Directives analyzed under the REFIT have been adopted in the pre-eCommerce era⁴ this does not necessarily mean that the principles they contain are outdated or that these cannot be applied across various retail channels (in-store, online, etc.). In principle EMOTA does not support the adoption of technology specific legislation especially for omni-channel retail (platform/market place specific rules or via the extension of B2C rules to B2B contracts).

Replies to the EU Commission questionnaire:

1B Business Questionnaire: What is your opinion regarding the following statements?

Q6.1 Businesses can trade across the EU easily thanks to the harmonised EU consumer and marketing rules

EMOTA Comment: The 2011 Consumer Rights Directive was a huge step forward and harmonised the pre-contractual information requirements and some other practices in distance selling (returns, refunds, etc.). However, the Consumer Rights Directive did not fully harmonize all aspects of distance selling and therefore companies still have to check for differences in consumer protection rules. Areas such as unfair contract terms or guarantees and remedies remain fragmented. This explains why despite the important step forward towards a harmonised set of consumer protection rules the compliance costs for cross-border trade will remain relatively high.

Q6.2 Businesses are well protected against misleading marketing practices of other businesses

EMOTA Comment: The legislative framework is sufficient in order to protect businesses from unfair and anti-competitive actions. The main challenge remains in the area of enforcement, especially in a cross-border context.

Q6.3 Businesses are well protected against unfair comparative advertising of other businesses

EMOTA Comment: The legislative framework is sufficient in order to protect businesses from unfair and anti-competitive actions. The main challenge remains in the area of enforcement, especially in a cross-border context.

Q10. In your view, how well do the competent national authorities implement consumer and marketing rules to protect EU businesses against misleading marketing?

Rather well

Q11. In your view, how well do the national courts implement consumer and marketing rules to protect EU business against misleading marketing?

EMOTA Comment: EMOTA has not seen evidence regarding problems with the enforcement of rules by courts. The legislative framework is sufficient to efficiently fight against misleading marketing but the enforcement remains the challenge, despite important improvements in the past years. Typically, the SMEs and micro-companies will be the ones without the necessary resources to fight against misleading marketing, often discovering the effects of such scams only after paying or subscribing. At the same time, larger companies and traders will feel the bulk of the financial effects of such scams (fake products, illegal use of names/brands, loss of consumer confidence, etc.).

⁴ Unfair Contract Terms Directive [93/13/EEC](#); Consumer Sales and Guarantees Directive [1999/44/EC](#); Unfair Commercial Practices Directive [2005/29/EC](#); Price Indication Directive [98/6/EC](#); Misleading and Comparative Advertising Directive [2006/114/EC](#); Injunctions Directive [2009/22/EC](#)



In the case of enforcement authorities the level of cooperation is often insufficient and it allows scammers to switch from one jurisdiction to another very quickly and continue their practices. The situation is even more complex when third country fraudsters are involved.

Q12. In your view, how well do business respect EU consumer rights?

Rather well. Please see comment in Q13.

Q13. In your view, what are the benefits for businesses from complying with EU consumer and marketing law.

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

Across the EU there are over 700.000 online shops. Out of these, a very limited number have a noticeable effect on the total volume of sales. Typically, 70-80% of the sales volumes will be attributed to the 20-30% of sellers. This 20-30% will tend to be the largest sellers who will find it easier to hire the necessary legal advice and become members in industry bodies to ensure maximum compliance. In practical terms, a lack of compliance in the case of SMEs will have a far smaller impact on the market (effect on the number of orders) than in the case of a large seller.

At the same time, EMOTA is aware that some of the central consumer rules are relatively recent, resulting from the transposition of the 2011 Consumer Rights Directive and the market still needs some space to adjust. Some other rules are also being tested by the evolution of technologies (e.g. using email addresses instead of other contact mechanisms, etc.). *This only confirms that there is a lot of room for industry bodies such as EMOTA and the EMOTA Members to work towards increasing awareness and help traders in their efforts for compliance.*

Another important dimension to consider is that over a relatively short span of time in eCommerce many best practices become industry standards. For example, this was the case with “free delivery and returns”. Even those companies that cannot afford the legal advice will eventually follow the leaders of the industry in their commercial practices by offering enhanced transparency (is it in stock, when will it be delivered, etc.) and better service standards.

This is even more visible when the enforcement of provisions is made easier by the wide availability of technological solutions (e.g. stock management, plug-ins for postal delivery that can help display the final price, VAT calculators, etc.).

Finally, referring to question 13, all recent studies, including by the EU Commission (2016 REFIT) show that consumers are increasingly buying online but the main decision factors remain the price and the level of trust the trader inspires. Word of mouth is an effective tool to help stop a dishonest trader but only post-factum.

Broadly, EMOTA is aware of two main instances where the lack of compliance can occur:

1. Where SMEs and micro-companies are overwhelmed by the number and complexity of the obligations and where the technical means at their disposal will not allow, in an easy way, the implementation of the rules (e.g. the obligation to provide a cookie banner before any processing takes place, or establishing the diminished value of a product, or dealing with a high number of returns, etc.).
2. Where the company tries to identify a more efficient solution which does not go against the spirit of the rule (e.g. providing consumers with a contact form rather than an email address or providing a link to a withdrawal mechanism rather than a paper form for each product in a certain order). In such cases authorities might feel it is appropriate for a court to re-interpret the law.

Q14. What is your most accurate estimate of the direct costs of compliance with consumer and marketing rules for your company / group of companies, e.g. costs of providing legal guarantee for goods, complying with consumer information requirements? (% of annual turnover)

The costs are prohibitive. Today a large number of online retailers do not sell cross-border. One of the main reasons is that they would have to comply with national consumer protection rules, next to the fragmented payments landscape, national rules on VAT registration, fragmented parcel delivery markets, a.o. The cost of consumer rules should be seen in this light and are one of the main reasons not to enter markets and therefore cost companies and the European economy as a whole dearly.

Q15. In your view, how well do the competent national authorities implement consumer and marketing rules to protect EU consumers?

Rather well

Q16. In your view, how well do the national courts implement consumer and marketing rules to protect EU consumers?

Rather well

EMOTA Comment: EMOTA has not seen any evidence pointing to issues linked to how courts enforce consumer and marketing law – other than the fact that it is very difficult for traders to follow the activities of courts in case of some relevant case law.

In the past years the enforcement has been greatly improved. There are a number of challenges that remain. First, some authorities will be more proactive than others and the measures taken will also differ, some will focus on dialogue some will take direct actions. In a cross-border context this increases complexity in trading. Second, the level of enforcement remains largely national and lacks a sufficient level of coordination.



Q20. How effective are the legal actions ("injunctions") taken by consumer organisations and public bodies to stop infringements of consumers' rights in the following economic sectors?

EMOTA is not aware of the number of injunctions following the update of the EU Injunctions procedure in 2009.

Q22. How effective for protecting the rights of consumer are self- and co-regulation initiatives by businesses at national or EU level, under which businesses establish standards as to how they deal with consumers (eg. industry trust marks)?

Very effective

EMOTA Comment: The EU Commission and the ECC-net have noted (2013 ECC Net Trust the Trustmark and EU Commission DG CNECT Study on EU Trustmark) the positive impact of eCommerce Trustmarks in improving compliance. EMOTA was the first EU level association to launch a mechanism to increase compliance checks in national eCommerce Trustmarks with the support of Commissioner Jourova. One of the most important effects of eCommerce Trustmarks is that they help set an industry standard which, in time, is also implemented by non-certified traders.

Q27. How effective are the following consumer redress/enforcement mechanisms in protecting consumer rights in case of breach of EU consumer and marketing rules?

- *Use by traders of unfair standard contract terms*
Neutral
- *Use by traders of misleading or aggressive commercial practices*
Neutral
- *Breach of the traders' obligations related to the legal guarantee*
Neutral
- *Breach of the traders' obligations related to the information they are legally required to provide to consumers*
Neutral
- *Breach of the traders' obligation related to the consumers' right of withdrawal (cancellation) for distance and off-premises contracts*
Neutral

Q28. How strongly do you agree or disagree with the following statements about the interplay between the Injunctions Directive and the provisions on enforcement of consumer rights included in other Directives covered by this questionnaire?

- *There is a need for clarification of the interplay between the Injunctions Directive and other provisions on enforcement of consumer rights*
Tend to agree
- *There is a need for ensuring coherence between the Injunctions Directive and other provisions on enforcement of consumer rights*
Tend to agree



Q32. How strongly do you agree or disagree with the following statements about the interplay between EU consumer and marketing rules and the EU sector-specific consumer rights in the area of electronic communications services?

- *EU consumer and marketing rules provide adequate complementary protection regarding issues, which are not expressly regulated by the sector-specific EU rules*
Tend to agree
- *Consumers are aware about the complementary application of EU consumer and marketing rules in the specific sector*
Neutral
- *Traders in the relevant sector are aware of the complementary application of these EU rules and comply with them*
Tend to agree
- *The competent public enforcement authorities in the relevant sector are aware of the complementary application of these EU rules and enforce them where appropriate*
Tend to agree
- *The co-operation between the various public enforcement authorities in charge of consumer protection should be strengthened*
Tend to agree

Q34. How strongly do you agree or disagree with each of the following statements about the potential areas to improve EU consumer and marketing rules for the benefit of consumers?

- *The marketing/pre-contractual information requirements currently included in the Unfair Commercial Practices Directive, Price Indication Directive and Consumer Rights Directive should be regrouped and streamlined*

Tend to agree

EMOTA Comment: EMOTA strongly supports the EU Commission's commitment towards a fully harmonised and coherent set of rules for consumer and marketing law at the EU level. Any streamlining and consolidation of EU law should ensure that no further burdens are added for traders and that the mix between B2B and B2C Directives does not result into a confusing framework.

- *The information given to consumers at the advertising stage should focus on the essentials whilst more detailed information should be required only at the moment before the contract is concluded*

Tend to agree

EMOTA Comment: Consumers and traders are overwhelmed by the complexity and granularity of the requirements in distance selling. Too many obligations result in less protection for consumers



and lower levels of enforcement – or sanction driven enforcement instead of prevention driven enforcement. In principle a drive towards simplification would be very welcomed.

On the other hand, a move to “segment” the pre-contractual information requirements into “early stage” and “conclusion of contract” moments could also increase legal uncertainty unless the overall legal framework is restructured towards a principle based, technology neutral approach.

From a competition point of view it is important to ensure that the rules establish a fair playing field across the markets.

- *Online platform providers should inform consumers about the criteria used for ranking the information presented to consumers*

Tend to agree

EMOTA Comment: EMOTA considers that the current requirements for transparency are crucial in order to ensure fairness in search and price comparison results. EMOTA warns against any obligations for sellers to arrange their products and pages in certain ways which could prevent them from innovating or improving their services. EMOTA considers that the current framework sufficiently covers these aspects and most issues will be linked to enforcement.

- *The presentation of pre-contractual information to consumers should be simplified by applying a uniform model, e.g. using icons*

Tend to disagree

EMOTA Comment: As it was demonstrated in the context of the 2011 Consumer Rights Directive (concerning the mandatory information on digital products), both consumers and companies will have different preferences and abilities to provide and process information. A general model provided by policy makers will not necessarily fit the market needs and most likely might not keep up with the technological developments.

Companies should be free to innovate and improve the way the consumer is presented the information. The ultimate goal for a seller is to ensure the consumer feels confident enough to make a purchase and returns for further purchases.

In some areas of eCommerce, the use of icons and labels is well established and brings results because of a solid infrastructure that gives these a meaning (Trustmarks, different quality labels, etc.)

EMOTA warns policy makers of the risk of “label” overpopulation and fragmentation. Over the past few years many labels have emerged some with the backing of the EU (ecolabel, trusted services, pharmaceutical products, energy label, etc.) and some with the backing of national governments (data protection, regional products, governmental programs, local quality of environment labels, etc.). There is a risk that consumers will be confused by the various labels and sellers pay an unreasonable price for the “obligation” to use all these mechanisms in order to be able to compete.

- *The obligation to display also the price per unit (eg, 1 Kg, 1 l) of the goods should apply to all businesses irrespective of their size*



- *Consumer protection against unfair commercial practices should be strengthened by introducing a right to individual remedies, e.g. compensation and/or invalidity of the contract when the consumer has been misled into signing a disadvantageous contract*

Tend to disagree

EMOTA Comment: A provision that would lead to the invalidity of the entire contract for the use of an unfair contract term would be disproportionate. The invalidity of the unfair contract term should be sufficient to restore the balance in the relationship between the trader and the consumer.

- *Consumer protection against unfair contract terms should be strengthened by introducing a "black list" of terms that are always prohibited the presentation of key standard Terms and Conditions to consumers should be improved by applying a uniform model, e.g. using icons*

Tend to disagree

EMOTA Comment: As mentioned before in this reply using a standardized set of terms and conditions, including based on icons, can be very challenging to adapt across the various activities in eCommerce (sale of products to the sale of services, pharmaceuticals, etc.).

Should legislators focus on the "black list approach" such a debate should carefully consider the potential complications should such a list be non-harmonized and should there be any possibility for regular updates as proposed in some of the past debates. The highest value of such an approach would be to provide stakeholders with clarity and legal certainty. Therefore, any such list should be extremely restrictive, fully harmonized and closed.

- *Consumer protection against unfair contract terms should be strengthened by incorporating key Court of Justice case law on the ex officio duties of judges to assess the presence of unfair terms*

EMOTA would support any such initiatives.

- *The legal guarantee period for goods should depend on their characteristics (If you agree with this statement please indicate the relevant characteristics in the box below, e.g. the category of the good (such as small/large household appliances, ICT products, cars etc.), price, expected/advertised lifespan)*

Strongly disagree

EMOTA Comment: The current system of 2 years (in most countries) works well and the vast majority of defects are addressed efficiently as the EU Commission research shows (EU Commission Partial REFIT Results August 2016).

Increasing the complexity of the remedies by introducing a link to the durability or life expectancy of the products would only reduce the level of effective enforcement available to the consumers and make trading costlier. The EU Commission notes in its recent research that consumers are often not aware of the most simple/basic rights.

As a fundamental dimension, EMOTA considers that an approach whereby policy makers install a virtually unlimited legal guarantee/claims mechanism would be suitable in case of a market failure.



In the current context EMOTA does not see the evidence of a market failure and considers that the extremely competitive market is able to offer a wide variety of choices to the consumers. EMOTA also warns against creating confusion between legal and commercial guarantees via links to industry voluntary product testing. Where such testing exists, as it is the case with some white goods (reference), the testing is often laboratory conditions testing and does not factor in the day to day use and maintenance diligence.

- *The period during which the defect is presumed to have existed already at the time of delivery of the good (reversal of the burden of proof) should be extended. It is 6 months under current EU law but longer in a few EU countries*

Strongly disagree

EMOTA Comment: EMOTA does not support the extension of the reversal of the burden of proof to longer periods than 6 months. The EMOTA Members believe that on a voluntary basis this can be offered and is offered as a competitive advantage by some market players but it should not become the minimum standard requirement. There are many reasons why EMOTA argues against this proposal, including because it makes it very difficult for the trader to be able to prove any misuse and not the least because of the additional logistical costs the changes would bring (consumers could claim a new product after each two years). Furthermore, according to the experience of the EMOTA Members the vast majority of defects would become visible immediately and in any case in under 6 months. Recent EU Commission research confirms this as well (EU Commission Partial REFIT Results August 2016).

- *The notion of "vulnerable consumers" should be reviewed/ updated. Under current EU law vulnerable consumers are those that are particularly vulnerable to unfair commercial practices because of their mental or physical infirmity, age or credulity*

Strongly disagree

EMOTA Comment: EMOTA does not support any further provisions around "vulnerable consumers" as this risks adding unjustified burdens for traders especially regarding information provision and will lead to legal uncertainty as a result.

As a general comment any further fragmentation of such concepts and even the addition of specific requirements for different contract terms in certain cases (beyond what is needed in terms of accessibility), as a general minimum standard would exceed the needs and possibilities of the markets.

- *There should be additional requirements for the protection of "vulnerable consumers" as regards standard contract terms*

Strongly disagree

- *The notion of "average consumer" should be reviewed/ updated. According to the case law of the EU Court of Justice, the average consumer is defined as reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors*

Tend to disagree



EMOTA Comment: As many studies demonstrate the familiarity and confidence of consumers with certain commercial channels such as eCommerce grew over time from a very low level of confidence to very high levels of confidence for those that already tried purchasing online at least once (EU Commission Consumer Scoreboard). EMOTA expects that any provisions around what constitutes an average consumer would become obsolete very quickly and would lead to legal uncertainty. In addition, EMOTA strongly believes in market forces as a solution to finding the best balance between the minimum legal requirements for information provision and the industry best practices.

- *Further criteria should be defined to allow for a clearer distinction between consumers and traders in the collaborative economy*

Tend to disagree

EMOTA Comment: The current legal framework is sufficient, EMOTA considers the enforcement dimension as the main challenge. From a trader perspective the main issue is to avoid unfair competition from “traders” which act as private individuals and do not respect their legal obligations. This however is not a widespread issue in experience of the EMOTA Members.

- *EU injunction proceedings should be made more effective, e.g. by allowing their use for more types of infringements and by reducing their costs and length*

Tend to agree

- *EU consumer and marketing rules should be further harmonised to make it easier for traders to offer their products/services cross-border and for consumers to rely on the same level of protection across the EU*

Strongly agree

EMOTA Comment: The EU should redouble efforts to make the internal market more competitive and reduce trading costs. Legal fragmentation remains an important barrier to trade. However, recent experiences showed that harmonization attempts can result in additional burdens for businesses that can reduce the benefits of harmonization.

- *EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument*

Tend to agree

EMOTA Comment: EMOTA strongly agrees that the current set of consumer and marketing rules are very difficult to follow and there would be important benefits from having one single horizontal instrument at the EU level. However, as mentioned above, the eCommerce market is evolving very quickly and policy makers should avoid imposing additional burdens on sellers in such a process.

- *Consumer protection should be strengthened by making sure that non-compliant businesses face truly dissuasive sanctions amounting to a significant % of their yearly turnover*

Strongly disagree

EMOTA Comment: EMOTA considers that the main challenge in enforcement remains uniform interpretation, prevention and education in face of a very complex system of rules. It is a very



important political decision to focus the attention of enforcement mechanisms on prevention or on “hunting missions”.

The adoption of sanctions linked to the annual turnover, as it is the case in the 2016 Data Protection Regulation, has not been proven to be more effective than other sanction mechanisms. In reality rogue traders are rarely affected by such sanctions while the resources used by the judicial system to accomplish the necessary procedural steps are very high.

Ultimately the effects on the level of consumer protection are very low. High sanction levels can also act as an inhibitor for new businesses and investments especially if the legal framework is not fully harmonised and legal uncertainties remain.

Looking at the 2016 EU Commission proposal for the revised Consumer Protection Cooperation Regulation, while welcoming the intention, EMOTA stresses the importance of ensuring a dialogue driven enforcement process, whereby legitimate traders can be allowed to rectify those instances of lack of compliance which result from the lack of clarity of the rules or complexity in the rules. The risk is that some authorities, because of main factors, including low resources, would rather prefer to issue sanctions and thus taking a quantitative approach rather than to address the issue in the most efficient way.

In a cross-border context this is even more complex and the risks a business will face (e.g. having its products banned from the market, or a website closed without the proper dialogue) are higher.

Q35. To what extent do you agree or disagree with each of the following statements about potential areas to improve the protection of businesses, especially SMEs and in particular micro enterprises?

- *Businesses protection against unfair commercial practices should be strengthened by introducing a "black list" of B2B practices that are always prohibited*

Strongly disagree

- *Business protection against unfair commercial practices should be extended to practices happening not just at the marketing stage but also after the signature of the contract*

Strongly disagree

- *Business protection against unfair commercial practices should be strengthened by introducing a right to individual remedies, e.g. compensation and/or invalidity of the contract when the business has been misled into signing a disadvantageous contract*

Strongly disagree

- *Business protection against unfair contract terms should be strengthened by extending totally or partially the scope of application of the Unfair Contract Terms Directive to B2B contracts*

Strongly disagree



- *Business protection against unfair commercial practices should be strengthened by introducing an enforcement co-operation mechanism for cross-border B2B infringements*

Strongly disagree

- *The scope of application of the Injunctions Directive should be enlarged to cover the protection of collective interests of businesses*

Strongly disagree

EMOTA Comment: EMOTA does not support in principle the extension of B2C rules to B2B contracts. The assumptions made in the above points seem to point in this direction. The current rules for B2B disputes and competition law are sufficient tools to address the lack of compliance of unfair contract terms in B2B contracts.

END

Contact:

Razvan Antemir

razantemir@emota.eu