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## PROPOSAL

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From: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 12 April 2018

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of  
the European Union

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Subject: COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT  
Accompanying the document Proposals for DIRECTIVES OF THE  
EUROPEAN PARLIAMENT AND OF THE COUNCIL (1) amending Council  
Directive 93/13/EEC, 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 and (2) on representative actions for the protection of the  
collective interests of consumers, and repealing Directive 2009/22/EC

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Delegations will find attached document SWD(2018) 96 final PART 1/3.

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Encl.: SWD(2018) 96 final PART 1/3



Brussels, 11.4.2018  
SWD(2018) 96 final

PART 1/3

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposals for**

**DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**(1) amending Council Directive 93/13/EEC, 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**

**and**

**(2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC**

{COM(2018) 184 final} - {SWD(2018) 98 final}

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## List of abbreviations

B2B	Business-to-Business
B2C	Business-to-Consumer
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer
CPC (Network/authorities)	Consumer Protection Co-operation Network (national consumer law enforcement authorities)
CPN	Consumer Policy Network (national ministries)
CMEG	Consumer Market Expert Group (experts nominated by Member States to advise the Commission on matters related to the Consumer Scoreboards, market and behavioural studies)
CRD	Consumer Rights Directive 2011/83/EU
CSGD	Consumer Sales and Guarantees Directive 1999/44/EC
DCD	Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)0634 final of 9.12.2015.
ECCG	European Consumer Consultative Group (Commission's main forum to consult national and European consumer organisations)
EEN	Enterprise Europe Network
IA	Impact Assessment
IIA	Inception IA
ID	Injunctions Directive 2009/22/EC
MCAD	Misleading and Comparative Advertising Directive 2006/114/EC
MS	Member State
OPC	(Online) Public Consultation (carried out for this IA)
PID	Price Indication Directive 98/6/EC
SMEs	Micro, Small and Medium-sized Enterprises
SWD	Commission Staff Working Document
T&Cs	Terms and Conditions (standard contract terms)
UCPD	Unfair Commercial Practices Directive 2005/29/EC
UCTD	Unfair Contract Terms Directive 93/13/EEC

## Glossary

Collective Redress Report	Report on the implementation of the 2013 Recommendation on Collective Redress, COM(2018) 40
Communication on Online Platforms	Communication on Online Platforms and the DSM - Opportunities and Challenges for Europe, COM(2016) 288 final, 25 May 2016: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&amp;from=EN">http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&amp;from=EN</a>
CPC/CPN/CMEG survey	Targeted consultation of CPC, CPN and CMEG authorities of the Member States, carried out for this IA via EUSurvey
CRD Evaluation Report and SWD	Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU, COM(2017) 259 final, 23 May 2017; Staff Working Document SWD(2017)169 final and SWD(2017) 170 final, 23 May 2017, all available via: <a href="http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=59332">http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=59332</a>
CRD Guidance	DG Justice Guidance Document on the CRD, June 2014, <a href="https://ec.europa.eu/info/files/guidance-document-consumer-rights-directive_en">https://ec.europa.eu/info/files/guidance-document-consumer-rights-directive_en</a>
ECCG survey	Targeted consultation of ECCG members, carried out for this IA via EUSurvey
Fines	Pecuniary penalties (for "penalties", see below).
Fitness Check Report	Commission Staff Working Document SWD(2017) 208 final and SWD(2017) 209 final, 23 May 2017, available at: <a href="http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=59332">http://ec.europa.eu/newsroom/just/itemdetail.cfm?item_id=59332</a>
Fitness Check public consultation	Online public consultation from May to September 2016 on the Fitness Check and the evaluation of the Consumer Rights Directive (CRD)
"Free" digital services	Online services for which consumers stipulate contracts not against payment of a price, but by providing personal data (e.g. e-mail account, cloud storage, social media), in line with the DCD Proposal
"Green" and "environmental" claims	Marketing that creates an impression that a good or a service has a positive or no impact on the environment or is less damaging to the environment than competing goods or services
Injunctions procedure	Court/administrative procedure under the ID
ID survey	Targeted consultation of CPC, CPN, CMEG, Member States authorities, consumer associations, business associations and lawyers associations on the possible revision of the ID carried out for this IA via EUSurvey
Mass harm situation	A situation in which a large number of consumers can be harmed by the same illegal practice
Online marketplace	A service provider which allows consumers to conclude online contracts with third party suppliers on its digital interface
Penalties	Sanctions imposed or to be imposed for a violation of consumer protection rules such as fines (see definition above)
Platform Markets Study	Exploratory Study of consumer issues in online peer-to-peer platform markets, 12 June 2017: <a href="http://ec.europa.eu/newsroom/just/item-detail.cfm?&amp;item_id=77704">http://ec.europa.eu/newsroom/just/item-detail.cfm?&amp;item_id=77704</a>
Platform Transparency Study	Behavioural Study on the transparency of online platforms, Consortium LSE&Partners for the European Commission, <i>soon to be published</i>

Pre-contractual information	Information that the trader is required to provide to the consumer before the conclusion of a contract
Public consultation	Commission's public consultation of 2017 for this IA. <a href="https://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives_en">https://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives_en</a>
Recommendation on Collective Redress	EC Recommendation (2013/396/EU) of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law: <a href="http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32013H0396">http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A32013H0396</a>
"Redress" and "remedies"	What consumers can get/do to remedy the situation when their consumer rights have been breached (e.g. terminating contract, getting their money back)
Revised CPC Regulation	Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004: <a href="http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.345.01.0001.01.ENG&amp;toc=OJ:L:2017:345:TOC">http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.345.01.0001.01.ENG&amp;toc=OJ:L:2017:345:TOC</a>
SMEs	For the purpose of this report SMEs are determined in terms of staff count (<250), for further information see: <a href="http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en">http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en</a> . Data on micro enterprises include self-employed if not indicated otherwise.
SME panel consultation	Consultation of SMEs for this IA (total of 291 included 5 responses from large companies, i.e. companies with 250+ employees). The SME panel consultation is a tool that allows Commission services to reach out to SMEs in a targeted way. For more information see Annex 2.
Unfair commercial practices	Breaches of national laws transposing the Unfair Commercial Practices Directive 2005/29/EC (UCPD), such as misleading advertising and aggressive commercial practices by traders
UCPD Guidance	Guidance on the implementation/application of Directive 2005/29/EC in unfair commercial practices, SWD(2016) 163 final of 25.5.2016

# 1 INTRODUCTION

## 1.1. Context

Consumer expenditure accounts for 56% of EU GDP.<sup>1</sup> A healthy consumer environment therefore supports economic growth, as shown by the positive relation between consumer conditions and the economic situation in Member States.<sup>2</sup>

Effective consumer policies have a significant impact because they affect both the demand and the supply side of the economy. On the demand side, they reduce consumer detriment, support trust and empower consumers to drive markets. On the supply side, they contribute to fair competition and legal certainty for business.

On 13 September 2017, Commission President Juncker announced a "**New Deal for Consumers**",<sup>3</sup> which aims to ensure fair and transparent rules for EU consumers.

*"The success of the internal market ultimately depends on trust. This trust can easily be lost if consumers feel that remedies are not available in cases of harm. The Commission will therefore present a New Deal for Consumers to enhance judicial enforcement and out-of-court redress of consumer rights and facilitate coordination and effective action by national consumer authorities."*

*Commission Work Programme 2018, COM(2017) 650 final*

Recent large-scale cross-border infringements of EU consumer law, such as the "Dieselgate" scandal<sup>4</sup>, have sparked a debate about problems in public and private enforcement mechanisms and redress systems. Thus, in line with the 2017 State of the Union Address, the New Deal for Consumers aims at stepping-up enforcement of EU consumer law in the context of growing risks of EU-wide infringements. It also addresses the European Parliament's call for the establishment of an EU-wide system for collective redress.<sup>5</sup>

**This Impact Assessment** (from now onwards: IA) **mainly builds on the findings of:**

- **The Fitness Check of EU Consumer and Marketing law**, published on 23<sup>rd</sup> May 2017 (from now onwards: "Fitness Check"),<sup>6</sup>
- **The evaluation of the 2011 Consumer Rights Directive** conducted in parallel with the Fitness Check and published the same day (from now onwards: "CRD Evaluation"),
- **The Report on the implementation of the 2013 Recommendation on Collective Redress**, published on 25<sup>th</sup> January 2018 (from now onwards: "Collective Redress Report").<sup>7</sup>

The Fitness Check and the CRD Evaluation concluded that the substantive EU consumer rules are overall fit for purpose. However, they also stressed the importance of applying and enforcing the

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<sup>1</sup> Eurostat, GDP and main components (output, expenditure and income) [nama\_10\_gdp], P31\_S14\_S15 - Household and NPISH final consumption expenditure.

<sup>2</sup> Data from the Commission's Consumer Scoreboards show a consistently positive relation between consumer conditions and the economic situation in different Member States.

<sup>3</sup> See the State of the Union Address and Letter of Intent to the President of the Council and the EP, available at: [https://ec.europa.eu/commission/state-union-2017\\_en](https://ec.europa.eu/commission/state-union-2017_en)

<sup>4</sup> See case description in Section 2.3.2 describing drivers of lack of compliance.

<sup>5</sup> European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP)). The European Parliament also previously demanded EU-level action to address mass harm situations, in particular in its resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' 2011/2089(INI), which was based on a comprehensive own-initiative report on collective redress. The EESC supported the Commission's initiatives and called for legislative action in its opinion on the Commission 2013 Communication and Recommendation on collective redress, highlighting the importance of both injunctive and compensatory collective redress (EESC opinion "European Framework for Collective Redress" 10 December 2013, INT/708).

<sup>6</sup> It covered the Unfair Contract Terms Directive 93/13/EEC (UCTD), Consumer Sales and Guarantees Directive 1999/44/EC (CSGD), Price Indication Directive 98/6/EC (PID), Unfair Commercial Practices Directive 2005/29/EC (UCPD) and Injunctions Directive 2009/22/EC (ID). See for results SWD (2017) 208 final and SWD(2017) 209 final (both on the Fitness Check) and COM(2017) 259 final, SWD(2017)169 final and SWD(2017) 170 final (on the CRD evaluation), all of 23.5.2017, available at: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332).

<sup>7</sup> COM(2018) 40.



rules effectively and identified scope for some targeted amendments of the consumer directives. As concerns procedural EU consumer rules, the Collective Redress Report notably supports the Fitness Check conclusion that existing individual redress mechanisms are not sufficient in mass harm situations. National collective redress mechanisms, where available, are often reported not to be effective enough to fully reach their objectives.<sup>8</sup>

In line with these results, this IA addresses two main problems:

1. Across all economic sectors – online as well as offline – there is still a relatively high level of lack of compliance by traders with EU consumer law.
2. In some specific areas, ineffective consumer protection rules and unnecessary costs for compliant traders have been identified.

This IA is expected to form the basis for a legislative package within the New Deal for Consumers, which would be likely to include:

1. A review of the 2009 Injunctions Directive (ID); and
2. Targeted amendments to substantive consumer protection rules in four Directives.<sup>9</sup>

## **1.2. Scope of the impact assessment and interplay with other legal and policy instruments at EU level**

The EU consumer law directives assessed in the Fitness Check, CRD Evaluation and Collective Redress Report apply horizontally across all economic sectors. Due to their general scope, they apply to many aspects of business-to-consumer (from now onwards: B2C) 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, whereby the provisions of the horizontal consumer law directives come into play only when relevant aspects of B2C transactions are not disciplined by the provisions of sector-specific EU law. Consequently, the general EU consumer law directives work as a "safety net", ensuring that a high level of consumer protection can be maintained in all sectors, including by complementing and filling gaps in other EU law.

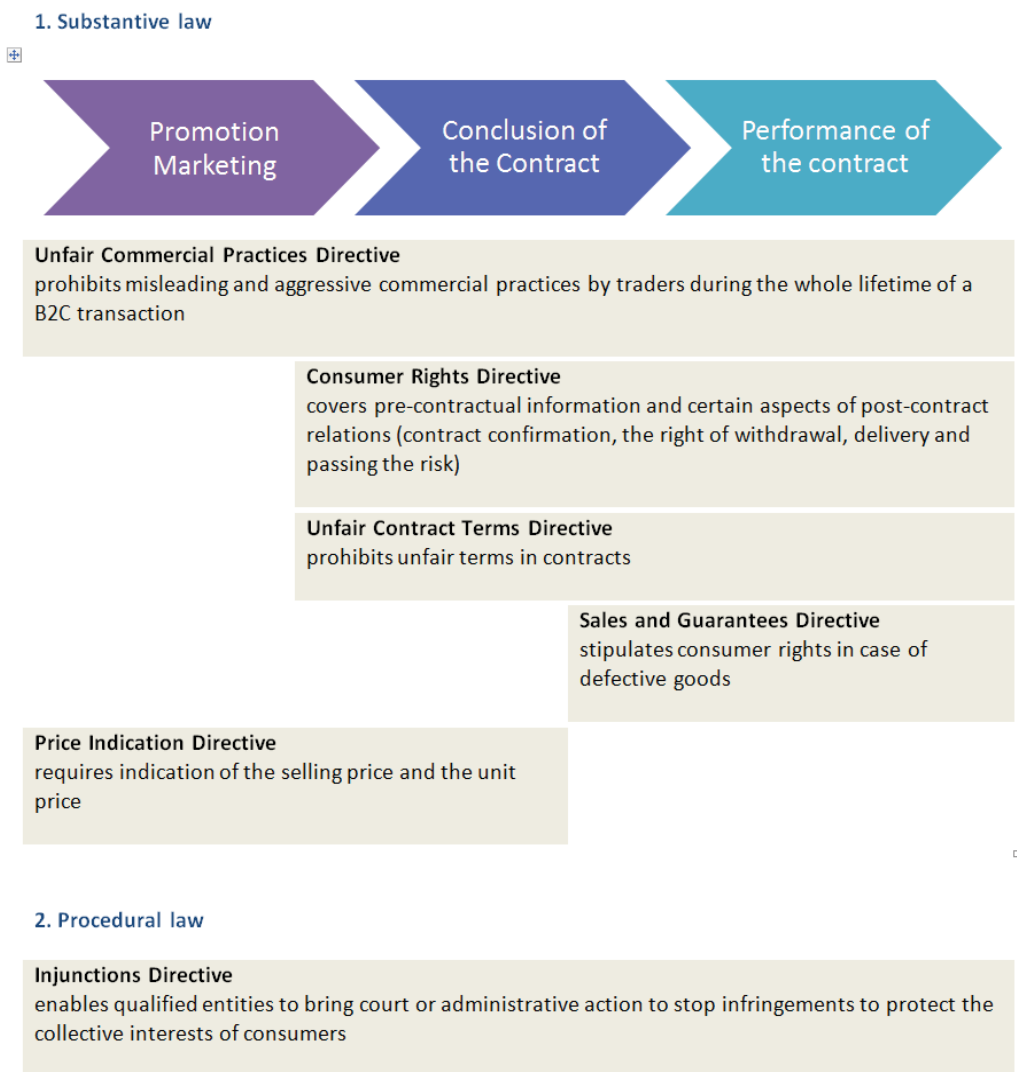
The Directives covered by this initiative aim at protecting the economic interests of consumers. The Treaties (Articles 114 and 169 TFEU) and the Charter of Fundamental Rights (Article 38) require a high level of consumer protection in the EU. EU consumer legislation also contributes to the proper functioning of the Internal Market. It aims to ensure that B2C relations are fair and transparent, which ultimately supports the overall welfare of European consumers and the EU economy. The directives have been developed over the past 25 years. This diagram illustrates how they cover the whole cycle of B2C economic transactions, from advertising and contract conclusion to contract performance, and how they complement one another.

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<sup>8</sup> See section 2.1 "Conclusions from recent evaluations" and Annex 5 for a detailed overview of the findings from these evaluations.

<sup>9</sup> UCPD, CRD, UCTD, PID (see Figure 4 "Overview of proposed amendments to specific directives" in Section 7.3).

**Figure 1: Consumer law directives subject to this IA**



This IA takes into account the recently adopted **revision of the Consumer Protection Cooperation (CPC) Regulation**.<sup>10</sup> While the revised CPC Regulation supports public enforcement, this IA assesses possibilities for strengthening private enforcement. According to a long-standing Commission position, supported by the European Parliament,<sup>11</sup> private enforcement should be independent and complementary to public enforcement. This is because the main aim of public enforcement is to curb unlawful behaviour in the general interest, whereas private enforcement aims to ensure redress for the victims. Not only do public and private enforcement serve different aims, public enforcement alone is not sufficient, as public authorities are often not able or willing to follow up on each infringement due to reasons such as limited resources and discretion concerning enforcement priorities. For public enforcement, the CPC Regulation lays down a basis for national consumer protection authorities to work together against cross-border infringements. Its revision makes cross-border public enforcement more effective and gives national authorities a uniform set of powers to cooperate more efficiently. It also enables the European Commission to launch and coordinate common enforcement actions to address EU-wide infringements.

<sup>10</sup> 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.

<sup>11</sup> European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)); European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP)).

Apart from the general interplay between public and private enforcement, there are also specific links between the revised CPC Regulation and interventions assessed in this IA. Firstly, although it was highlighted during the negotiations for the revised CPC Regulation that *"effective, proportionate and dissuasive"* penalties in all Member States would be essential for the success of the Regulation, the co-legislators decided that it was more appropriate to address the need for a strengthened level of penalties in connection with the possible revision of substantive EU consumer law.<sup>12</sup> It is therefore dealt with in this IA.

Secondly, the revised CPC Regulation did not introduce rights to redress for consumers harmed by cross-border or EU-wide infringements. Public enforcers can only receive or seek from the trader voluntary remedial commitments.<sup>13</sup> Nonetheless, during the negotiations for the Regulation, the need for strong private enforcement measures complementing public enforcement was acknowledged.<sup>14</sup> Private enforcement measures related to individual and collective consumer redress are assessed in this IA.

Thirdly, interventions assessed in this IA related to UCPD remedies, to revising the Injunctions Directive (ID) and to strengthening penalties for infringements of EU consumer law would ensure strong synergies with the revised CPC Regulation. In particular, measures assessed in this IA would:

- a. Include specific provisions to ensure the coherence of decisions within possible parallel proceedings under public and private law (e.g. staying of judicial proceedings and suspending prescription periods for consumer claims during the administrative procedures);
- b. Draw inspiration from the 2014 Antitrust Damages Directive, with a view to give decisions by public enforcers the legal strength of proof of breaches of law, in order to facilitate subsequent follow-on redress actions by consumers, individually or collectively;
- c. Ensure that remedies voluntarily provided by traders following CPC enforcement action are duly taken into account within judicial collective redress proceedings. Similarly, in accordance with the new CPC Regulation (e.g. Article 21), the measures related to penalties assessed in this IA would require Member States to take into account, when deciding on whether to impose a penalty and on its level, any action taken by the trader – voluntarily or as a result of civil proceedings – to mitigate or remedy damage suffered by consumers.

This IA is also based on the **Commission 2013 Recommendation on Collective Redress**, which recommended that all Member States provide for injunctive and compensatory collective redress mechanisms for violations of rights granted under Union law. It also set out common principles for such mechanisms. The measures relevant for mass harm situations under the ID analysed in this IA follow up on the **Collective Redress Report**. It concludes that, amongst others, the Commission *"intends to follow-up this assessment of the 2013 Recommendation in the framework of the forthcoming initiative on a "New Deal for Consumers", as announced in the Commission Work Programme for 2018, with a particular focus on strengthening the redress and enforcement aspects of the Injunctions Directive in appropriate areas"*. The Collective Redress Report shows that there

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<sup>12</sup> 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."

<sup>13</sup> Revised CPC Regulation, Recital 46 and Article 9(4)(c).

<sup>14</sup> See Recital 17 of the revised CPC Regulation, which reads: "Consumers should be entitled to redress for harm caused by infringements covered by this Regulation. Depending on the case, the power of the competent authorities to receive from the trader.... additional remedial commitments for the benefit of consumers that have been affected by the alleged infringement covered by this Regulation....should contribute to removing the adverse impact on consumers caused by a cross-border infringement (...). This should be without prejudice to a consumer's right to seek redress through appropriate means."

has been limited follow-up to the 2013 Recommendation, with 9 Member States still not providing any collective compensatory redress mechanism.<sup>15</sup> Evidence shows that the absence of an EU wide collective redress mechanism is of particular practical relevance in the field of consumer protection. This IA has found that many national authorities would support such an EU intervention on redress. The fact that not all Member States have ensured horizontal collective redress measures following the Recommendation on Collective Redress does not necessarily contradict this support, which was expressed in the survey on a possible revision of the ID for this IA (from now onwards: ID survey). The support comes mainly from national authorities (ministries, enforcers) responsible for consumer protection, i.e. for the area for which the 2018 Collective Redress Report identified the greatest practical relevance of this instrument. Such authorities' views may not always suffice to prompt corresponding legislative measures at national level. Some such authorities may also consider that EU intervention, rather than different national solutions, would be more appropriate given the high level of regulatory harmonisation in the field of consumer protection and the cross-border implications at stake. Nonetheless, account is also taken of the fact that in some Member States introducing specific collective redress instruments for consumers is being discussed.<sup>16</sup>

Existing EU-level measures on individual redress are taken into account, but they are not the subject matter of this IA.<sup>17</sup> Under the Directive on consumer **alternative dispute resolution (ADR)**,<sup>18</sup> EU consumers have access to quality-ensured out-of-court dispute resolution systems for domestic and cross-border contractual disputes. Member States are also encouraged<sup>19</sup> to ensure that collective ADR schemes are available. An **online dispute resolution platform (ODR platform)** set up by the Commission<sup>20</sup> also helps consumers and traders resolve domestic and cross-border disputes over online purchases of goods and services.<sup>21</sup> The 2013 ADR/ODR legislation is tailored for individual redress actions, whereas the ID is aimed at redress actions brought by qualified entities designated by the Member States to act in the collective interest of consumers. The 2013 Directive on consumer ADR states in its recital 27 that "*This Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures.*"

The possible revision of the ID assessed in this IA takes into account the findings of the Collective Redress Report and the underlying call for evidence, which show that it is highly effective to have out-of-court dispute resolution mechanisms in place, also in the framework of collective redress cases, as this incentivizes the parties to the dispute to find a settlement.

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<sup>15</sup> CY, CZ, EE, IE, HR, LU, LV, SI, SK. Moreover, in AT there is no compensatory mechanism specific for collective actions, in DE the existing compensatory collective redress procedure applies only to investors cases, therefore not covering all consumer protection areas and in NL there is no judicial compensatory collective redress mechanism.

<sup>16</sup> See draft German law for a 'Musterfeststellungsklage' of 31 July 2017.

<https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Musterfeststellungsklage.html>

<sup>17</sup> For an overview of enforcement and redress opportunities and the already existing EU legal framework providing for efficient out-of-court dispute resolution, speedier and cheaper court proceedings in consumer cases and procedural consumer protection, including EU instruments in private international law, see Annex 6.

<sup>18</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, available at : <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011>

<sup>19</sup> By Directive 2013/11/EU on alternative dispute resolution.

<sup>20</sup> Available since 15 February 2016, based on Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524>

<sup>21</sup> The Commission adopted its first report on the functioning of the ODR platform on 13 December 2017, see: [https://ec.europa.eu/info/online-dispute-resolution-1st-report-parliament\\_en](https://ec.europa.eu/info/online-dispute-resolution-1st-report-parliament_en)

Measures related to the modernisation of EU consumer law are also closely related to the Commission's **Digital Single Market (DSM) Strategy**.<sup>22</sup> Within the DSM Strategy, the Commission proposed, in December 2015, a **Directive for contracts for the supply of digital content (DCD)**.<sup>23</sup> It defines consumer rights when digital content and digital services acquired by the consumer, including upon provision of personal data without any payment in money, are not in conformity with the contract, for example because they do not correspond to the specifications provided before contract conclusion. Pre-contractual information requirements are laid down in the CRD, which, however, currently does not apply to "free" digital services. The DCD will provide remedies for consumers in case of lack of conformity with the contract for both "free" digital content and "free" digital services. This makes it urgent to remedy the current legal incoherence within the CRD, whose pre-contractual information requirements and right of withdrawal apply to the free provision of digital content, but not to the "free" provision of digital services, thus creating legal uncertainty for both users and providers. The possible introduction of individual rights to remedies for consumers harmed by unfair commercial practices, as assessed in this IA, is also related to the DCD, which includes remedies for non-conformity with the contract, but without covering all aspects of unfair commercial practices.

This IA also takes into account key issues identified in the Commission's 2016 **Communication on Online Platforms**<sup>24</sup> and planned initiatives related to platforms. The Platform Communication stresses consumer expectations to improve platform transparency, and refers to the UCPD and the CPC Regulation as tools to reach this goal. In December 2016, the European Economic and Social Committee suggested to adapt pre-contractual information requirements to needs linked to the "platform" phenomenon in general.<sup>25</sup> The European Council supports this goal and, on 19 October 2017, underlined "*the necessity of increased transparency in platforms' practices and uses*".<sup>26</sup>

Whilst this IA does not address business-to-business (B2B) relations, it is complementary to the Commission's action on **unfair platform-to-business (P2B) contract terms and trading practices** (P2B initiative), as announced in the May 2017 Mid-Term Review of the DSM Implementation.<sup>27</sup> Both the New Deal for Consumers and the P2B initiative pursue the goal of enhanced transparency and fairness of transactions through online platforms. However, contrary to the B2B area, existing EU consumer law (and in particular the UCPD and the UCTD) indiscriminately applies to all traders, including all on-line platforms which qualify as traders. EU consumer law ensures protection to consumers vis-à-vis such traders.<sup>28</sup> Therefore, this IA deals with the specific problem,

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<sup>22</sup> [https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en).

<sup>23</sup> Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)0634 final of 9.12.2015. At the same time the Commission presented a parallel Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 of 9.12.2015. This Proposal provided for further harmonisation and updating of the rules on remedies for tangible goods sold at distance. On 31 October 2017, the Commission presented an amended Proposal for a new Directive on consumer sales and guarantees for all sales channels fully replacing the current CSGD (Amended proposal for a Directive on certain aspects concerning contracts for the sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council, COM (2017) 637 of 31.10.2017. For further information: [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en) and [http://ec.europa.eu/newsroom/just/item-detail.cfm?&item\\_id=606582](http://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=606582).

<sup>24</sup> 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>.

<sup>25</sup> 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>

<sup>26</sup> European Council Conclusions on Migration, Digital Europe, Security and Defence (19 October 2017): [http://www.politico.eu/wp-content/uploads/2017/10/19-euco-conclusions-migration-digital-defence-1.pdf?utm\\_source=POLITICO.EU&utm\\_campaign=af65e58c5d-EMAIL\\_CAMPAIGN\\_2017\\_10\\_20&utm\\_medium=email&utm\\_term=0\\_10959edeb5-af65e58c5d-189614505](http://www.politico.eu/wp-content/uploads/2017/10/19-euco-conclusions-migration-digital-defence-1.pdf?utm_source=POLITICO.EU&utm_campaign=af65e58c5d-EMAIL_CAMPAIGN_2017_10_20&utm_medium=email&utm_term=0_10959edeb5-af65e58c5d-189614505).

<sup>27</sup> 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>. add reference to the IA for the P2B initiative on promoting fairness and transparency for business users of online intermediation services when it becomes available.

<sup>28</sup> See in particular Chapter 5.2 of the revised Guidance on the UCPD (UCPD Guidance), SWD(2016) 163 final, 25.05.2016.



identified by the CRD Evaluation that consumers who shop on online marketplaces often do not know who their contractual counterpart is and whether they benefit from protection under EU consumer rules. The proposed new transparency rules assessed in this IA will thus only apply to "online marketplaces", which will be defined in line with definitions that already exist in EU law.

The two initiatives are also complementary to the extent that, next to findings from the studies carried out in relation to P2B practices, also the CRD Evaluation identified a call for enhanced transparency of **ranking criteria of offers on online marketplaces**. The two initiatives therefore both address this issue, with this IA assessing if there is a need to require online marketplaces to inform consumers about the criteria determining the ranking of different offers in response to search queries by consumers.

Furthermore, the findings of the Fitness Check on the need of strengthening the B2B rules of the Misleading and Comparative Advertising Directive and on the possibility of extending the B2C rules of the Unfair Contract Terms Directive also to B2B contracts have informed the P2B initiative.

The initiative assessed in this IA to extend the CRD to cover "free" digital services is linked to the **General Data Protection Regulation 2016/679** (GDPR). Since the GDPR does not regulate the contractual consequences of consumers' withdrawal of consent to the processing of personal data, extending the CRD to cover "free" digital services could build upon and enhance the protection provided by the GDPR. Specifically, it would introduce a general right to terminate the contract within 14 days from the conclusion of the contract, which will complement the rights provided by the GDPR, e.g., right to access, right to be forgotten and right to data portability.

This IA does not discuss which individuals are to be regarded as traders, neither in the so-called **collaborative economy**<sup>29</sup> nor on other types of online marketplaces where both traders and consumers offer goods and services. This is a general question concerning the entire traditional and collaborative, online and offline economy. It is not specific to the issues of online marketplaces discussed in this IA.

Positive impacts of more effective EU consumer legislation can also be expected on other EU policy areas where B2C commercial transactions play an important role. One example is **sustainable consumption**, as addressed by the Commission's Circular Economy Action Plan.<sup>30</sup> Here, misleading "green" claims are a major issue. Although already prohibited under the UCPD, stronger enforcement and redress tools are needed to combat such infringements.

## 2 THE PROBLEM DEFINITION

### 2.1. Conclusions from recent evaluations

As mentioned in Section 1.1, this IA builds on the findings of the Fitness Check of EU Consumer and Marketing Law and the CRD Evaluation, both published in May 2017, as well as on the Collective Redress Report, published in January 2018.

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

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<sup>29</sup> See DG GROW initiative on collaborative economy in the accommodation sector ([https://ec.europa.eu/growth/content/opening-plenary-collaborative-economy-tourism-accommodation-sector-0\\_en](https://ec.europa.eu/growth/content/opening-plenary-collaborative-economy-tourism-accommodation-sector-0_en)).

<sup>30</sup> Communication from the Commission "Closing the loop - An EU action plan for the Circular Economy", COM/2015/0614 final of 2.12.2015, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0614>.

However, the Fitness Check concluded that the effectiveness of the rules is hindered by lack of awareness both among traders and consumers, as well as by insufficient enforcement and consumer redress opportunities.

It therefore 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 UCPD remedies. In this respect, it also recommended making the ID more effective, for example, by expanding its scope and further harmonising the procedure to: (i) facilitate access to justice and reduce the costs for qualified entities, (ii) increase the deterrent effect of injunctions, and (iii) produce an even more useful impact on the affected consumers. The Fitness Check also recommended acting in order to ensure that not only consumers, traders and their associations, but also judges and other legal practitioners have better knowledge of rights and duties under EU consumer law. Finally, the Fitness check recommended simplifying the regulatory landscape where this is fully justified.

DG JUST is currently following up on all the Fitness Check recommendations.

In particular, in relation to the need to ensure better knowledge among consumers, traders and legal practitioners about EU Consumer Law, DG JUST will launch a **2018 EU-wide awareness raising campaign on consumer rights**, which will build upon the lessons learnt from a 2014-2016 Consumer Rights Campaign.<sup>31</sup> Additionally, it is carrying out a **pilot project on training SMEs in the digital age** (the "ConsumerLawReady" initiative<sup>32</sup>) and plans to roll out a number of training activities for judges and other legal practitioners within the **revamped European Judicial Training Strategy** for 2019-2025 (currently under preparation).<sup>33</sup> Furthermore, to make it easier for all market actors to understand their contractual rights and duties, DG JUST is coordinating a **self-regulatory initiative within the REFIT stakeholder group** aimed to secure a clearer presentation of both mandatory pre-contractual information and standard Terms and Conditions. Finally, to further enhance legal certainty for all market actors, DG JUST has been working on several Guidance documents to ensure better compliance with EU consumer law<sup>34</sup> and is about to publish a new **Consumer Law Database within the E-Justice Portal**, displaying EU and national case-law and administrative decisions in relation to the EU consumer acquis.

In relation to the need to ensure stepped-up enforcement and easier redress, this IA takes duly into account the recently revised **CPC Regulation** to boost cross-border public enforcement and the efforts being done at EU level to make it easier for individual consumers to seek redress thanks to the revised **Small Claims Regulation** and the **ADR/ODR provisions**; it thus focuses on the precise gaps identified by the Fitness Check recommendations, thus assessing the need for an increased deterrent effect of penalties for breaches to EU consumer law and for individual remedies to consumers affected by breaches to the UCPD, whilst assessing different options to make the ID more effective.

Also in relation to the concrete, and limited, areas for simplifying and enhancing the effectiveness of the current regulatory landscape, this IA assesses in particular the need for eliminating duplications of requirements between the UCPD and the CRD. It does however not assess any further targeted amendments to the UCTD, apart from that aimed at introducing also in this

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<sup>31</sup> See also: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=30149](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=30149)

<sup>32</sup> The European Commission has launched a *ConsumerLawReady* training project for SMEs, thanks to financing received 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 SMEs started in December 2017 and will continue throughout 2018. A dedicated website was created in November 2017: [www.consumerlawready.eu](http://www.consumerlawready.eu)

<sup>33</sup> Roadmap available at [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247_en)

<sup>34</sup> UCPD Guidance, 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 is planned for the end of 2018 and updated Guidance on the Consumer Rights Directive in 2019.

Directive an Article on the appropriate level of penalties. Indeed, in light of the rich and recent case-law of the European Court of Justice, national case-law and administrative decisions identified in the Consumer Law repository and the recent findings of a Study on national procedural laws<sup>35</sup>, it appears that the issues identified in the 2017 Fitness Check mainly require explanations of the current Directive and are thus best addressed through a **Commission guidance on the UCTD**.

The CRD evaluation found that the CRD has **contributed positively to the functioning of the B2C internal market** and ensured a high common level of consumer protection. However, it identified emerging gaps in relation to developments in the digital economy. The evaluation recommended amendments in the area of B2C relations as regards in particular the following: i) transparency of transactions on online marketplaces; ii) alignment of the rules governing digital content contracts with those for "free" digital services (such as cloud storage and webmail); iii) simplification of some of the existing information requirements in the UCPD and the CRD that overlap; iv) reduction of the burden on traders, especially SMEs, regarding the right to withdraw from distance and off-premises sales, where the consumer has used goods beyond what is strictly necessary; and v) information requirements on the means of communication between traders and consumers. The evaluation also recommended further awareness-raising activities and guidance documents as follow-up actions.<sup>36</sup>

DG JUST is currently following up on all these legislative and non-legislative activities.

Detailed information on follow-up to the recommendations from the Fitness Check and the CRD evaluation, including those not addressed in this IA, is provided in Annex 5. Synergetic impacts expected by the policy measures assessed in this IA and on-going/planned non-legislative measures are presented in Chapter 8.

The **2018 Collective Redress Report** concluded that the 2013 Recommendation created a benchmark in relation to the principles for a European model of collective redress. However, it also demonstrated that there has been only a rather limited follow-up to the Recommendation in legislative terms.<sup>37</sup> This means that the potential of the principles of the Recommendation in facilitating access to justice is still far from being fully exploited. Whilst the Recommendation has a horizontal dimension given the different areas in which mass harm may occur, evidence shows that the absence of an EU wide collective redress mechanism is of particular practical relevance in the field of consumer protection, as demonstrated by concrete cases, including the diesel emissions case (see description in Chapter 2.3.2). On this point, the Fitness Check found that the limited effects of the current ID on harmed consumers is one of its biggest shortcomings, especially according to the qualified entities that are able to use the ID.

Some Member States have found it necessary, for various reasons, to introduce **bans or restrictions on specific types of off-premises selling such as doorstep selling**. While going against the fully harmonised nature of the UCPD, such restrictions have no or very limited cross-border implications (due to the very nature of doorstep selling) and therefore are unlikely to affect the single market. Therefore, considering the principles of subsidiarity, the possibility for Member States to introduce such bans or restrictions based on clear justifications will be considered as part of the targeted revision of the UCPD. However, the issue is not covered in this IA since the introduction of such

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<sup>35</sup> 2017 MPI Study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law study of national procedural laws, second strand published on 25 January 2018, available at [add link to the study].

<sup>36</sup> Section 6 of the CRD Report and Section 7 of the CRD SWD(2017) 208 final.

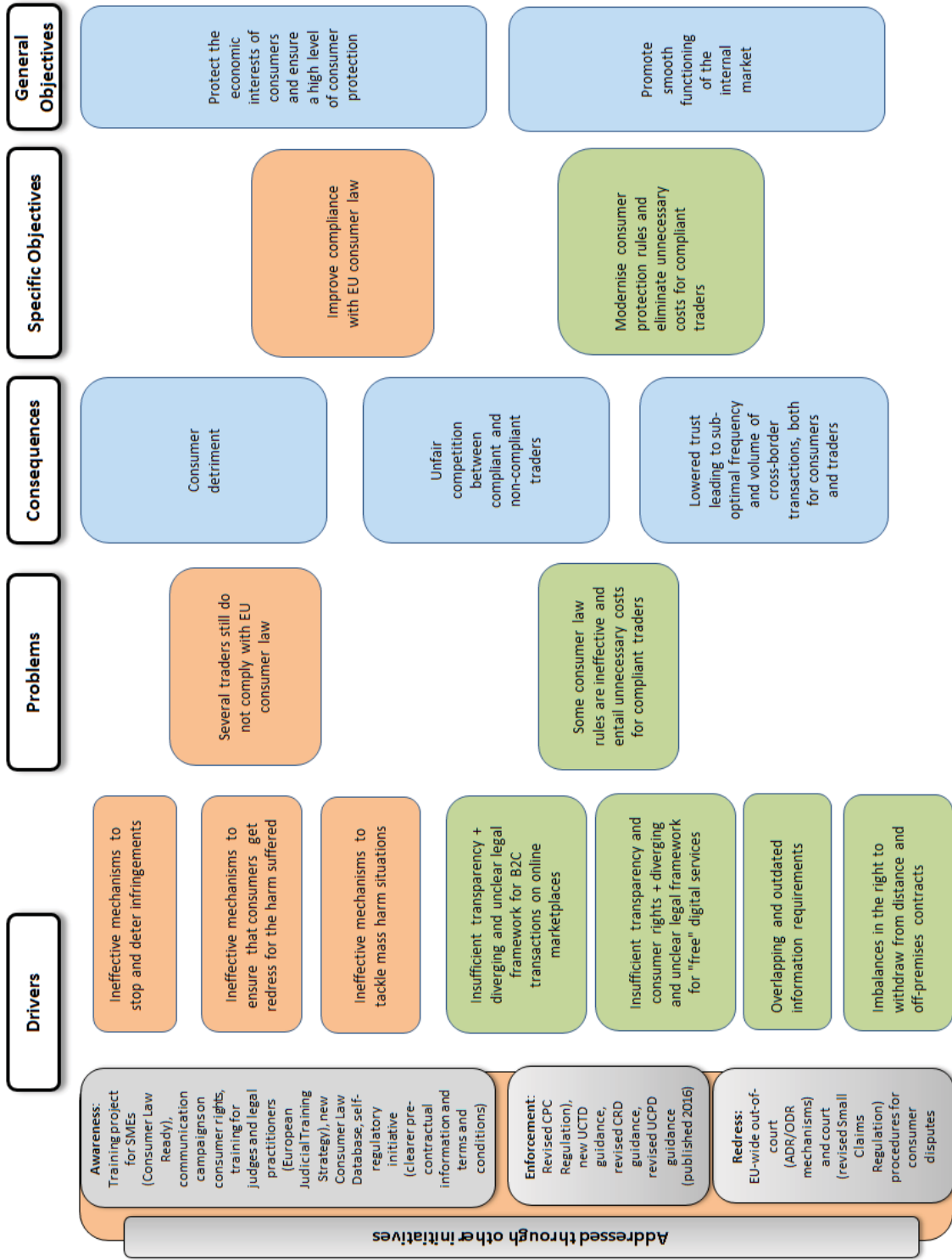
<sup>37</sup> The availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still very unevenly distributed across the EU. The impact of the Recommendation is visible in the two Member States where new legislation was adopted after its adoption (BE and LT) as well as in SI where new legislation is pending, and to a certain extent in the Member States that changed their legislation after 2013 (FR and UK).



bans would be the decision of the Member States, who will have to justify it, and should have no or very limited cross-border implications.

## 2.2. Overview of problems and robustness of data

**Figure 2: Overview of drivers, problems and objectives**



## Robustness of data for this IA

Quantitative data received for this IA<sup>38</sup> has been complemented by robust data collected for the Fitness Check, the CRD evaluation, the Collective Redress Report and from other information sources, such as desk research, Eurobarometer data and relevant studies. Furthermore, qualitative assessments have been used as much as possible to supplement quantitative data.

### 2.3. Main problem 1: Still many traders do not comply with EU consumer law

#### 2.3.1. Scale and consequences of non-compliance

Across all sectors – online as well as offline – there is still a relatively high level of lack of compliance by traders with EU consumer law. According to the Consumer Conditions Scoreboard 2017, the number of consumers reporting consumer rights-related problems in 2016 was 20.1%.<sup>39</sup>

Retailers also agree that many traders do not comply with consumer law. In 2016, only 67% of retailers considered that competitors in their country comply with consumer legislation, and 24% of traders considered that compliance with consumer law in their country and sector is not good enough.<sup>40</sup>

Lack of compliance causes consumer detriment and disrupts fair competition.

According to a recent study on consumer detriment,<sup>41</sup> consumers suffered, in total for all the 6 markets covered,<sup>42</sup> detriment after seeking redress of between EUR 20.3 billion and EUR 58.4 billion over the last 12 months in the EU-28.<sup>43</sup> These values amount to between 0.2% and 0.7% of the overall level of total private consumption in the EU-28, which stood at EUR 8 285 billion in 2015.<sup>44</sup> As regards cross-border infringements of EU consumer rules, the IA for the revised CPC Regulation estimated the financial detriment for individual consumers caused by non-compliance with consumer rules in a sample of five cross-border online markets at EUR 770 million per year.<sup>45</sup>

Not all of the problems and the related detriment reported by consumers are caused by non-compliance with consumer law. A consumer's own assessment of whether his or her rights have been breached may not always be legally correct. However, lack of compliance with the rules is very likely an important source of consumer problems and detriment. For example, in the public consultation for the Fitness Check, almost all responding consumer associations (95%) and public

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<sup>38</sup> For more information about the consultation process, see Annex 2.

<sup>39</sup> The figure was collected through the 2016 edition of the survey on "Consumer attitudes towards cross border trade and consumer protection" – percentage of consumers who experienced at least one problem with a good or service in the last 12 months.

<sup>40</sup> Source: "Retailers' attitudes towards cross border trade and consumer protection" (2016). The survey was one of the main data collection tools for the Consumer Conditions Scoreboard 2017.

<sup>41</sup> Study on measuring consumer detriment in the European Union (2017), available at: <https://publications.europa.eu/en/publication-detail/-/publication/b0f83749-61f8-11e7-9dbe-01aa75ed71a1/language-en>, [https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/market-studies\\_en](https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/market-studies_en)

<sup>42</sup> Mobile telephone services; clothing, footwear and bags; train services; large household appliances; electricity services; and loans, credit and credit cards.

<sup>43</sup> These estimates refer to the revealed personal consumer detriment (sum of total post-redress financial detriment and monetised time loss). Post-redress detriment is understood as sum of financial detriment (monetary costs and losses incurred by the consumer either as a direct result of a problem or from trying to solve a problem) and monetised time loss, after compensation received from the seller/provider or obtained via alternative dispute resolution, legal procedures etc. Estimates are conservative in nature. Hidden detriment that consumers experience but are unaware of is excluded. The same is true for psychological detriment, situations in which consumers tried to make a purchase but failed or were denied market access as well as other dimensions of personal detriment.

<sup>44</sup> Source: [https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/macro-economic-database-ameco/ameco-database\\_en](https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/macro-economic-database-ameco/ameco-database_en) 'Private final consumption expenditure' refers to the expenditure on consumption of goods and services of households and non-profit institutions serving households. Goods and services financed by the government and supplied to households as social transfers in kind are not included.

<sup>45</sup> IA for the Proposal for the revised CPC Regulation, SWD(2016) 164 final, 25 May 2016, p. 6.

authorities (86%) said that non-compliance with consumer protection rules by traders is an important problem.<sup>46</sup>

Consumer legislation is not considered particularly burdensome when compared to other areas of EU legislation.<sup>47</sup> Compliance costs identified by the Fitness Check were also moderate.<sup>48</sup> Nonetheless, the minority of non-compliant traders that do not bear such costs have a **competitive advantage** over the majority of law-abiding traders.

### 2.3.2. Drivers of lack of compliance

The Fitness Check concluded that the main obstacle to ensuring a high level of consumer protection is lack of compliance due to: (1) insufficient enforcement of the rules,<sup>49</sup> (2) lack of awareness about consumer rights<sup>50</sup> and (3) limited consumer redress opportunities.<sup>51</sup>

As described in Section 2.1, a number of steps have already been or are being taken to improve awareness about and enforcement of consumer law, whilst facilitating consumer redress.

Consequently, this IA focuses on the outstanding drivers of lack of compliance that have not already been addressed by other initiatives: ineffective mechanisms to (1) stop and deter infringements of consumer law, (2) ensure that consumers get redress for the harm suffered and (3) tackle mass harm situations.

#### **Example of drivers for lack of compliance with EU consumer law: the "Dieselgate" scandal**

In September 2015, the Volkswagen Group admitted it had installed so-called 'defeat devices' in Diesel cars in order to manipulate emission test results. According to estimates, over 11 million cars had such devices installed worldwide, 8 million of them in Europe.<sup>52</sup> This resulted in mass harm for consumers buying cars manufactured by the Volkswagen Group, as these consumers were misled by untruthful claims about the environmental performance of the cars. Such misleading advertising is prohibited in Europe by the UCPD.

<sup>46</sup> The public consultation for the Fitness Check was carried out between May and September 2016. The total of 436 respondents comprised: 86 business associations (51 national + 35 at the European level), 20 consumer associations and 28 public authorities (13 government authorities in charge of consumer policy, 10 national consumer enforcement authorities, 5 national sector-specific -e.g. energy/telecom- enforcement authorities). The detailed results are available in Part 2 (report of the public consultation) of the 'Study for the Fitness check of consumer and marketing law', p. 80-92, available at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332).

<sup>47</sup> The Commission assessed costs to SMEs of complying with EU regulation in 2012 in the 'TOP 10 most burdensome legislative acts for SMEs'. The area of 'Consumer protection — safe shopping (distance selling, advertising, unfair commercial practices, timeshare of holiday properties, etc.)' scored as the second least burdensome for SMEs among 32 surveyed areas. In the 'Annual Burden Survey' in 2017 (available at: <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2129>) half of all surveyed companies (50%) thought that regulatory costs due to consumer protection laws remained unchanged in the last financial year. Three in ten companies (30%) said costs increased, 2% thought that costs decreased. Perceptions of regulatory cost increases were the 2<sup>nd</sup> lowest among the six surveyed regulatory areas, most widely cited in MT (50%), followed by FR; least widely cited in EE (8%), SE, HR, LV, LT and DK. A relatively high proportion of companies (18%) was unable to provide an opinion on this area of legislation.

<sup>48</sup> For instance, the overall compliance costs with rules in the areas of marketing (including B2B marketing) and standard contract terms were estimated to amount to approximately 0.024 % of annual turnover. For further information, see Chapter 6.2.4. of the Fitness Check report (SWD(2017) 209 final).

<sup>49</sup> For example, in the public consultation for the Fitness Check, most consumer associations and public authorities pointed to the lack of legal powers for national administrative enforcement authorities, inactivity by such authorities and the complexity of administrative procedures as important problems for consumer rights.

<sup>50</sup> The Fitness Check showed that lack of awareness is an important impediment to well-functioning consumer protection: the percentage of consumers complaining to the seller or service provider increased with increasing consumer rights awareness: no less than 64 % of respondents with very high consumer rights awareness (i.e. scoring between 75 % and 100 % on the consumer awareness index) took action to solve their problem, as opposed to just 47 % doing so among the respondents with a very low consumer awareness (i.e. scoring between 0 % and 25 %). For further details see p. 32-34 of the Fitness Check report.

<sup>51</sup> The majority of consumer associations and public authorities considered existing mechanisms for injunction proceedings too complex, lengthy and costly. They also highlighted significant differences among national injunction proceedings as an obstacle to the effectiveness of the Injunctions Directive, particularly in cross-border situations. For further details see Annex 5.

<sup>52</sup> <http://www.bbc.com/news/business-34324772>

Only two national consumer protection authorities have imposed financial penalties on the car producer for breaching the UCPD.<sup>53</sup> However, the level of fines is unlikely to be sufficiently deterrent to prevent similar infringements by large multinational companies in the future.<sup>54</sup>

Furthermore, despite efforts by the Member States, consumer organisations and the European Commission to persuade the car producer to remedy the harm it has caused, it has refused to compensate European consumers.<sup>55</sup>

There have also been few private actions by European consumers and consumer organisations. This is partly because in many Member States there is no direct link between breaches of the UCPD and the right to remedies, such as rights to refunds or damages. Moreover, some national remedies only apply where there is a contract between a consumer and a trader. Consumers can then only seek remedies against their contractual counterparts, which in this case are usually car sellers, not the car producer, which is likely to be responsible for the misleading advertising in this case.

As concerns collective redress, only 4 consumer organisations and 1 ad hoc association<sup>56</sup> have brought cases to court (in BE, IT, ES, PT and PL). So far, only the collective redress actions in IT and BE have been deemed admissible by the competent courts. In IT, around 90 000 consumers have indicated their interest in joining the action during the registration phase<sup>57</sup> and in BE the court admitted that all affected consumers would be represented by the collective action ('opt-out' approach).<sup>58</sup>

### 2.3.3. Driver 1: Ineffective mechanisms to stop and deter infringements<sup>59</sup>

Sanctions deter traders from engaging in or continuing illegal behaviour. For this reason, the CRD, UCPD and PID contain a requirement for Member States to have in place 'effective, proportionate and dissuasive penalties' to tackle breaches of the national law provisions transposing these Directives. The CSGD and UCTD do not include such a requirement<sup>60</sup>, although no less than 11 Member States already provide for penalties also in case of breaches of national laws transposing these directives.

Member States have very different rules on penalties (see Annex 7, Table 1 for an overview). Fines for breaches of the above-mentioned five Directives exist as penalties in many Member States. However, the maximum level of such fines is, in several Member States, set at a very low level. Some countries have turnover-based fines at least for infringements of the UCPD, although in most cases also these countries apply an absolute cap to fines. For example, fines for infringing the UCPD may reach 10% of a company's annual turnover in FR, PL and NL whilst it is capped at EUR 8 688 in LT, EUR 13 157 in HR and EUR 32 000 in EE.

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<sup>53</sup> The Italian Competition and Consumer Protection Authority (AGCM) has imposed a fine of EUR 5 million. The Dutch Consumer and Markets Authority (ACM) has imposed a fine of EUR 450 000.

<sup>54</sup> For instance, the bonuses of the top managers of Volkswagen have only in 2017 been capped to EUR 5,5 million: <http://www.reuters.com/article/us-volkswagen-results-managementpay-idUSKBN16321P>, i.e. more than the Italian fine.

<sup>55</sup> By contrast, more substantial public and private enforcement action has been taken in the US. The US Environmental Protection Agency imposed dissuasive penalties, e.g. the obligation to pay USD 2.7 billion into a special trust that supports environmental programmes and an additional USD 2 billion more to promote zero emissions vehicles. Furthermore, US consumers have succeeded in collective private actions. More than 200 class actions have been launched in US courts, which were subsequently bundled into a single law-suit, which led to a settlement. According to the terms of the settlement, consumers could either choose to return the vehicle to the company, which then would compensate them for the value of the car, or have the car repaired. In both options, the consumers would also get a compensation payment of \$ 5,000 - 10,000.

<sup>56</sup> An association created under Polish law for the purpose of representing rights of consumers affected by "Dieselgate".

<sup>57</sup> Altroconsumo press release 7.11.2017 <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2017/class-action-dieselgate-respinto-reclamo-vw>

<sup>58</sup> See Test-Achats' press release of 19 December 2017 <https://www.test-achats.be/mobilite/autos/news/action-collective-dieselgate-vw>

<sup>59</sup> See Annex 7 for further details on the problem description in this area.

<sup>60</sup> The amended proposal for a Directive on certain aspects concerning contracts for the sale of goods, COM(2017)637 of 31.10.2017, which aims at repealing and replacing the CSGD, does not provide for any penalties either.

Results of hypothetical case studies about fines that could be imposed for the same infringement in different countries on a micro and a large company demonstrated both the lack of deterrence (especially vis-à-vis large companies) and the disproportionate character of the fines that can be imposed under the current national rules.

As regards deterrence, for infringements of the UCPD by a large company, the estimated fine ranges in different countries from just 0.002% to 0.179% of the company turnover, i.e. the economic impact of the fine in one country is 90 times lower than in another country. Consequently, traders established in 'low-fine' countries may not be deterred from pursuing the infringement harming consumers in other Member States. The survey responses of the national consumer authorities also show that, in most cases, the fact that the infringement has affected consumers also in other Member States is not systematically taken into account in the imposition of fines.

As regards proportionality, the case study demonstrated that the median fine-to-turnover ratio for breaches of the UCPD would be 2.36% for micro companies but just 0.011% for large companies. This means that the economic impact of the fine on a micro company would be 215 times higher than on a large company. Accordingly, the current systems for fines, which are in most cases based on absolute maximum amounts, treat large and small companies in a highly disproportionate manner, to the disadvantage of smaller ones. Thus, it does not seem surprising that in the SME Panel consultation, only between 20% and 25% of the 210 respondents considered the current level of fines as proportionate.

The "Dieselgate" case shows the limits of the fining systems based on maximum absolute fines. Although the Italian consumer enforcement authority AGCM imposed the maximum fine of EUR 5 million available under Italian law (this is also one of the highest absolute maximum fines across the EU), several consumer associations commented in their replies to the ECCG survey that *"Such a cap, which is lower than the annual bonus of the VW managers involved, will clearly not unfold dissuasive effects. By contrast, companies would be advised to ignore consumer protection law to maximise their profits."* More recently, the Dutch consumer enforcement authority imposed a lower fine of EUR 450 000 for the same infringement; again, this was the maximum fine available under national law at the time of the infringement.<sup>61</sup> Consequently, even relatively high absolute fines may not be sufficiently deterrent and proportionate when large companies and mass-harm situations are involved.

In the public consultation, most consumer associations and public authorities agreed that differences in the nature and level of fines for the same or similar breaches of EU consumer laws lead to insufficient compliance and insufficient deterrence especially for breaches that take place in more than one Member State. Among business associations only 17% and 23% agreed that these differences lead to, respectively, insufficient compliance and deterrence. In contrast, in the same consultation, 46% of 41 SMEs agreed (42% disagreed, 12% did not know regarding insufficient compliance and 34% disagreed, 20% did not know regarding insufficient deterrence) and large companies were divided in their views (5 agreed and 5 disagreed, 6 did not know)

The different levels of fines shown by these hypothetical case studies can also have a negative impact on tackling cross-border infringements in the CPC framework. The CPC provides a coordinated procedure to assess the infringement and decide how to address it concretely. In most cases, the national authorities will seek to obtain commitments from the trader to cease or modify a practice. If this approach does not work, each country concerned will have to take enforcement measures as foreseen in their national law, including fines or other measures such as blocking websites. They should seek to take these measures in a coordinated manner and simultaneously.

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<sup>61</sup> Decision of the Authority for Consumers & Markets to impose a fine on Volkswagen AG, 18 October 2017, available at: <https://www.acm.nl/sites/default/files/documents/2017-11/acm-fines-volkswagenag-for-unfair-commercial-practices.pdf>. Since 2016, the Netherlands have introduced turnover-based fines for consumer law infringements.



However, this is unlikely to be the case as concerns fines under the current divergent national systems.

In the public consultation, most consumer associations and public authorities agreed that these differences lead to a lack of level playing field between traders operating in Member States where fines are relatively low and traders operating in Member States where fines are relatively high. 39% of business associations agreed with this statement (49% disagreed). In contrast, in the same consultation 25 of 41 SMEs and 7 of 15 large companies agreed with these statements.

#### **Example of different fines for the same infringement**

In December 2011, the Italian consumer enforcement authority imposed a fine of EUR 900 000 on Apple for misleading advertising of its commercial guarantee scheme and misleading information on applicable legal guarantees stemming from EU law. A regional consumer protection authority in Spain imposed a penalty of EUR 40 000 for the same infringement. Consumers in the other EU Member States were targeted by the same practice.

#### **2.3.4. Driver 2: Ineffective mechanisms for individual consumers redress<sup>62</sup>**

Misleading and aggressive commercial practices are the consumer-rights related problems that consumers experience most often (see Table 1 in Annex 8). Such practices are prohibited as "unfair commercial practices" under the UCPD. However, their continued prevalence means that lack of compliance is a significant problem.

The UCPD does not harmonise rules on what consumers can do to remedy the situation when they have become victims of unfair commercial practices. This Directive rather leaves it to the Member States to determine if and how civil remedies, such as the right to terminate a contract and get a refund, should be available to consumers.<sup>63</sup> The absence of a clear framework for individual remedies in the UCPD go back to its drafting history, when, at the time of its adoption in 2005, enforcement against unfair commercial practices was rather viewed as a matter for public enforcement, shortly after the creation, in 2004, of the CPC network. The UCPD was thus designed to mainly regulate the market conduct of traders.<sup>64</sup>

With the benefits of more than 10 years of experience, however, the impacts of the lack of individual remedies in the UCPD have become clearer. This can be illustrated by comparing consumer behaviour under the UCPD and the Consumer Sales and Guarantees Directive (CSGD). The CSGD regulates legal consequences of the lack of conformity with the contract for consumer goods. As opposed to the UCPD, the CSGD ensures consumers EU-wide rights to remedies, such as having the defective good brought into conformity with the contract by repair or replacement, having the price reduced and the contract rescinded. In the consumer survey for the Fitness Check, many more respondents who had been confronted with unfair commercial practices reported that they had not taken action to solve the problem (27%) than what was the case for consumers that had bought defective goods (10%) (see Table 2 in Annex 8). This indicates that the CSGD is more effective than the UCPD in ensuring that consumers can solve problems when their rights have not

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<sup>62</sup> For a more complete analysis of the problems related to redress mechanisms under the UCPD, including stakeholder views see Annex 8.

<sup>63</sup> For the black-listed 'inertia selling' (no 29 of Annex I to the UCPD), Article 27 of the CRD provides that consumers shall be exempted from the obligation to provide any consideration for unsolicited goods or services.

<sup>64</sup> See also the IA for the UCPD (COM(2003)356 final), where, under section 7.2 on "more ambitious options that were rejected", there was a discussion on harmonising aspects of consumer contract law in addition to commercial practices. At that time, harmonising both was considered to be unmanageable in a single instrument and contract law aspects were expected to be "addressed elsewhere". However, subsequent legislative action in the area of consumer contract law (aside from the adoption of the CRD) has not been successful and therefore the gap identified in the original IA remains.

been respected. It seems likely that this is, at least to some extent, linked to the fact that the CSGD gives consumers rights to take specific action to get problems remedied, contrary to the UCPD.

National rules are diverging and two main groups of Member States can be identified. Firstly, 14 Member States have made links between civil remedies and breaches of national provisions transposing the UCPD. However, the specific rules within these Member States differ significantly. Secondly, 14 Member States have not made explicit references to remedies in case of breaches of national legislation transposing the UCPD. However, it may still be possible for consumers in these Member States to rely on certain remedies under general civil law. Table 8 in Annex 8 gives an overview of the civil remedies in the different Member States.

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 the UCPD have been breached.

#### **Example: Dual quality of products and lack of remedies in the UCPD**

Identically branded products with different compositions may mislead consumers who expect a certain quality from products or brands. Concerns have been raised that consumers in some Member States are sold products, especially foodstuff, of lower quality than in other countries, despite the packaging and branding of the products being identical. The Commission has started several interventions to meet these concerns, including dialogue with the parties concerned, guidelines for a common testing methodology and a Notice to facilitate the practical application of existing EU law.<sup>65</sup>

While the provisions of sector-specific EU food law are the first legal basis for assessing issues related, for example, to misleading marketing of foods, the UCPD does come into play to address those aspects of the commercial practice that are not covered by sector-specific EU rules. However, if enforcement authorities conclude that the identical branding of a product, while having significantly different composition, is contrary to the UCPD, affected consumers would currently have very different possibilities to get their money back and/or receive compensation for damages suffered, depending on whether the relevant Member State law ensures links between breaches of the UCPD and remedies for transactional decisions prompted by those unfair commercial practices.

Against this backdrop, it would appear that the current situation – where it is left to the Member States to determine if and how remedies should be available – keeps the UCPD from being fully effective. The Directive does not seem to fully reach its dual purpose: to contribute to the proper functioning of the Internal Market and achieve a high level of consumer protection.

As concerns the Internal Market, diverging national rules have created a fragmented legal landscape. This creates unnecessary costs for compliant traders engaging in cross-border trade, who need to adapt to different rules and assess risks related to possible legal challenges. At the same time, it is difficult for consumers to enforce their rights under the UCPD. This lack of effective mechanisms for individual redress means that traders do not have the added incentive to comply with the UCPD that they would have had if consumers had been ensured rights to claim remedies for breaches of the UCPD.

In the public consultation, 59% of citizens reported having experienced problems with getting redress from traders. A majority of stakeholders confirmed that, in their experience, consumers face

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<sup>65</sup> See an overview of these actions 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; C(2017) 6532 final: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=604475](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=604475)



such problems. 18<sup>66</sup> of 42 SMEs (16 disagreed, 8 did not know) and 9 of 17 large companies confirmed this as well. On the other hand, 30 of 68 (14 confirmed<sup>67</sup>, 24 did not know) business associations did not think consumers face problems with getting redress. A majority of stakeholders in the public consultation also agreed that differences between national rules on remedies under the UCPD cause harm to consumers. 21 of 40 SMEs and 7 of 16 large companies agreed (7 disagreed, 2 did not know). Only 10 of 74 business associations agreed. Also in the public consultation, a majority (including SMEs and large companies) found that differences between national rules on remedies cause costs for traders engaging in cross-border trade. However, 34 of 74 business associations disagreed (29 agreed, 11 did not know). See Section 3 of Annex 8 for a detailed breakdown by respondent category.

### 2.3.5. Driver 3: Ineffective mechanisms for consumer redress in mass harm situations<sup>68</sup>

The risk of mass harm situations that affect the collective interests of consumers continues to increase due to globalisation and digitalisation. Infringing traders may affect thousands or even millions of consumers with the same misleading advertisement or unfair standard contract terms in various economic sectors, such as telecommunications, financial services, environment and energy. The "Dieselgate" scandals is a greatly publicized example of mass harm situations taking place across the EU.

As demonstrated by the Fitness Check, the existing individual enforcement and redress possibilities appear insufficient particularly in mass harm situations and infringing traders are not sufficiently deterred from non-compliance. Reliance on individual private enforcement results in consumer detriment and under-deterrence of infringements.<sup>69</sup> A comparison of this data with EC data from 2008 shows that EU consumers today face the same problems while seeking redress individually as ten years ago, such as excessive length of the procedures, perceived low likelihood of obtaining redress, previous experience of complaining unsuccessfully, uncertainty about consumer rights, not knowing where or how to complain and psychological reluctance.<sup>70</sup>

The need for an EU instrument that addresses the collective interests of consumers was already evident in 1998 when the Injunctions Directive was first adopted. The ID made it possible for "qualified entities", mainly consumer organisations and independent public bodies, to bring actions for the protection of the collective interests of consumers with the primary aim of stopping infringements of EU consumer law. Such actions may be brought to challenge both domestic and cross-border infringements without an explicit mandate from the affected consumers.

The 2008 and 2012 Commission reports on the application of the ID as well as the Fitness Check have all confirmed the significant role of the ID in the EU-level regulatory toolbox for reducing non-compliance. However, these reports have also concluded that there are considerable shortcomings to the current ID, which, if left unaddressed, will continue to hinder its full effectiveness and lead to its sub-optimal use. Even in those Member States where injunctions are considered effective and are widely used, its potential is not fully exploited due to a number of elements which are not sufficiently regulated by the ID. The key identified shortcomings are its limited scope, the cost and length of the procedure, as well as its limited effects on consumers.

The scope of the ID is limited to the EU instruments enumerated in its Annex I, leaving out several instruments that are important for the protection of the collective interests of consumers from

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<sup>66</sup> 6 stated consumers encounter problems a few times, 8 said often and 4 indicated "yes, once".

<sup>67</sup> 6 stated yes, a few times, 5 said yes, often and 3 yes, once.

<sup>68</sup> For a comprehensive analysis of the problems related to mass harm situations see Annex 9.

<sup>69</sup> Fitness Check, Lot 1 Study, Part 1 Main report, p. 159.

<sup>70</sup> 2017 Consumer Condition Scoreboard, p. 58, Survey carried out within the 2017 Study on Procedural Protection of Consumers available at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=612847](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847) and Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (2008 Problem Study), p.42, available at [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

various policy areas, such as passenger rights, energy, telecommunication and data protection. Moreover, the ID has limited effects on individual consumers and infringing traders. Due to a lack of publicity obligations, the affected consumers are not necessarily made aware of the breach identified in the injunction order and the infringing traders are not deterred by the "naming and shaming" effect of such publicity. Due to a lack of redress effects, consumers may not be able to rely on the injunction order to obtain redress and have to litigate against that trader for the same issues, including proving the infringement anew. The lack of clarity about whether the ID may also cover redress for the victims of the infringement is widely considered a key reason for its insufficient effectiveness and deterrence. As shown by the 2018 Collective Redress Report, the impact of the 2013 Commission Recommendation on Collective Redress, which explicitly called Member States to ensure in their legal systems the existence of injunctive and compensatory collective redress in all areas of EU law, has been limited. Even in Member States where compensatory redress exists, it is still reported to be not effective enough to fully reach its objectives, with respondents referring to the cost, length and complexity of procedure.

Since the ID applies to both domestic and cross-border infringements, problems related to its effectiveness have cross-border implications. The use of injunctions for cross-border infringements is low and qualified entities from different Member States are not cooperating with each other sufficiently, i.e. not exchanging best practices or developing common strategies to challenge widespread infringements.

#### **Examples of mass harm situations and ineffective mechanisms to tackle them:<sup>71</sup>**

**Length of the procedure:** In Germany, in the injunction case of *RWE* on unfair standard terms in gas contracts regarding increasing price<sup>72</sup>, the injunction claim was brought in 2006, whereas the last instance decision was rendered in 2013. Under German law, prescription periods for individual damages actions that could follow an injunction order are not suspended while a collective action on the same issue is pending.<sup>73</sup>

**Publication costs for qualified entities:** In Italy, the consumer organisation Altroconsumo has been active in bringing collective redress actions. However it has regularly faced significant costs for informing consumers about the ongoing actions. Recently, in the Volkswagen defeat device case, it had to pay EUR 130 000 for publishing announcements in five Italian newspapers to alert the relevant consumers.<sup>74</sup>

**Lack of effective enforcement of injunction orders:** In Spain, within an action brought by the consumer organisation Organización de Consumidores y Usuarios, the court declared in 2013 that 20 of the general terms and conditions used by the Irish airline Ryanair were unfair. It was reported, within the 2017 Fitness Check, that Ryanair has not yet removed in Spain the unfair clause related to the law applicable to conflicts with consumers.<sup>75</sup>

**Lack of compensatory collective redress mechanism:** In Ireland, around 160,000 consumers were mis-sold a credit card protection policy, with the total damage equivalent to between EUR 15 - 30

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<sup>71</sup> Several recent studies and reports have identified examples of mass harm in different economic sectors: 2017 Fitness Check Study Lot 1, part 4, p. 13, EC 2017, [Call for evidence on collective redress \(not yet published\)](#), 2008 Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (2008 Problem Study), p.21, 2012 Commission report on the application of the ID, Brussels, 6.11.2012 COM(2012)635final, p. 4-5 available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434096245408&uri=CELEX:52012DC0635>.

<sup>72</sup> CJEU, judgment of 21/3/2013, Case C-92/11 *RWE*,

<sup>73</sup> Fitness Check Study, Part 1, page 121

<sup>74</sup> European collective redress – what is the EU waiting for? BEUC contribution to the 2017-2018 EU initiatives on collective redress available at [http://www.beuc.eu/publications/beuc-x-2017-086\\_ama\\_european\\_collective\\_redress.pdf](http://www.beuc.eu/publications/beuc-x-2017-086_ama_european_collective_redress.pdf)

<sup>75</sup> Fitness Check Study, Part 3, p. 1145.

million. However, there is no collective redress system in Ireland enabling consumers to seek compensation for damages.<sup>76</sup>

**Complexity of compensatory collective redress mechanism:** In Germany, in 2012 the Federal Court of Justice decided that certain contract clauses regarding the surrender value of life insurances were invalid. As reported, this could have been the basis for redress claims for millions of consumers. The Consumer Association of Hamburg took action against Allianz Lebensversicherungs AG in front a court. According to the Consumer Association's estimate, claims against Allianz added up to EUR 1.3 to 4 billion. Only 80 consumers, who had ceded their claims to the consumer organisation, were refunded € 114,000. It has been reported that the recovery claims procedure used in this case is too complex to be used for large numbers of consumers.<sup>77</sup>

## 2.4. Main problem 2: Ineffective consumer protection and unnecessary costs for compliant traders

### 2.4.1. Scope for modernising and simplifying EU consumer law

The Fitness Check and the CRD evaluation identified possibilities for modernising EU consumer law in the following areas of B2C relations:

- transactions on online marketplaces;
- contracts for "free" digital services (such as cloud storage and webmail);
- information requirements in the UCPD and the CRD that overlap;
- information requirements on the means of communication between traders and consumers;
- right to withdraw from distance and off-premises sales, for example where the consumer has used goods more than necessary to establish their nature, characteristics or functioning.

Although these are different areas of EU consumer law, they are grouped together in this IA as they are addressed for the same reasons: the underlying consumer rules are not sufficiently effective and do not ensure an adequate level of consumer protection. They also create unnecessary costs for compliant traders.

### 2.4.2. Driver 1: Lack of transparency and legal certainty for B2C transactions on online marketplaces<sup>78</sup>

Online marketplaces are a category of online platforms (intermediaries) that enable consumers to directly conclude contracts with third party suppliers. Online marketplaces are already defined in EU legislation and have specific information obligations related to B2C online dispute resolution<sup>79</sup>.

Over the last years, online marketplaces have experienced substantial growth. Survey data suggest that a great majority of users consider it beneficial that online marketplaces provide them with a variety of offers. However, according to the Platform Markets Study, almost 60% of consumers are not sure who is responsible when something goes wrong with their transaction on the online marketplace. In fact, users may be under the impression that the online marketplace is the supplier, whereas in reality the counterpart is a third party. Similar data emerge from the public consultation: Over 50% of 90 responding citizens said it was unclear to them with whom they had concluded their contract on the online marketplace. They were thus also unsure as to whether their transaction could benefit from EU consumer rights. Over 50% of responding business associations (34 of 58) agreed that consumers face situations of lack of clarity regarding the identity of their contractual

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<sup>76</sup> BEUC additional comments to the EC Inception impact assessment 'A New Deal for Consumers – revision of the Injunctions Directive', p. 1, available at : [http://www.beuc.eu/publications/beuc-x-2018-004\\_a\\_new\\_deal\\_for\\_consumers.pdf](http://www.beuc.eu/publications/beuc-x-2018-004_a_new_deal_for_consumers.pdf)

<sup>77</sup> Ibidem

<sup>78</sup> For a comprehensive analysis (including stakeholder views) of the problems related to B2C transactions on online marketplaces see Annex 10.

<sup>79</sup> The term 'online marketplace' is defined in Article 4(1)(f) of Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (Consumer ODR Regulation), as a service provider allowing consumers and traders to conclude online sales and service contracts on the online marketplace's website.

counterpart. Over 50% of SMEs (28 of 50) agreed. On the contrary, a majority of large companies (10 out of 18) disagreed.

The Platform Transparency Study indicates that the ranking of products can be decisive when consumers decide which product to buy. When consumers have no information about the criteria used for ranking their search results, first ranked products have a 47% higher chance of being chosen than other products on the same list. Studies also show that around 80% of consumers only look at the first page of search results.<sup>80</sup> As a consequence, there is potential for detriment if consumers are misled by ranking due to lack of transparency about the ranking criteria used by online marketplaces.<sup>81</sup>

Consumers buying on online marketplaces suffer mostly hidden detriment because they are not aware that they only benefit from EU consumer rights in transactions with third party suppliers that are traders, as opposed to suppliers that do not qualify as traders, e.g. in contracts with other consumers. The Platform Transparency Study reveals that, when trying to get a faulty product bought through an online marketplace replaced or repaired, no less than 12% of consumers found that the seller was not a trader and, because of that, they did not have the right to legal guarantee. 7% report that, for the same reason, they could not withdraw from the contract in the two week cooling-off period applicable to online B2C contracts.<sup>82</sup> The targeted consultation of Member State authorities confirmed that there are many consumer complaints in this area. There is also sub-optimal consumer trust: data shows that European consumers have concerns when using online marketplaces for their purchases.

Businesses, too, face problems. Online marketplaces are subject to different national requirements related to platform transparency. Authorities in 17 Member States report that they require online marketplaces to indicate whether the contract is concluded with the online marketplace itself or with third party suppliers. Indicating whether the third party supplier is acting as a trader or not is required in 15 Member States. 12 Member States require indicating to the consumer whether consumer law applies to the contract. The replies received to the targeted consultation indicate that marketplaces have different perceptions of what they are required to do under different applicable laws and that they incur compliance costs due to varying national requirements. These costs include time to differentiate relevant web-pages as well as legal costs to ensure compliance.

In addition to differences between national rules, the lack of clarity of rules also creates costs for businesses. According to the recently published Platform Markets Study, 40% of the third party providers on platforms do not know or are unsure about their rights and responsibilities, and only 30% think they know about them.<sup>83</sup> Specifically, when a consumer has not been made sufficiently aware of the applicable procedure and contact persons in case of problems, he or she will often contact the wrong person who will then have to individually assess and reply to complaints. Thus, online marketplaces incur costs in handling consumer queries and complaints even in cases where they have no possibilities to solve the problem.

#### **2.4.3. Driver 2: Lack of transparency, consumer protection and legal certainty for "free" digital services<sup>84</sup>**

Existing EU consumer law does not offer protection in all digital transactions.

Indeed, the CRD applies to contracts for the supply of digital content, regardless of whether the consumer pays a price in money (paid digital content) or provides personal data ("free" digital content). Digital content includes, for example, the typically one-off relation with a trader for the

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<sup>80</sup> See, for example, "The Power of Ranking: Quantifying the Effects of Rankings on Online Consumer Search and Choice", Raluca M. Ursu 2015, pages 15-16.

<sup>81</sup> Platform transparency study, pages 21 and 29.

<sup>82</sup> Platform transparency study, page 24.

<sup>83</sup> Platform markets study, p. 117.

<sup>84</sup> For a comprehensive analysis of the problems related to "free" digital services see Annex 11.

purpose of receiving a given app, a given game, a given video or a given computer programme, irrespective of whether such content is accessed by the consumer through downloading or streaming from a tangible medium or other means. For all such contracts, the CRD provides consumers with EU rights to pre-contractual information and to a 14 days' right withdraw unless the consumer gives his consent to the start of the performance.<sup>85</sup> The CRD does not apply if no contract is concluded, for instance in case a consumer merely accesses a website or uses a search engine without providing anything in return.<sup>86</sup>

However, the CRD does not ensure adequate protection for consumers that conclude contracts for digital services. Digital services include, for example, the typically longer-term relation with a trader for the purpose of accessing, creating, processing, storing or sharing of data in digital form, such as subscription contracts to content platforms (e.g. iTunes, GooglePlay), cloud storage (e.g. Dropbox, iCloud), webmail (e.g. Hotmail, Gmail) and social media (e.g. Facebook, Instagram). The CRD applies to digital service contracts supplied against the payment of a price in money (paid digital service), but does not apply to contracts where the consumer provides personal data ("free" digital service).

It is difficult to justify such a legal gap in consumer protection, in particular given the steady growth of digital B2C transactions, the similarities between digital content and digital services and the interchangeability of paid digital services and "free" digital services, made available in exchange for personal data.

The CRD evaluation highlighted the legal gap in the current scope of the CRD for "free" digital services, which was not foreseen at the time of the adoption of the Directive. The CRD Report found that practical difficulties arise when distinguishing between "free" digital content and digital services.<sup>87</sup> As only one of these categories is currently covered under the scope of the CRD, there is legal uncertainty about the applicable rules, and the legal protection of consumers entering into contracts for similar digital products differs dramatically. The different treatment will be further highlighted once the proposed Digital Content Directive (DCD) is adopted, as it will provide remedies for consumers in the case of lack of conformity with the contract for both "free" digital content and "free" digital services. In situations where the consumer provides personal data, such rights to remedies would apply in parallel with the rules of the new General Data Protection Regulation.

Against this background, the CRD evaluation concluded that, in order to ensure that the CRD remains fully relevant and able to meet current challenges, its scope should be expanded to cover contracts for 'free' digital services while making sure, where appropriate, that it ensures equal treatment of digital services and digital content.<sup>88</sup>

The unclear legal framework under the CRD creates unnecessary costs for compliant traders due to diverging national rules addressing contracts for "free" digital services; such existing costs are linked to the need to check and comply with possible national mandatory rules on pre-contractual information and right of withdrawal for "free" digital services. In the public consultation, 7 out of 10 of responding business associations considered the current costs due to diverging national requirements as unreasonable.<sup>89</sup> These costs are likely to increase in the future if the EU does not act, as the targeted consultation points to ongoing discussions in some Member States about

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<sup>85</sup> Under Article 16(m) CRD the consumer does not have a right to withdraw from the digital content supply if the performance has begun with his prior express consent and acknowledgment that, by accepting to have the performance starting, he no longer has the right to withdraw.

<sup>86</sup> See page 64 of the DG Justice Guidance Document on the CRD.

<sup>87</sup> CRD Report, p. 9.

<sup>88</sup> *Idem*.

<sup>89</sup> Question 92 of the public consultation. 7 out of 10 responding business associations considered such costs not to be reasonable. The only responding company also considered these costs unreasonable.



introducing national rules aimed to extend the notion of "payment of a price", laid down by the CRD in relation to "service contracts", also to the provision of personal data .

Furthermore, there is unfair competition between traders. Depending on whether they supply the exact same digital service against personal data or against the payment of a price, traders are subject to different rules. Similarly, traders that supply digital content for "free" have to comply with the CRD rules, unlike traders that supply digital services for "free". Moreover, these divergences are likely to create difficulties for compliance with consumer law for business models that combine elements of "free" and paid digital services.

The lack of protection for "free" digital services leads to detriment for consumers, with many consumers reporting problems with contracts for such services, which include, for instance, difficulties when unsubscribing, or different characteristics of the digital service compared to what has been promised by the trader. In particular, the CRD study found that 48% of the surveyed consumers experienced difficulties with unsubscribing from such services. Furthermore, the IA for the DCD proposal estimated that almost 1 in 3 consumers across the EU had experienced at least one problem in the previous 12 months with contracts for digital products, including contracts for "free" digital services (such as cloud storage with which 30% reported problems).<sup>90</sup> In addition, in response to the public consultation, majority of individuals, consumer associations and national authorities indicated that the lack of pre-contractual information and the right of withdrawal is problematic and can create harm for consumers when using "free" digital services cross-border. 48% of citizens replying to the public consultation, over 80% of consumer associations and over 40% of national authorities reported that "free" digital services would be used more often if consumers had such rights. Business associations disagree on both aspects (consumers experiencing detriment and "free" digital services used more if rights existed), while companies expressed mixed views, with a higher share of SMEs acknowledging consumer harm than large companies. For additional information on question and responses, see Subsection 3 of Annex 11.

#### **2.4.4. Driver 3: Overlapping and outdated information requirements**

The Fitness Check analysed the interaction and possible overlap between information requirements in the UCPD and the CRD. The UCPD (Article 7(4)) contains some information requirements for the "invitation to purchase" of specific products at a specific price. These information requirements apply already at the advertising stage, whilst the CRD imposes the same and other, more detailed requirements at the pre-contractual stage (i.e. just before the consumer enters into a contract; see Figure 1 in Section 1.3). Consequently, traders may have to provide the same information in advertising (e.g. in the ad displayed on an online newspaper) that they are required to provide once again at the pre-contractual stage (e.g. on the pages of their online web-shop).

The Fitness Check found that consumers regarded UCPD information requirements about complaint handling and traders' geographical address as relatively less relevant at the advertising stage (see Figures 1 and 2 in Annex 12).<sup>91</sup>

In the public consultation, respondents held mixed views, with business associations supporting the deletion of these two requirements at the advertising stage whereas consumer associations were against it. Most of the public authorities thought that the trader's address was important at this stage, also for enforcement purposes, but not information about complaint handling. In the same consultation, 9 of 15 SMEs agreed that information about the geographical address is necessary already at advertising stage but only 2 considered necessary the information about the complaint handling.<sup>92</sup> Among 6 large companies that responded to this question, 4 considered that information

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<sup>90</sup> The IA of the DCD proposal also indicates that consumers incurred costs as a result of a problem also when no money was paid in exchange for the digital content or service; the net cost incurred by consumers averaged EUR 5.79 per consumer for 'free' music, EUR 6.42 for "free" games, EUR 8.80 for "free" antivirus and EUR 5.59 for "free" cloud storage. See annex 11, subsection 2.

<sup>91</sup> Based on a consumer survey and a behavioural experiment; Fitness Check Report, p. 82.

<sup>92</sup> Question 162 in the public consultation - See more information in Annex 12.

about geographical address is not necessary at the advertising stage and 3 considered that information about complaint handling was not necessary at the advertising stage.

The pre-contractual information requirements under the CRD for distance and off-premises contracts (Article 6) additionally include "fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently". The CRD Report found, in respect of the obligation to provide trader's fax number and e-mail address, that other, more modern means of communication (such as web-based forms) could be sufficient.<sup>93</sup>

In the public consultation, all stakeholders found web-based communication nearly as relevant as e-mail, whereas fax was considered largely irrelevant.<sup>94</sup> These findings show that there is a potential for modernisation and simplification of the above-mentioned requirements and, consequently, for some cost reduction for traders.

#### **2.4.5. Driver 4: Imbalances in the right to withdraw from distance and off-premises sales**

During the implementation and evaluation of the CRD, several business stakeholders expressed concerns especially about the following two aspects related to the exercise of the right of withdrawal according to current CRD provisions.

The first relates to the consumer right to withdraw from sales contracts concluded at a distance (e.g. online) or outside the business premises (e.g. at an occasional fair) even after using goods more than necessary to establish their nature, characteristics and functioning (Article 14(2) CRD). According to Article 14 of the CRD, within the 14-day right of withdrawal period, the consumer should handle and inspect the goods only to the extent necessary to establish their nature, characteristics and functioning. The idea is that this allows the consumer to inspect the goods as he/she would be able to do in a physical shop. If the consumer uses the goods more than allowed (hereinafter: "unduly tested goods"), he/she will still be able to withdraw from the online/off-premises purchase, but would then become liable "for any diminished value of the goods".

Within the CRD evaluation, business stakeholders reported regulatory costs associated with the consumer right to return also unduly tested goods. Specifically, traders found it difficult to assess the "diminished value" of the returned goods and to resell them as second-hand goods. This problem was also discussed in the framework of the REFIT Platform of the European Commission.<sup>95</sup> The CRD evaluation concluded "that if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, it would indeed risk distorting the right balance between a high level of consumer protection and the competitiveness of enterprises pursued by the Directive in accordance with its recital 4".<sup>96</sup>

The second relevant aspect raised by business stakeholders during the CRD evaluation concerns its rule (Article 13) 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 the traders to reimburse the consumer even before having received back the returned goods and having had the possibility to inspect them (hereinafter: "early reimbursement").

In the SME panel consultation, close to 50% of the respondents (48 out of 99) from across 15 Member States replied that they face disproportionate burden due to these obligations at least

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<sup>93</sup> CRD Report, p. 57.

<sup>94</sup> Question 103 in the public consultation – for more information see Annex 12.

<sup>95</sup> For information on REFIT Platform, see [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform\\_en](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en). See in particular the opinion of the REFIT Platform adopted on 23.11.2017 on the submissions by different organisations on the Consumer Rights Directive, [https://ec.europa.eu/info/sites/info/files/vi-1-a-f-consumer-rights\\_en.pdf](https://ec.europa.eu/info/sites/info/files/vi-1-a-f-consumer-rights_en.pdf).

<sup>96</sup> CRD SWD(2017) 169 final, p. 39.

'sometimes' or 'rarely' in relation to "unduly tested goods"; their share went down to 40% (39 out of 97 respondents) in relation to "early reimbursement".<sup>97</sup>

The public consultation showed that similar problems are experienced not only by SMEs (with 28% of them – 26 out of 92 - having experienced them at least once), but also by larger companies (with almost 50% of them – 8 out of 17 - having experienced them at least once). In line with the fact that this is a new obligation stemming from a Directive applying across the EU only since June 2014, evidence indicates that the matter is still an emerging one, as shown by the fact that 67% (62 out of 92) of the SMEs replying to the public consultation, next to a lower 41% (8 out of 17) of larger companies, chose the option "do not know". Interestingly, close to 50% of the consumer associations (7 out of 16) and more than 50% of the public authorities (10 out of 16) acknowledged that the right of withdrawal for unduly tested goods creates disproportionate/unnecessary burden for traders to 'a large' or 'some extent'. Very few respondents provided quantitative data/estimates. 12 respondents (out of which 10 micro-companies, 1 large company and a national business association) indicated that, on average, 20% of goods are "unduly tested" in proportion to all returned goods. For more information, see Annex 13.

## 2.5. How will problems evolve?

### 2.5.1. Main problem 1: Traders do not comply with EU consumer law

Compliance rates have not significantly improved over the last decade. This lack of compliance is likely to continue to cause consumer detriment and to disrupt competition between traders.

A number of ongoing or upcoming EU initiatives are likely to contribute positively to improving compliance with EU law. This is particularly the case for the various initiatives following up on the recommendations from the Fitness Check, CRD Evaluation and Collective Redress Report, as described in Sections 2.1 and 2.2, with further details provided in Annex 5. The interventions expected to have the most significant impact on improving compliance are the following ones:

- An EU-wide communication campaign on consumer rights and a training project for SMEs, both aiming to raise awareness among consumers and traders about key consumer rights and obligations.
- A new Consumer Law Database to facilitate awareness of consumer law among legal practitioner.
- Multi-stakeholder work to develop a self-regulatory set of principles for better presentation of consumer information and terms and conditions.
- New Commission Guidance on the application of the UCTD and updated Commission Guidance on the CRD. Updated Guidance on the UCPD was published in 2016.
- Stepped-up enforcement of EU consumer law, including through common actions by national enforcers within the framework of the revised CPC Regulation.

Several initiatives that are not follow-up actions to our recent evaluations can also be expected to contribute significantly to better compliance with EU consumer law. The most relevant are described in Section 1.2 Policy context. In particular:

- The revised CPC Regulation will make cross-border public enforcement more effective and give national authorities a uniform set of powers to work more efficiently together against widespread infringements.
- The Directive on alternative dispute resolution will continue to ensure access to quality-ensured out-of-court dispute resolution systems for domestic and cross-border consumer disputes.

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<sup>97</sup> Question 1 in section C.1 of the SME panel consultation – For additional information on question and responses see Annex 13.



- The online dispute resolution platform will continue to help consumers and traders resolve their domestic and cross-border disputes over online purchases of goods and services.

Important steps have thus been taken to meet the needs identified in the Fitness Check, CRD Evaluation and Collective Redress Report to ensure better knowledge about EU consumer law, strengthened enforcement and easier possibilities for consumer redress. However, the evaluations also recommended complementing these measures with targeted legislative interventions. Such legislative measures would aim at aspects of the problem that many traders do not comply with EU law that cannot be adequately addressed through other interventions. This applies, in particular, to the specific problem drivers described in Sections 2.3.3 to 2.3.5.

As concerns these problem drivers, ineffective mechanisms to stop and deter infringements (driver 1) will remain. National systems for fines in many countries will continue to lack deterrent effect and proportionality, thus undermining also enforcement co-operation on cross-border infringements under the revised CPC Regulation.

Ineffective mechanisms for individual consumers redress (driver 2) will also remain. Insufficient remedies for the victims of unfair commercial practices will still be an important reason for lack of compliance with the UCPD. Traders engaged in cross-border trade will also continue to face costs due to diverging national rules in this area.

Ineffective mechanisms for consumer redress in mass harm situations (driver 3) will continue. The ID will still lack adequately deterrent effect and will not be applicable to redress issues. In the Member States that currently provide for compensatory collective redress, consumers will continue to benefit from these procedures. However, the collective redress landscape will remain divergent across the EU, resulting in unequal consumer protection.

#### 2.5.2. Main problem 2: Ineffective consumer protection rules and unnecessary costs for compliant traders

The potential for modernising EU consumer law identified in the Fitness Check and the CRD evaluation would not be addressed. As a consequence, there will likely still be instances of ineffective consumer protection rules and unnecessary costs for compliant traders.

The Commission will also carry through several initiatives to promote consumers' and traders' awareness of their rights and obligations, as explained in Section 2.1. Several of these activities, notably the planned EU-wide Campaign on consumer rights, training project for SMEs, creation of a Consumer Law Database and issuing of revised guidance on the CRD will help consumers and traders to be better informed about key consumer rights and obligations, including when shopping on online marketplaces and using "free digital services". Enforcement of the existing rules will also be stepped up, including through common actions for consumer law enforcers within the framework of the revised CPC Regulation. However, consumer protection for "free" digital services will remain a matter to be regulated through national rules.

Consumer detriment due to current lack of transparency on online marketplaces will remain, and possibly increase due to the growth of this business model. The Commission has sought to ensure that existing EU rules are applied in a way that increases transparency on online marketplaces through issuing a revised guidance document on the UCPD.<sup>98</sup> However, analyses on national level indicate only little compliance with the rules and the Guidance.<sup>99</sup> Consumer organisations confirm that the Commission guidance has not led to improvement of transparency of online marketplaces<sup>100</sup> and that the application of EU consumer law when facilitating contracts on platforms is still unclear, leading to a low legal standard for ensuring the correctness and validity of

<sup>98</sup> European Commission Guidance on the implementation/application of the UCPD, SWD(2016) 163 final.

<sup>99</sup> Platform Transparency Study.

<sup>100</sup> Position paper of VzBv in the public consultation.

information provided.<sup>101</sup> Several business associations also take the view that the fragmented nature of the EU market for (digital) goods, content and services is still a stumbling block for consumers and businesses.<sup>102</sup>

The forthcoming P2B initiative might provide in the future greater transparency on issues such as ranking criteria of offers on online marketplaces that would benefit not only businesses but also consumers.

However, even if progressive improvement of the situation could be expected, it is likely that the current opacity regarding transactions on online marketplaces will continue.

Consumers would continue to experience detriment when using "free" digital services, due to the lack of pre-contractual information and of a right to withdraw from contracts for such services. Consumer confidence in such services could therefore decrease, leading to a potential suboptimal use of the services. Compliant traders would continue facing costs due to diverging national rules and lack of a coherent legal framework at EU level as regards digital content and digital services. Concerning differences in national laws, uncertainty would become even more important for compliant traders who wish to sell cross-border, since they would have to assess if and which rules apply in each Member State to "free" digital services and whether they are mandatory. This can represent a big obstacle for small companies that wish to enter a market, but also for bigger companies when developing a new business model that could apply EU-widely, thus undermining the correct functioning of the DSM. Existing costs were deemed to be disproportionate by 7 of 10 business associations in the public consultation. They are likely to increase in the future, since at least three Member States have already regulated such services and others are likely to regulate them in the future, based on replies received to the targeted consultation.

Legal incoherence within the CRD will remain. With the upcoming DCD there will also be added legal incoherence and legal uncertainty for both users and providers of "free" digital content and "free" digital services.

Traders will still have to provide the same information twice due to overlapping information requirements under the UCPD and the CRD. Outdated information requirements related to means for consumers to contact traders will also remain.

Burdensome aspects for traders of the right of withdrawal related to unduly tested goods and early reimbursement will continue and are likely to increase due to growing e-commerce and increasing awareness of consumer rights, in particular of the right of withdrawal.

According to the 2017 Consumer Conditions Scoreboard, the right of withdrawal is the best known consumer right, with 67.4% of consumers giving correct answers in relation to it, which scores also as the largest increase in knowledge compared to two years ago (+11 percentage points). When increased awareness and exercise of a right is combined with an imbalance in how that right is defined, it might lead to higher/disproportionate burden on the other party (businesses in this case). The CRD rights to return unduly tested goods and to early reimbursement have been criticised by business associations from the very start of the CRD implementation and also discussed in the REFIT Platform. The CRD Evaluation concluded "that if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, it would indeed risk distorting the right balance between a high level of consumer protection and the competitiveness of enterprises pursued by the Directive in accordance with its recital 4".<sup>103</sup>

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<sup>101</sup> Position paper of BEUC in the public consultation.

<sup>102</sup> They observe significant differences in Member State implementation of the CRD and the UCPD. While they also consider fully harmonized rules to address this, they prefer adopting further guidelines and recommendations. See position paper of BusinessEurope and EDiMA.

<sup>103</sup> CRD SWD(2017) 169 final, p. 39.

### 3 WHY SHOULD THE EU ACT?

#### 3.1. Legal basis

Consumer protection belongs to the **shared competences** between the EU and the Member States. As stipulated in Article 169 of the TFEU, the EU shall contribute, inter alia, to protecting the economic interests of consumers as well as to promoting their right to information and education in order to safeguard their interests. Possible legislative action to be taken in relation to the problems analysed in this IA would be based on Article 114 TFEU, which refers to the context of the completion of the internal market, in conjunction with Article 169 TFEU.

#### 3.2. Subsidiarity: Necessity of Union action

This IA addresses problems related to the effectiveness of the existing 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 in the context of deepening the internal market, notably due to the increasing number of intra-EU consumer transactions.<sup>104</sup>

From an economic perspective, the behaviour of traders towards consumers is likely to have a large impact on the functioning of consumer markets, or markets more generally, since the influence on consumers' information and decision-making in such markets is very significant. Consumer policy has therefore the potential to positively interact with market forces to foster competition and improve both allocative and productive efficiency.

Within the EU, the size and intensity of cross-border trade are high enough (in fact, higher than in any other large trading area in the world)<sup>105</sup> to make such economic activity in the Single Market vulnerable to inconsistent or even merely divergent policy choices by Member States. Moreover, traders reach consumers across Member States' borders, thus leading to issues that national lawmakers and regulators are ill placed to adequately address in isolation.

In addition, perceptions and realities regarding domestic vs. cross-border infringements can differ. Although there is often a perception that most transactions (and therefore infringements) are domestic, in reality many have a cross-border element.<sup>106</sup>

The problems identified in this IA are widespread and have the same causes across the EU. Any legislative action would occur against the background of existing EU consumer protection rules. The UCPD ensures full harmonisation of information requirements related to unfair commercial practices harming consumers' economic interests. The CRD provides fully harmonised rules concerning pre-contractual information requirements and rights to withdraw for consumer contracts. New legislative action on national level within the scope of these Directives would go against the fully harmonised *acquis* that is already in place.

The EU-wide character of the problem, requiring adequate 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,<sup>107</sup> which provides a powerful procedural framework for

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<sup>104</sup> Fitness Check Report, page 68.

<sup>105</sup> World Trade Organization, International Trade Statistics 2015, available at [https://www.wto.org/english/res\\_e/statis\\_e/its2015\\_e/its2015\\_e.pdf](https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf)

<sup>106</sup> See 2015 support study for the IA on the review of the CPC Regulation 2006/2004/EC by Civic Consulting, page 5: [https://ec.europa.eu/info/sites/info/files/cpc\\_review\\_support\\_study\\_1\\_en.pdf](https://ec.europa.eu/info/sites/info/files/cpc_review_support_study_1_en.pdf)

<sup>107</sup> 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.

cooperation between national enforcers in this respect. But, to be fully effective, enforcement across the EU must also be grounded in a common and uniform substantive law framework.<sup>108</sup>

As a complement to the EU-wide public enforcement mechanisms, consumers from all Member States must have effective and deterrent private enforcement and redress opportunities. In light of the increasing cross-border trade and EU-wide commercial strategies, injunction and redress procedures will increasingly have cross-border implications.

However, currently, the impact of the ID on cross-border infringements is still minimal, since qualified entities concentrate on domestic infringements. As demonstrated by the Fitness Check and the Collective Redress Report, collective injunction and redress procedures (in the 19 Member States where available) vary greatly across the EU and are not sufficiently efficient and effective. The lack of collective redress in some Member States further deteriorates the level of protection of European consumers in practice.

The need for EU legislation on collective redress in order to ensure that consumers in the EU are compensated fairly and adequately in particular in mass harm situations has also been identified by the European Parliament. In its 2012 Resolution on “Towards a Coherent European Approach to Collective Redress”, the European Parliament highlighted the need for a horizontal EU approach on collective redress, with particular focus on the infringement of consumers' rights, based on a common set of principles respectful of national legal traditions and providing safeguards to avoid abusive litigation. It underlined the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims. In its 2017 Recommendation to the Council and the Commission following the inquiry into emission measurements in the automotive sector, the European Parliament called on the Commission to put forward a legislative proposal for a harmonised collective redress system for EU consumers, based on best practices within and outside the EU, thus eliminating the current situation where consumers lack protection in many Member States which do not allow them to enforce their rights collectively.

The Member States' action alone to develop collective injunctions and redress procedures is likely to result in further fragmentation of the legal landscape across the EU and even more divergent level of protection of European consumers, in particular in mass harm situations that affect a multitude of consumers across the EU. Moreover, the smooth functioning of the Single Market requires comparable deterrent (injunction) and corrective (redress) actions in all Member States, based on further harmonised EU rules. In their absence, the level of deterrence of illegal practices would remain sub-optimal and the detriment suffered by consumers would not be significantly reduced. This would affect in return consumer trust, with a negative impact on trade including cross-border.

Thus, the objectives of ensuring the effectiveness of the enforcement of consumer rights and redress opportunities across the EU cannot be sufficiently achieved by actions taken exclusively by Member States.

For the digital topics, it does not seem possible to sufficiently address the problems related to the detriment of consumers at national level. Many online marketplaces and providers of digital services act Europe-wide and across borders.

### **3.3. Subsidiarity: Added value of EU action**

The Fitness Check and the CRD evaluation confirmed that the horizontal EU consumer and marketing law acquis has contributed towards a high level of consumer protection across the EU. It

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<sup>108</sup> Fitness Check Report, page 71.

has also ensured a better functioning internal market and helped reduce costs for businesses offering products and services cross-border.<sup>109</sup>

According to the business interviews carried out in the context of the Fitness Check, 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. The UCPD, 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.<sup>110</sup> Similarly, the CRD has contributed significantly to the functioning of the internal market and ensured a high common level of consumer protection by eliminating differences among national laws relating to B2C contracts. It has increased legal certainty for traders and consumers, especially in the cross-border context.<sup>111</sup> In particular, consumer trust has increased significantly in recent years in the growing market of cross-border e-commerce.<sup>112</sup>

This initiative addresses problems that affect other EU interventions. Addressing problems related to lack of transparency in B2C transactions on online marketplaces and low levels of consumer protection for "free" digital services will notably contribute towards the completion of the DSM. The Justice and Home Affairs Council has invited the Commission to ensure coherence between the Proposal for a Directive on Digital Contracts and the CRD, particularly as concerns the definitions of "digital content" and "digital services".<sup>113</sup> The 2016 Communication on Online Platforms noted 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".<sup>114</sup>

The Fitness Check Report notes that the most important EU added value of EU consumer law is that the common harmonised rules enable national enforcement authorities to address cross-border infringements that harm consumers in several Member States more effectively.<sup>115</sup> Without further EU-level action to ensure that penalties are truly "effective, proportionate and dissuasive", the existing divergent national systems for fines would likely remain insufficiently deterrent to ensure fair competition for compliant traders and would undermine the enforcement co-operation 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

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<sup>109</sup> Fitness Check Report, page 73

<sup>110</sup> Fitness Check Report, page 74

<sup>111</sup> See results of the evaluation of the Consumer Rights Directive, available at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332)

<sup>112</sup> According to the 2017 Consumer Conditions Scoreboard, between 2012 and 2016, the proportion of consumers who feel confident purchasing goods or services via the internet from retailers or service providers in another UE country has increased by 24 percentage points to reach 58%.

<sup>113</sup> Outcome of the 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 Brussels, 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>.

<sup>114</sup> 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>

<sup>115</sup> Fitness Check Report, page 71.



law. Synergies between these three fields, particularly with regard to the coordination of enforcement activities, have been increasingly acknowledged at the EU level.<sup>116</sup>

Action is also required in the area of improving consumer redress. As concerns UCPD remedies, most Member States have been unable to ensure effective private enforcement of the UCPD since its adoption in 2005. As concerns the ID, the significant disparities identified among Member States as regards the modalities of injunction procedures, their level of use and effectiveness require EU intervention in light of the cross-border implications.<sup>117</sup> The existing national collective compensatory redress mechanisms also vary significantly and 9 Member States still do not provide for any such mechanisms. EU-wide procedural solutions addressing issues related both to domestic procedures and EU cross-border infringements are thus needed to ensure that European consumers are not faced with different enforcement and redress opportunities<sup>118</sup>, in particular in case of the same mass harm situation. For example, only common EU rules could provide for the mutual recognition of the legal standing of qualified entities from other Member States or the possibility of a single redress claim introduced by a qualified entity for the protection of consumers from different Member States. The proposed action would respect the legal traditions of Member States since it would not replace the existing national mechanisms. It would instead provide for an alternative solution ensuring that consumers in all Member States have at their disposal at least one collective redress mechanism with the same main procedural modalities, including for cross-border actions.

#### **4 WHAT IS TO BE ACHIEVED?**

The general objectives of the policy interventions discussed in this IA are those enshrined in the Treaties and the Charter of Fundamental Rights:

- Contribute to protecting the economic interests of consumers in line with Article 169 of the TFEU and ensure a high level of consumer protection in line with Article 38 of the Charter of Fundamental Rights;
- Promote the smooth functioning of the internal market, for the benefit of both consumers and traders (Article 114 TFEU, 169 TFEU).

The specific objectives are to:

- Improve compliance with EU consumer law;
- Modernise consumer protection and eliminate unnecessary costs for compliant traders.

#### **5 WHAT ARE THE AVAILABLE POLICY OPTIONS?**

##### **5.1 Improve compliance with EU consumer law**

###### **5.1.1. Overview of the Options**

The following options have been identified to ensure better compliance by traders with consumer protection law. Beside the baseline scenario, they consist of different combinations of the measures to improve compliance that were identified in the Fitness Check, CRD Evaluation and Collective

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<sup>116</sup> 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 from the areas of competition, consumer and data protection 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.

<sup>117</sup> Fitness Check Study, Lot 1, p.223.

<sup>118</sup> As described below under the analysed policy options, an EU wide solution would support parallel coordinated injunction (possibly complemented by redress) actions of qualified entities protecting interests of consumers from their respective Member States in front of their national jurisdictions. It would also enable qualified entities from one Member State to use the injunction order issued in another Member State as a rebuttable presumption of the breach of EU law. Furthermore, it would enable a single action in front of a single forum, for instance in front of the court of the domicile of the trader (or another competent jurisdiction under the EU rules on private international law), for the protection of consumers coming from different Member States.

Redress Report. Please see Section 2.1 and Annex 5 for an overview of the recommendations from these evaluations. The options go from a more limited intervention to full-scale intervention applying all the identified measures:

**Option 1: Improving enforcement to stop and deter infringements.** This option would:

- (1) Provide deterrent and proportionate penalties; and
- (2) Strengthen injunctions for stopping breaches of EU law (without collective redress).

**Option 2: Improving enforcement and individual consumer redress.** This option would consist of the same measures as option 1, with the addition of providing individual remedies for victims of unfair commercial practices.

**Option 3: Improving enforcement and individual and collective consumer redress.** This option would include the measures in Options 1 and 2 and, in addition, improve mechanisms for collective redress in mass harm situations.

As mentioned, these options address outstanding drivers of lack of compliance that have not already been addressed by initiatives outside of this IA.

### 5.1.2. Options discarded at an early stage

#### *Industry self-regulation or co-regulation*

In the public consultation, stakeholders were asked about their views on different tools to enhance compliance with EU consumer rules. Within one question, they were given the possibility to rate tools such as self-regulation and legislative interventions. 67 of 73 (92%) business associations and 116 of 123 (94%) individual companies supported self-regulation. 21 of 29 (72%) MS authorities and 9 of 27 (33%) consumer associations also indicated that self-regulation could contribute to better compliance. However, Member State authorities and consumer associations showed stronger support (over 85%) for legislative interventions (for UCPD remedies and stronger penalties) than for self-regulation. The latter groups also supported more resources for enforcement authorities (over 90%).

Whilst self-regulatory action may be suitable to address specific issues within a clear set of existing rules (e.g. better presentation of mandatory information to consumers), industry self-regulation and co-regulation do not appear adequate to strengthen the deterrence of penalties for infringements of consumer legislation. This is because this is a matter related to powers of national administrations and courts vis-à-vis infringing traders.

Self- and co-regulation also do not appear useful in the area of individual redress for consumers harmed by unfair commercial practices. A mystery shopping exercise for the Fitness Check indicates that a voluntary approach on this is not likely to provide good results for consumers.<sup>119</sup> It tested whether retailers were willing to offer remedies to consumers they had misled. A majority of retailers did not recognise that their presentation of products had been misleading. Almost half of the traders did not react (48%), more than a quarter denied that the advertising or presentation was misleading (29%) and one in five did not reply to the mystery shoppers' allegations that their practices were misleading (21%). Only 3% of traders recognised that their practice was misleading. 16% of the traders proposed remedies to the consumers, even if they did not acknowledge that they had misled them. Overall, the mystery shoppers evaluated traders' willingness to offer remedies as low: 62% of the retailers were evaluated as (very) unwilling to offer a remedy and only 17% as (very) willing.

#### *More far-reaching options*

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<sup>119</sup> Consumer Market Study to support the Fitness Check of EU Consumer and Marketing law (Lot 3), Section 5.5, page 85-87.

For penalties, it could have been an option to require Member States to ensure that fines can be imposed by administrative authorities. This would have excluded the possibility for Member States to decide that courts should be competent to impose fines. However, this option was discarded from the outset, as it would have been incompatible with the existing institutional set-up in several Member States. Systems where only courts can impose fines are recognised under existing EU consumer law, including in the new CPC Regulation 2017/2394, which expressly leaves it to the Member States to decide whether fines for cross-border infringements should be imposed by the CPC (administrative) authorities or via court procedures.

For compensatory collective redress, it could have been an option to replace existing national collective redress mechanisms with an EU-level instrument, which would set out detailed procedural modalities (e.g. prescribing whether the mechanisms should be judicial or administrative). However, for the purposes of this IA, this option was discarded from the outset, as it would interfere in a disproportionate manner with different legal traditions and existing national collective redress mechanisms.

### 5.1.3. Option 0: Baseline

Member States will continue to decide how to ensure "effective, proportionate and dissuasive" penalties for breaches of the UCPD, CRD and PID. They will also remain free to provide penalties or not for breaches of the Directives that do not have penalty provisions (CSGD and UCTD).

It will be left to the Member States to determine if and how individual remedies should be available to victims of unfair commercial practices. Consumers will not be empowered to take action to solve problems when traders do not respect their rights under the UCPD.

Member States will continue to decide on procedural modalities for the injunction procedure. Member States will also remain free to decide whether consumers should be provided with a possibility for collective redress. Currently, injunctions are used in just a few Member States. 9 Member States have no specific mechanism for compensatory collective redress.

For information about ongoing and upcoming EU initiatives that are likely to contribute positively to improving compliance with EU law, see section 2.5 "How will problems evolve".

### 5.1.4. Option 1: Improving enforcement to stop and deter infringements

This option would include measures to improve public and private enforcement of consumer law identified in the Fitness Check. It would strengthen penalties for breaches of consumer law and improve the effectiveness of the injunctions procedure.

As regards deterrence and proportionality, the existing requirement to provide "effective, proportionate and dissuasive" penalties would be extended to four relevant Directives, *i.e.* also for breaches of the UCTD, which currently does not include such a requirement.<sup>120</sup>

To increase consistency in the application of penalties across the EU, a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones) would be introduced. 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 and size as well as any fines imposed for the same or similar infringements in other Member States. In case of "widespread infringements" and "widespread infringements with a Union dimension", as defined in the revised CPC Regulation, the penalties would have to include fines. The maximum amount of these fines should not be set below a specific threshold, which should be based on a specific percentage of the trader's annual turnover.

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<sup>120</sup> For the CSGD, impact on the progress of the legislative negotiations on the amended proposal COM(2017)637 of 31 October 2017 would need to be taken into account.

There are no viable alternatives to harmonising fines for “widespread infringements” and “widespread infringements with a Union dimension”. Establishing common criteria alone cannot achieve the objective of stronger deterrence and proportionality as well as coordination required by the CPC Regulation for these cross-border infringements. Only fines based on the infringing trader's turnover would achieve these objectives. The exact minimum percentage rate should be decided taking into account the existing national consumer law examples, which provide for maximum turnover-based fines of between 1% and 10%, and EU law examples, notably the GDPR and competition law,<sup>121</sup> which provide for maximum turnover-based fines between 2% and 10%. The final choice should, firstly, have to ensure deterrence. Secondly, it should take into account that the initiative does not aim at maximum harmonisation of national penalties. Instead, the objective should be to achieve minimum harmonisation, by requiring Member States to set their maximum amounts for fines at levels not below a specific % of the trader's turnover.

In the public consultation, a large majority of responding public authorities (13, which is 77%) and all consumer organisations (16) supported the idea that fines should be available for breaches of consumer law in all Member States and that there should be common criteria in all Member States for imposing fines. Amongst business organisations, the first of these ideas was supported by 15 (31%) and the second by 20 (44%) of respondents (see Table 8 in Annex 7). There was also some support to both ideas among companies: A majority of SMEs (8 of 15) and of large companies (4 of 6) supported common criteria, 5 of 15 SMEs and 3 of 6 large companies also agreed that fines should be available in all Member States (8 and 3 disagreed, respectively).

In the Fitness Check public consultation, a majority of consumer associations and public authorities agreed that consumer protection should be strengthened by ensuring that non-compliant traders face dissuasive penalties that amount to a significant percentage of their annual turnover. In contrast, the majority of business associations were opposed to this idea. The public consultation for this IA showed a similar trend: Many consumer associations and public authorities supported that the maximum level of fines should be expressed as a percentage of the trader's turnover, whereas only a few business associations and 5 of 15 SMEs agreed. All the 6 responding large companies disagreed with the introduction of such turnover based fines. In contrast, in the SME panel 80% of the respondents considered that the most proportionate, effective and dissuasive way of setting the maximum level of fines would be by expressing them as a percentage of the trader's turnover, possibly combined with an absolute amount, whichever is higher. Only 16% of the respondents were in favour of maximum fines being expressed only as lump-sums.

When deciding about the allocation of revenues from fines, Member States should take into account the general interest of consumers. This means that at least part the revenues from fines should be dedicated to promote consumer protection, such as funding consumer associations. In the public consultation the idea of using penalty revenues to promote consumer protection was supported by all 16 responding consumer organisations and by half (8 of 16) of the respondents from public authorities (consumer enforcement authorities, ministries in charge of consumers, European Consumer Centres, sector specific regulators). In contrast, most business associations were against it (6 in favour, 33 against of total 47 respondents).

The effectiveness of the injunctions procedure under the ID would also be improved with this option. In the Fitness Check public consultation, most consumer associations (80%), consumers (66%) and public authorities (57%) agreed that the ID should be made more effective. 45% of businesses agreed, as did 12% of business associations. In the survey for the 2017 Study on

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<sup>121</sup> COM(2017) 142 final, Proposal for a "Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" introduces a legal maximum penalty of no less than 10% due to the fact that, currently, the penalty for the same offence can be much higher in one Member State than another without any objective reason and that the effect of fines differs widely across the EU available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0142>. IA for the proposal, SWD(2017) 114 final is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017SC0114>.

collective redress, 67% of all respondents considered that the collective injunction procedure could be improved in their Member State, with most business (60%) and consumer experts (70%) sharing this view.<sup>122</sup>

This intervention would be limited to procedural modalities which are not regulated or not sufficiently regulated by the current ID, and have been identified by the Fitness Check and the 2008 and 2102 Commission Reports on the ID as impediments to an effective injunctions procedure.

It would be left to the Member States to decide if the procedure should be of judicial or administrative nature. The suggested intervention would regulate the scope of application of the procedure, the designation of qualified entities, financial assistance for qualified entities and the length of the procedure. As to effects of the procedure, this option would provide more precise requirements on publication measures, on penalties for non-compliance with injunctions orders and on effects for individual consumers who want to bring follow-on actions to claim damages.

The scope of application of the ID would be extended from the EU instruments listed in its current Annex I to any EU instrument relevant for the protection of collective interests of consumers. In the ID survey, this was supported by national authorities (86.4%) and consumer organisations (100%), while business associations were less supportive (20%). The proposed scope would make the injunction procedure future-proof and responsive to the large spectrum of illegal business practices that could affect consumers. The ID would continue to apply to both domestic and cross-border infringements, with the primary effect of stopping traders from pursuing illegal practices.

The suggested injunctions procedure would ensure that independent public bodies, consumer organisations and business associations can be appointed as qualified entities to bring injunctions to stop infringements. It would be for the Member State to decide who should qualify as qualified entities in each country, either in an ad hoc manner or through pre-designated national lists. This is in line with the 2013 Recommendation on collective redress. All stakeholders support including independent public bodies and consumer organisations in the list of possible qualified entities. The inclusion of business associations in the list enjoyed less support from national authorities (39.5%), consumer organisations (64.3%) and business associations (38.9%).

There would be safeguards to ensure that qualified entities act in the best interest of consumers. This option therefore includes reputability criteria, which was supported by all stakeholders and is in line with the 2013 Recommendation.

The revision of the injunctions procedure would also facilitate access to justice for underfunded qualified entities by tackling financial obstacles that impede them from fully using the procedure. This was supported by national authorities (72.1%) and consumer organisations (87.6%), but by fewer business associations (21%).

Member States would be required to ensure due expediency of procedure, and to enable competent courts and/or administrative authorities to take the specific circumstances of each case into consideration. Following an injunction order, the infringing trader would be obliged to publicise and, where possible, individually inform all concerned consumers about the order. Publicity obligations should be proportionate to the stage of the proceedings and other relevant circumstances, taking due account of the risk of reputational damage and of the respect of business secrecy. While measures to ensure expediency, such as time-limits, were supported by most stakeholders, publication obligations were supported by national authorities (81.8%) and consumer organisations (100%), but by fewer business associations (10.6%).

This option would ensure that injunction decisions with definitive effect could be presented in follow-on redress actions as proof of breaches of EU law before domestic courts and as rebuttable

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<sup>122</sup> Question 69 of the survey carried out within the Study supporting EC Assessment of the implementation of the Recommendation on collective redress, not yet published (hereinafter 2017 Study on collective redress).



presumptions of infringements before courts in other Member States. Reliance on injunction decisions for follow-on actions was supported by national authorities (88.6%) and consumer organisations (100%), but less by business associations (31.6%).

Limitation periods for redress actions would be stayed for the time of the injunction procedure. If a trader would fail to comply with procedural obligations, the courts/administrative authorities would be able to impose penalties. This was supported by all stakeholders, including business associations (84.2%), and suggested by the 2013 Recommendation. In order to ensure the effective functioning of the procedure, courts/administrative authorities would have the power to require traders to provide information about the relevant practice. This was supported by national authorities (93.2%), consumer organisations (100%) and by many business associations (42.1%).

The amendments of the injunctions procedure under this option would benefit the application of the ID in both domestic and cross-border situations. Moreover, actions before a court or administrative authority of a single Member State would not be hindered by national rules on admissibility of the case or the legal standing of qualified entities, as suggested by the 2013 Recommendation. This is without prejudice to EU private international law instruments. The Commission would support cooperation between qualified entities from different Member States, which would be enabled to exchange best practices and elaborate common strategies for tackling cross-border infringements.

There are no viable alternatives to revising the injunctions procedure as proposed with this option. The intervention would tackle common problems regarding cost, length and complexity of the current procedure, as identified in the 2008 and 2012 Commission Reports and confirmed by the Fitness Check and stakeholders. These common problems should be addressed through a legislative revision to ensure the effectiveness of the ID. The specific modalities could have alternative approaches and the intervention would therefore be flexible, so that Member States can adapt modalities as appropriate to their national systems.

#### **5.1.5. Option 2: Improving enforcement and individual consumer redress**

This option would include the measures of option 1 to strengthen enforcement. It would also introduce a requirement for Member States to ensure that certain specific types of contractual and non-contractual remedies for breaches to the UCPD are available under national law. The introduction of rights to individual remedies in the UCPD would empower victims of unfair commercial practices to take action against traders to solve problems created by these traders.

In the public consultation, a large majority of public authorities (25 of 28), consumer associations (all 27) and consumers (86 of 93) indicated that an EU-wide right to remedies should be introduced to ensure that traders comply better with consumer protection rules. On the other hand, support was low among business associations (35%) and individual companies (31%). This confirms the findings of the public consultation for the Fitness Check, where a large majority of public authorities, consumer associations and consumers agreed that consumer protection against unfair commercial practices should be strengthened by introducing a right to remedies, while 64% of business associations disagreed. Compared to the business associations, individual companies replying to the public consultation were more nuanced in their views, with 45% agreeing that there is a need to introduce such EU-wide right to remedies and 37% disagreeing. See Section 3 of Annex 8 for a detailed breakdown of responses to these questions by respondent category.

In the SME panel consultation, 87% of a total of 263 respondents supported introducing an EU-wide right to UCPD remedies. See Table 14 in Annex 8 for more granular data on this.

This option would require Member States to ensure that consumers harmed by unfair commercial practices have access to both contractual and non-contractual remedies. In particular, the "Dieselgate" situation 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 this case, many consumers have not been able to claim remedies even in Member States which already provide remedies for victims of unfair commercial practices, 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. By contrast, the national rights to UCPD remedies do not enable consumers to act against the car producer, with whom consumers will usually not have any contract.

Stakeholders' views vary on whether specific remedies to be introduced in the UCPD should be decided at EU level. In the public consultation, over 80% of responding consumer associations and almost 80% of responding citizens supported deciding this at EU level. 60% of business associations supported leaving the choice of remedies to the Member States, whereas individual companies were rather divided on this matter: Of 20 responding companies, 9 (half of which large companies) were in favour of this being decided at EU level and 8 (mainly SMEs) were in favour of leaving this to the Member States). Views were also divided among MS authorities, with 47% in favour of leaving the choice of remedies to the Member States and 41% in favour of this being decided at EU level.<sup>123</sup>

In the CPC/CPN/CMEG survey, 15 Member State authorities indicated that the most frequently used UCPD remedy under national law today is the right to terminate the contract and get a refund of the price paid. 20 of them supported the idea of introducing this remedy in the UCPD, with 15 Member States supporting also the introduction of the right to compensation for damages.

In the public consultation, all consumer associations, 92% of the responding citizens and 75% of the Member State authorities indicated that the right to terminate the contract and get a refund should be introduced in the UCPD. 67% of the responding companies also agreed with this, but only 25% of business associations. In addition, 94% of consumer associations, 82% of citizens and 56% of the Member State authorities indicated that a right to compensation for damages should be introduced, while only 41% of business associations and 39% of responding companies supported this.<sup>124</sup>

Against this background, it is envisaged to require Member States to ensure that, as a minimum, the contractual remedy of a right to contract termination and the non-contractual remedy of a right to compensation for damages are made available under national law. A sub-option could be to limit the proposed introduction of UCPD remedies to a requirement whereby Member States should ensure that contractual and non-contractual remedies are made available for consumers harmed by unfair commercial practices, without specifying any typology of such remedies. This would leave a bigger margin of manoeuvre to the Member States. It would also provide the legal certainty that every EU consumer harmed by an unfair practice would be entitled to at least one type of contractual and one type of non-contractual remedy. However, the preferred alternative, which determines at EU level that Member States must make certain typologies of remedies available, would ensure greater legal certainty for all parties, while still ensuring a proportionate approach. It would ensure that consumers and qualified entities can seek the same type of contractual and non-contractual remedies across the EU. This will reduce the level of discrepancies in mass-harm situations and ensure coherence with the proposed revision of the ID.

### **5.1.6. Option 3: Improving enforcement and individual and collective consumer redress**

This option would include the measures covered by Options 1 and 2. In addition, it would strengthen mechanisms for collective redress in mass harm situations. Qualified entities would be empowered to simultaneously request injunctions and consumer redress from courts and administrative authorities.

In the ID survey, national authorities (88.6%) and consumer organisations (93.8%) strongly supported the addition of mechanisms for redress to the ID. There was support from national authorities from 21 Member States (AT, BE, BG, CY, CZ, EE, FI, EL, HU, IT, LV, LT, LU, MT, PT, RO, SK, SL, ES, SE, UK). Business associations were less supportive (15.8%). Moreover, in the survey for the 2017 Study on collective redress, 79% of all respondents agreed that the

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<sup>123</sup> See Section 3 of Annex 8 for a detailed breakdown by respondent category.

<sup>124</sup> *Idem*.

collective compensatory procedures in their Member State could be improved, with most business (67%) and consumer experts (75%) sharing this view.

This option would not replace existing national collective redress mechanisms. It would be left to the Member States to decide if the procedure required at EU level should be integrated into the existing national procedures or established as alternative solutions. The suggested EU mechanism would provide for general procedural modalities improving consumers redress opportunities, while providing for relevant safeguards against the risk of abusive litigation. This is in line with the 2013 Recommendation. It would also provide for procedural efficiency by enabling a single procedure for the two main instruments to protect consumers' collective interests, namely, on the one hand, measures to stop infringements of EU law and, on the other, consumer redress measures, including compensation for harm caused by the infringements. This Option would also encourage out-of-court settlements between qualified entities and traders.

Representative actions would be brought by qualified entities for injunctive relief and for redress in two situations: Firstly, if there is an ongoing infringement and, secondly, if the infringement has stopped but there is still a need to eliminate its continuing effects. The choice between making the relevant procedure judicial or administrative would be left to the Member States. Depending on the circumstances of the case, the court/administrative authority would be able to issue, in addition to an injunction decision, a redress order or invite the infringing trader and the qualified entity to start out-of-court redress negotiations. In the ID survey, this was supported by national authorities (79.5%), consumer organisations (80%) and business associations (63.2%). The encouragement of settlements builds on the findings of the Collective Redress Report and the accompanying call for evidence, which show that out-of-court dispute resolution mechanisms are highly effective, as they incentivise efficient resolution of disputes. If negotiations lead to amicable settlements, courts/administrative authorities would have to check the fairness of the settlements and approve them, in order for them to become enforceable, as suggested by the 2013 Recommendation. In the ID survey, the need for such approval was supported by national authorities (68.2%), consumer organisations (86.7%) and to some extent also by business associations (35%). Redress orders and approved settlements would be legally binding only for affected consumers who accept the settlement, according to the procedural modalities under national law. If a redress order would not be considered appropriate in a given case or if negotiations would be unsuccessful, the court/administrative authority would continue the proceedings to provide consumer redress.

Member States which currently do not have collective redress procedures would need to introduce them. As under option 1, there would be obligations to ensure due expediency of procedure, publicity, deterrent penalties for non-compliance and provisions to facilitate cross-border actions also regarding redress. Cross-border recognition of the legal standing for redress actions builds on findings from the Collective Redress Report regarding the lack of express rules on the recognition of foreign representative entities for collective redress actions among the Member States.

There are no viable alternatives to the mechanism for consumer redress under option 3. In order to build redress actions on the existing category of "measures eliminating the continuing effects of the infringements" in the ID, redress actions would need to follow the existing modalities of the injunction procedure, such as the limitation of representative action to qualified entities. No alternative redress models within the ID were suggested in the relevant studies and consultations. In line with the 2013 Recommendation and its assessment Report, the model proposed in option 3 would ensure the balance between improving access to justice and preventing abusive litigation.

## **5.2. Modernise consumer protection and eliminate unnecessary costs for compliant traders**

### **5.2.1. Overview of the Options**

This Chapter presents options to address the problem drivers of:

1. Lack of transparency and legal certainty for B2C transactions on online marketplaces
2. Lack of transparency, consumer protection and legal certainty for "free" digital services

3. Overlapping and outdated information requirements
4. Imbalances in the right to withdraw from distance and off-premises sales

### 5.2.2. Options discarded at an early stage

#### ***Lack of transparency and legal certainty on online marketplaces (driver 1)***

A possibility could have been to require online marketplaces to verify whether third party suppliers qualify legally as traders or consumers. This would have gone beyond requiring online marketplaces to inform consumers about whether third parties are traders or not on the basis of self-declaration by the third parties. An online marketplace's knowledge about the frequency and value of transactions on the marketplace may technically be a good basis to assess whether a third party supplier acts for purposes related to their trade, business, craft or profession and thus qualify as traders under EU consumer law. However, such a requirement would seem hardly reconcilable with Article 15(1) of the e-Commerce Directive, which excludes imposing a general obligation on hosting service providers to monitor the information they transmit or store, as well as a general obligation to actively seek facts or circumstances indicating illegal activity. Such a requirement would also put more burden on online marketplaces than seems justified. For these reasons, the option of requiring online marketplaces to verify whether third party suppliers qualify legally as traders or consumers has not been pursued in this IA. In any case, consumer law as it stands sanctions traders that wrongly present themselves as consumers.<sup>125</sup>

#### **Overlapping/outdated requirements, imbalances in the right to withdraw (drivers 3 and 4)**

Self and co-regulation are not feasible options for addressing overlapping and obsolete information requirements and rules related to the right of withdrawal that create unjustified burdens for traders. Since the respective requirements are laid down in EU law, the law needs to be changed to address these problems. These options have therefore been discarded from the outset in these two areas.

### 5.2.3. Lack of transparency and legal certainty on online marketplaces (driver 1)

#### ***Option 0: Baseline***

Enforcement of EU consumer law for online marketplaces will continue to be stepped up, including through common actions in the framework of the CPC network. Accordingly, where, on a case-by-case basis, the conditions of the transparency requirements in Articles 5(2), 6(1) or 7 of the UCPD are met, national enforcement authorities could require online marketplaces to: 1) ensure that third party suppliers clearly indicate to users whether they act as traders or consumers and 2) inform their users that they will only benefit from EU consumer law protection in relation to third party suppliers who qualify as traders.

The CRD will continue to provide rules on pre-contractual information applicable to B2C contracts. However, it will not provide specific information rules for online marketplaces.

For further information about ongoing or upcoming EU initiatives that are likely to impact on online marketplaces see section 2.5 "How will problems evolve".

#### ***Option 1: Promoting self and co-regulation***

A non-legislative option could be envisaged to encourage online marketplaces to voluntarily increase transparency for consumers in line with the Commission's recommendations in the revised UCPD guidance.

#### ***Option 2: Providing specific transparency requirements for contract conclusion on online marketplaces***

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<sup>125</sup> No. 22 of Annex I to the UCPD.

This option would introduce requirements in the CRD for online marketplaces to inform consumers, before the conclusion of contracts, about:

- (a) Criteria used by the online marketplace for determining the ranking of offers presented to the consumer as a result of his or her search query;
- (b) Whether the third party offering the product is a trader or not, on the basis of self-declaration by the third party
- (b) Whether consumer rights stemming from EU consumer law apply to the contract
- (c) 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. This requirement is without prejudice to the right of the online marketplace to assume responsibility for specific elements of the contract.

Online marketplaces would have to provide this information to consumers in a clear and comprehensible manner, not just in general terms and conditions.

Online marketplaces would be defined on the basis of existing EU definitions, such as Article 4(1)(f) of Regulation (EU) No 524/2013 on Online Dispute Resolution for consumer disputes and Article 4(17) of Directive 2016/1148/EU on security of network and information systems.

In the public consultation, all consumer associations and public authorities, almost all citizens and the vast majority of companies and business associations agreed that consumers buying on online marketplaces should be informed about the identity and status of the supplier<sup>126</sup> and that platform transparency would increase consumer trust.<sup>127</sup>

Also in the SME panel consultation, a vast majority was in favour of informing about the identity and legal status of the contractual partner (82% on identity, 81% on legal status and 84% on applicability of consumer law).<sup>128</sup> Arguably, smaller companies lack the necessary bargaining power against bigger platforms and therefore support more transparency and legal clarity in the operation of online marketplaces. There has also been support for platform transparency from business associations, which also requested that information requirements should be specific and should not duplicate the existing information obligations in the CRD on the existence of the right of withdrawal and the legal guarantee.<sup>129</sup>

84% of the respondents to a behavioural experiment from the Platform Transparency Study agreed that online marketplaces should inform about who is selling the good or service. 83% of the respondents agreed that such an obligation should be set by law.

In a survey of 4800 internet users for this study, 70% of those who remembered the information they had been given about selection criteria for ranking of search results agreed that these criteria were important in their decision to purchase.<sup>130</sup> In the CRD Evaluation, a large majority of national competent authorities, of consumer associations and of ECCs, as well as 45% of trade associations considered introducing requirements to inform consumers about ranking criteria beneficial to consumers. Results were similar in the public consultation for the Fitness Check: A majority of consumer associations, public authorities, consumers and companies (however only a relative

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<sup>126</sup> All 16 consumer associations and all 19 public authorities, next to 30 of 31 citizens, 12 of the 16 SMEs respectively, 8 of the 9 large companies respectively and roughly 40 of 48 business associations, as well as all 10 "other" stakeholders.

<sup>127</sup> All 16 consumer associations and 18 of 19 public authorities, next to 28 of 30 citizens, 9 of the 16 SMEs, 6 of the 10 large companies, 32 of 45 business associations and 9 of 10 "other" stakeholders.

<sup>128</sup> Question 6 in section C.2 of the SME panel, see question in Annex 10, subsection 2.

<sup>129</sup> See for example, position papers of the AIM, EuroCommerce and Confederation of Danish Enterprises in the public consultation.

<sup>130</sup> Platform Transparency Study, page 53.



majority in the case of business associations) agreed that online platform providers should inform consumers about the criteria used for ranking the information presented to consumers.<sup>131</sup>

#### 5.2.4. Insufficient consumer protection and legal certainty for "free" digital services (driver 2)

##### ***Option 0: Baseline***

"Free" digital services will still be regulated by the Member States, with different levels of consumer protection as regards information requirements and rights of withdrawal. Member States will decide whether any consumer protection should exist for such contracts.

On EU level, the upcoming DCD is likely to introduce remedies for consumers in case of lack of conformity with the contract for both "free" digital content and "free" digital services.

For further information about ongoing or upcoming EU initiatives that are likely to have an impact on "free" digital services, see section 2.5 "How will problems evolve".

##### ***Option 1: Promoting self and co-regulation***

A non-legislative option could be envisaged to encourage traders to voluntarily provide consumers with the same level of protection for "free" digital services as for similar paid digital services.

##### ***Option 2: Extending the CRD to cover "free" digital services***

This option would extend the scope of the CRD to contracts for the provision of digital services, whenever concluded through personal data within the meaning of Article 4(1) of the GDPR<sup>132</sup> and with no payment of a monetary price. In line with the current scope of the CRD, this extension would not cover situations that cannot lead to the conclusion of a contract, such as web searches where consumers access websites without providing anything in return.

Traders would be required to provide consumers with pre-contractual information when concluding contracts for "free" digital services. This information would include the main characteristics of the "free" digital service, including its functionality, and relevant interoperability of the service with hardware and software. Consumers would be given a right to cancel the "free" digital service within 14 days from the conclusion of the contract without giving any reason. In the event of contract termination, as concerns the consumer's personal data the trader would be required to comply with his obligations under the GDPR, including refraining from the use of such data. The consumer would have the rights to erasure of personal data and to data portability, i.e. to receive the personal data in a format that allows the data subject to transmit it to another controller. Similar rules would also apply under certain conditions to any content which the consumer uploaded or generated through the use of the digital service and which does not constitute personal data. Therefore, the extension of the CRD to "free" digital services would provide for a general right to cancel the contract within 14 days from its conclusion.<sup>133</sup>

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<sup>131</sup> CRD Staff Working Document, page 56.

<sup>132</sup> Art. 4(1) GDPR: "*personal data* means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;"

<sup>133</sup> The lawfulness of processing of personal data would be regulated under the GDPR, and consumers would benefit of the rights therein, *inter alia* the right to receive information on the collected data in a concise and transparent form, in clear and plain language, the right to access collected personal data, the right to obtain from the data controller without undue delay the rectification of inaccurate personal data, the 'right to be forgotten', i.e. to have personal data erased if they are no longer needed for the purposes for which they were collected and the right to data portability, i.e. the right to receive personal data in a structured format that allows the data subject to transmit it to another controller.

In the CRD evaluation, all stakeholders, except for trade associations, expressed strong support for the extension of both pre-contractual information obligations and the right of withdrawal to "free" digital services.<sup>134</sup>

This was confirmed in the public consultation, where, overall, the majority of stakeholders supported the introduction of pre-contractual information requirements and a right of withdrawal for "free" digital services. While traders supported the extension of pre-contractual information requirements, they expressed more mixed views on the right of withdrawal. Furthermore, business associations disagree with the introduction of a right of withdrawal for "free" digital services as some of them argue that there could be overlaps with EU data protection rules. However, as can be seen from the description of the interplay with the GDPR in subsection 2 of Annex 11, the extension of the right of withdrawal under this option would rather complement than repeat the rights stemming from EU data protection rules.

### **5.2.5. Overlapping and outdated information requirements (driver 3)**

#### ***Option 0: Baseline***

The UCPD will continue to require traders to provide specific information to consumers at the advertising stage (whenever making "invitations to purchase" – see Article 7 (4) UCPD), and the CRD will require that consumers receive the same information also before concluding the contract.

The current CRD information requirement to display the fax number will continue to apply. As regards e-mail addresses, traders will be able to offer consumers alternative, more modern web-form communication tools, but will still be required to also provide an e-mail address and process the relevant consumer correspondence via this communication tool.

#### ***Option 1: Modernising outdated and overlapping B2C information requirements***

This option would address overlapping information requirements in the UCPD for the "invitation to purchase" and the CRD for the pre-contractual stage of transactions. It would also address outdated information requirements. On the basis of the consultation results, it would:

1. Remove from Article 7(4) of the UCPD the requirement to inform consumers about the trader's complaint handling policy
2. Remove the requirement to provide fax number (where available) from the list of pre-contractual information requirements for distance and off-premises contracts in the CRD
3. Replace the requirement to inform about the trader's e-mail address with a technology-neutral reference to means of online communication. This would allow traders to use both e-mail and other online means (such as web-forms and chats), provided that they allow the consumer to retain the record of the communication on a durable medium.

### **5.2.6. Imbalances in the right to withdraw from distance and off-premises sales (driver 4)**

#### ***Option 0: baseline***

Consumers will keep the right to withdraw from sales contracts concluded at a distance or outside business premises, even after using goods more than necessary to establish their nature, characteristics and functioning (Article 14(2) CRD).

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<sup>134</sup> In particular, the CRD Study asked stakeholders whether pre-contractual information requirements should be introduced for "free" digital services (particularly highlighting social media and cloud storage): 82% of national competent authorities, 80% of consumer associations, 85% of ECCs and 35% of business associations considered this (rather/very) beneficial for consumers. When asked whether a right of withdrawal should be introduced for "free" digital services, 71% of national competent authorities, 77% of consumer associations, 77% of ECCs considered this (rather/very) beneficial for consumers and 36% of business associations considered it rather beneficial. CRD SWD, p. 52.

Traders will still be required to reimburse consumers, in some circumstances, before they have received returned goods and without the possibility to inspect the goods before reimbursing the consumers (Article 13 CRD).

***Option 1: Removing specific obligations for traders related to the right of withdrawal in the CRD***

This option would repeal specific CRD obligations for traders related to the right of withdrawal that have been identified by business stakeholders as especially burdensome, in particular:

- a. The obligation to accept the return of the goods also when the consumer has used them more than necessary ("unduly tested goods") and to charge the consumer for their diminished value; and
- b. The obligation to reimburse the consumer, if the consumer presents proof that the goods have been sent back, before the trader has received them ("early reimbursement").

In the public consultation, around 35% of online companies reported significant problems due to these obligations. A majority of business associations<sup>135</sup> confirmed that traders face disproportionate/unnecessary burden resulting from these obligations. In the SME panel, close to half of self-employed, micro and small companies selling to consumers online reported disproportionate burdens.

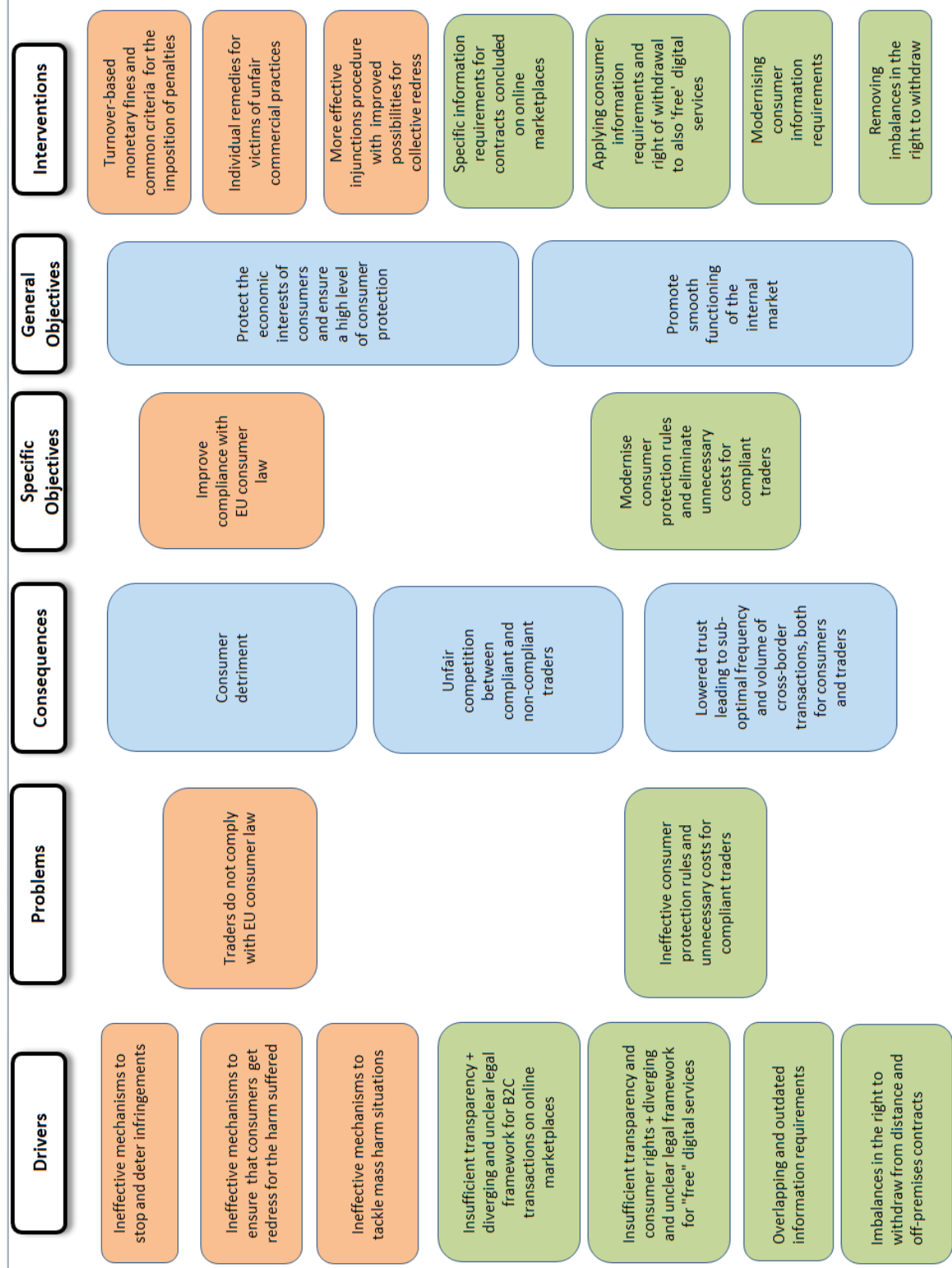
Consumer associations, Member State authorities and citizens do not support repealing these rights. The majority of respondents in these groups in the public consultation consider these rights important.<sup>136</sup>

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<sup>135</sup> 33 of 36 from the obligation to accept the return of goods used more than necessary and 32 of 35 from the obligation to reimburse the consumers before receiving the goods back as soon as the consumer has supplied evidence of having sent them back.

<sup>136</sup> 18 of 26 citizens, 14 of 15 consumer associations, 12 of 16 MS authorities consider important the right of withdrawal for unduly tested goods, whereas 14 of 27 citizens, 14 of 15 consumer associations, 12 of 16 MS authorities consider important the right to early reimbursement.

**6 WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?**  
**Figure 3: Overview of possible interventions assessed in this IA**



## 6.1 Improve compliance with EU consumer law

### 6.1.1. Option 1: Improving enforcement to stop and deter infringements

HOW OPTIONS MEET OBJECTIVES
<b>Specific objectives</b>
<b>Improve compliance with EU consumer law</b>
<p>This option would strengthen deterrence and proportionality of penalties for breaches of consumer law and improve the effectiveness of the injunctions procedure.</p> <p>Introducing a list of common, non-exhaustive criteria for assessing the gravity of infringements and criteria for setting the amount of fines would contribute to a more consistent application of fines in different Member States. Where the penalty to be imposed is a fine, Member States would need to take into account the cross-border nature of the infringement and fines imposed by other Member States for the same or similar infringement. The requirement to provide fines for “widespread infringements” and “widespread infringements with a Union dimension” in the framework of coordinated CPC enforcement would provide an additional enforcement tool in many Member States, where fines currently do not exist. This is especially the case for breaches of the UCTD.<sup>137</sup> Turnover-based fines would provide more deterrence and proportionality, as the scale of the trader's activity would be taken into account, including revenues from the products that were the object of the infringement. They would thus ensure a consistent response by national enforcement authorities to widespread infringements of consumer law in the CPC co-operation context.</p> <p>Stronger fines will also stimulate voluntary compliance where national enforcement authorities would encourage traders to amend their practices voluntarily. Faced with the risk of stronger fines, infringing traders would have additional impetus to remedy their practices.</p> <p>However, penalties are only one of the tools to improve compliance with EU consumer law. Strong penalties alone do not guarantee better consumer conditions. This IA therefore does not seek to compare the overall performance of Member States on the sole basis of the level of penalties provided under national law.<sup>138</sup></p> <p>In the public consultation, a large majority of consumer associations and public authorities, but relatively few business organisations, agreed that stronger rules on penalties would lead to better compliance with consumer protection rules. In contrast, in the SME panel consultation a large majority of respondents agreed that stronger rules on penalties would improve compliance.</p> <p>Some Member States have recently strengthened their rules on penalties or are considering doing so. For example, the UK consumer protection authority has advocated the introduction, in addition to the existing consumer compensation mechanism, of effective, dissuasive and proportionate “civil penalties”.<sup>139</sup> Some EU countries have recently moved to turnover-based</p>

<sup>137</sup> For the CSGD, impact on the progress of the legislative negotiations on the amended proposal COM(2017)637 of 31 October 2017 would need to be taken into account, see also fn. 120.

<sup>138</sup> Whilst Poland is among the Member States with the highest possible penalties (up to 10% of turnover) and with the highest fine actually imposed (ca. 6,7 mio € see Annex 7, Table 5), Poland has the EU's lowest score on the compliance and enforcement composite indicator. On the contrary, Luxembourg, UK and Austria are the Member States with the highest scores on the compliance and enforcement composite indicator, but have relatively low or no financial penalties available to their enforcement authorities. Source: 2017 Consumer Conditions Scoreboard, p. 118-147.

<sup>139</sup> CMA's response of 25 April 2016 to the consultation by the Department for Business, Innovation and Skills (BIS) and "Digital comparison tools market study" of 26 September 2017, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521154/CMA\\_response\\_to\\_BIS\\_call\\_for\\_evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521154/CMA_response_to_BIS_call_for_evidence.pdf) and <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf>.



penalty systems. In Latvia, the maximum fine for breaches of the UCPD was set at 10% of turnover in 2015 (although capped at EUR 100 000). It was considered that the previous maximum fine of up to EUR 14 000 was ineffective and not deterrent, especially for large companies. In the Netherlands, a maximum penalty of 1% of the annual turnover (as in the most recent annual report) for breaches of consumer law (or 10% for engaging in the UCPD black-listed practices) was introduced from 1 July 2016, in combination with a maximum absolute penalty of EUR 900 000, whichever is higher. Previously, there was only a maximum absolute penalty of EUR 450 000. The reasons for the reform were to increase the preventive and deterrent effect of penalties and, as a consequence, traders' compliance with the rules.<sup>140</sup>

Revising the ID injunctions procedure would improve its overall effectiveness, reduce the number of infringements and provide incentives for amicable settlements.<sup>141</sup> In the ID survey, 58% of all respondents agreed that revising the injunctions procedure would have a positive impact on increasing deterrence, whereas only 1% predicted a moderate negative impact and 19% predicted no impact. Member States authorities and consumer organisations strongly agreed that there would be increased deterrence (83% and 92.8% respectively), but fewer business associations thought so (25%).

Extending the scope of the ID to all infringements of rights under EU law that may harm the collective interests of consumers would increase the effectiveness of the injunctions procedure. It would become sufficiently future-proof and responsive to different forms of non-compliance in mass harm situations.

Enabling independent public bodies, consumer organisations and business associations to bring injunction actions in all Member States would increase the use of the ID and the likelihood of reaching amicable settlements. This would be the case even before the legal action starts, as the deterrent effect of the ID would increase in most Member States.

By addressing financial obstacles (e.g. court fees, legal aid, financial support), qualified entities with limited financial and human resources would have better possibilities use the injunctions procedure.

By introducing more expedient procedures (e.g. through time-limits), which was supported by all stakeholder groups, lengths of injunction actions would be shortened in most Member States. Without this intervention, infringing traders may continue to breach EU law for the duration of the proceedings, continuing to gain unlawful profits and creating consumer detriment.

By granting courts/authorities the power to request the trader to provide information, the efficiency of the ID would be increased, particularly in those Member States that do not currently provide for such powers.

By introducing publicity requirements covering a broad range of communication channels, there would be increased deterrence, particularly for traders whose depend on their reputation. Publicity would also help compliant traders become more aware of the illegal practices of their non-compliant competitors.

By introducing a requirement in the ID for Member States to ensure effective, proportionate and dissuasive penalties in the form of fines, infringing traders would be more likely to comply with the outcome of the procedure. Findings from the Fitness Check show that systems with clear rules on penalties for non-compliance with injunction orders are more effective than systems where penalties must be obtained through a separate court procedure.

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<sup>140</sup> Response of the Latvian and Dutch authorities to the CPC/CPN/CMEG survey.

<sup>141</sup> The 2012 Commission Report on the ID recognised that the mere possibility of an injunction action has a deterrent effect. see p. 8. The Report was unable to express the impact on the level of compliance in quantitative terms, but these findings were confirmed by the qualitative views of the public authorities and consumer organisations.

<b>General objectives</b>
<b>Protect the economic interests of consumers and ensure a high level of consumer protection</b>
<p>Introducing turnover-based fines for widespread infringements and revising the injunctions procedure would increase the effectiveness of the enforcement of consumer law. This would contribute to better compliance by traders. Better compliance should lead to less consumer detriment and contribute to the strong consumer protection objectives enshrined in Article 38 of the Charter of Fundamental Rights and Article 169 of the Treaty on the Functioning of the EU. Better compliance is also likely to lead to increased consumer trust in purchasing.</p> <p>In the public consultation, a majority of consumer associations and public authorities agreed that stronger rules on penalties would lead to greater consumer trust and more effective enforcement of consumer protection rules. Most business organisations did not share these views.</p> <p>A more effective injunctions procedure would contribute to reducing consumer detriment by stopping infringements. In the ID survey, 56% of all respondents agreed that revising the injunctions procedure would reduce consumer detriment, whereas 1% predicted a moderate negative impact on consumer detriment and 22% predicted no impact. Most MS authorities (90.2%) and consumer organisations (73.4%) predicted a positive impact, whereas much fewer business associations (8.3%) shared this view. 59% of all respondents considered that it would also have a positive impact on increasing consumer awareness and empowerment, due to new publicity requirements for traders, whereas 1% predicted a significant negative impact and 19% no impact. Again, most Member States authorities and consumer organisations shared this view, while business associations did not.</p> <p>Injunction orders on their own would have only limited effects on reducing consumer detriment, as additional steps would usually be necessary to ensure redress for consumers. However, by introducing the possibility of using injunction decisions as proof of infringements,<sup>142</sup> consumers would be enabled to take follow-on actions to injunction proceedings more easily. Still, Option 1 would not fully address consumer redress concerns in mass harm situations. While consumer organisations considered that Option 1 would lower consumer costs for obtaining redress through the use of follow-on actions (25% significant cost reduction), the inclusion of collective redress (see Option 3) was viewed much more favourably (57% significant cost reduction).</p>
<b>Promote the smooth functioning of the internal market</b>
<p>The stronger deterrent effect of strengthened rules on penalties and a more effective injunctions procedure would ensure better functioning of the internal market. In the public consultation, all responding consumer associations and a large majority of responding public authorities agreed that stronger rules on penalties would lead to fairer competition to the benefit of compliant traders. Few business organisations shared this view. In contrast, in the SME panel consultation, a majority of respondents agreed that stronger rules on penalties would increase fair competition between traders operating in different Member States and between traders with different economic strength.</p> <p>In the ID survey, 55% of all respondents considered that an improved injunctions procedure would have positive impacts on fair competition. 6% predicted negative impacts and 17% predicted no impact. Member State authorities and consumer organisations shared this prediction (82.9% and 85.7% respectively), whereas business associations did not (8.3%).</p>
<b>ADDITIONAL EFFECTS OF THE OPTIONS</b>
<b>Costs and savings for traders</b>

<sup>142</sup> Such a solution would be inspired by Article 9 of Antitrust Damages Directive 2014/104/EU.

For strengthened rules on penalties and a more effective injunctions procedure, only costs for compliant traders, such as possible ex-ante risk-assessment costs in case of non-compliance, are relevant. Costs for non-compliant traders are not relevant for this IA.

There could be some initial familiarisation costs for traders because of the proposed new rules on penalties. This is particularly the case for traders operating in Member States that do not currently have fines for certain breaches of EU consumer law or do not apply turnover-based fines for wide-spread infringements. In the SME panel consultation, most respondents said that strengthening penalties across the EU would have no impact on their costs or could not reply to this question.

Most of the business associations in the ID survey considered that revising the injunctions procedure could increase insurance premiums for coverage against claims in mass harm situations. In a broader perspective, the revision could lead to increased use of the ID, including an increase in frivolous claims against compliant traders. However, as described in Chapter 8.3.1, this risk is mitigated by control criteria built into the improved procedure, such as reputability criteria for qualified entities.

### **Costs and savings for authorities**

There may be an increase in administrative costs for imposition of fines, especially for infringements that were not previously subject to fines, and to calculate turnover-based fines. The introduction of turnover-based fines will involve additional one-off enforcement costs to adjust existing internal guidelines on the imposition of penalties. There will also be recurrent costs due to the need to gather information about traders' turnover. These costs are not likely to differ depending on whether the turnover-based fine is set at, for example, 1% or 10%. Enforcement bodies will have to do the same data gathering and computation in both cases.

In the public consultation, a majority of the public authorities indicated that costs of administrative and judicial enforcement would increase if rules on fines are strengthened. Fewer respondents agreed that there would be no effect on costs or that costs would decrease (6%). As regards assessing such costs, 3 respondents (27%) agreed that the cost increase would be reasonable and 2 respondents (18%) that the increase would not be reasonable (see Table 12 in Annex 7). No public authority provided estimates of increased or decreased enforcement costs.

However, possible costs are likely to be off-set by an overall reduction of infringements due to the increased deterrence of strengthened penalties. Furthermore, enforcement authorities will benefit when, in the context of the revised CPC Regulation, authorities in other Member States take effective enforcement actions against cross-border traders. Already today, according to the CPC/CPN/CMEG survey, the trader's turnover is taken into account when determining the level of fines in at least 14 Member States (i.e. not only in those eight countries where the maximum fine under the law is linked to the turnover). Such relatively wide use of the trader's turnover in enforcement activities suggests that it is not very burdensome.

By improving the effectiveness of the ID, economies of scale in the preparation and litigation of collective injunction cases would increase. In the ID survey, 56% of all respondents considered that an improved injunctions procedure would have a positive impact on procedural efficiencies due to the collective resolution of mass claims, whereas only 4% predicted a negative impact and 19% predicted no impact. In particular, Member State authorities shared this view (82.9%).

National authorities responding to the ID survey were divided when assessing costs from revising the injunction procedure. They did not consider implementation costs significant for courts (34.4% predicted moderate increase) or for administrative authorities (45.5% predicted moderate increase). They did also not consider running costs for courts significant (40.6% predicted moderate increase) or for administrative authorities (53.1% predicted moderate increase). Moreover, when taking into account possible benefits for consumers, national authorities (43.9%) considered these costs to be reasonable.

<b>Costs and savings for qualified entities (in the area of injunctions)</b>
<p>Existing costs of bringing actions under the ID would be alleviated by reducing financial obstacles for underfunded qualified entities and by shifting costs of publicity to infringing traders. Qualified entities would also have savings from increased procedural efficiencies. In the hypothetical mass harm case study, the qualified entities responding to the ID survey held mixed views about the impact of revising the injunctions procedure on their legal advice costs (23.3% predicted reduction) and litigation costs (70.9% predicted reduction). The impact of such costs would depend on the financial and legal capacities of the qualified entity in question, as well as the specific circumstances of each case. By supporting cooperation between qualified entities from different Member States, Option 1 would facilitate the exchange of best practices and the development of common strategies for tackling cross-border infringements, and thus reduce costs of bringing actions.</p>
<b>Degree of legal change required in Member States</b>
<p>According to the available information, fines are provided as penalties in between 11 and 20 countries, depending on the Directive in question (see Table 1 in Annex 7). Currently, 8 countries (CY, FR, HU, LT, LV, NL, PL, SE) provide for turnover-based penalties in their legislation, at least for UCPD infringements. However, with the exception of FR, PL and NL, most of these countries also have an absolute cap on the fine, ranging from EUR 8 688 to approximately 6.5 million. Therefore, on top of the requirement for several Member States to introduce fines where they do not exist at all, a vast majority of Member States will need to change their legislation to introduce turnover-based fines or to remove absolute caps. As regards the proposed common criteria for penalties, those related to the cross-border dimension of the infringement are currently recognised in only a few countries (see Tables 3 and 4 in Annex 7). On the other hand, the other proposed common criteria are already applied in between 13 and 23 countries, depending on the criterion (see Table 7 in Annex 7).</p>
<p>The revised injunctions procedure would require legal changes in all Member States. The extent of these changes would depend on whether Member States choose to integrate the proposed procedure into existing national schemes or to establish it as a separate, alternative scheme.</p>
<p>The proposed extension of the scope of the injunctions procedure would require changes in 16 Member States. Conversely, 12 Member States (CZ, EE, FI, DE, EL, IT, NL, PL, PT, SK, SI, ES) have already extended the scope of application of the injunction procedure to consumer law in general. The requirement to establish at least three categories of qualified entities would require changes in several Member States, since, according to the Study supporting the Fitness Check, in 4 Member States (AT, DE, RO, EL) only consumer and business organisations are qualified entities and in 2 Member States (LV, FI) only public authorities are qualified. Measures regarding mandatory publicity would require changes in 26 Member States, since only 2 Member States (PL, FR) provide for the publication of injunction orders at the traders' expense. The requirement to ensure penalties for non-compliance with injunction orders already exists in all Member States except 3 (SE, HU, EE). However, all Member States would need to ensure the introduction of the specifications on fines. The provisions regarding measures and follow-on actions would require legal changes in the majority of the Member States, since in the area of consumer law only 4 Member States (BE, BG, DK and IT) allow follow-on actions to rely on injunction orders.</p>
<b>Legal coherence</b>
<p>The proposed intervention on penalties will increase legal coherence, as fines will be provided as a mandatory type of penalties for all widespread infringements of all the relevant directives and all Member States will take the same criteria into account when imposing penalties. The obligation for Member States to ensure minimum thresholds for turnover-based fines as a mandatory element of the penalties for widespread infringements and widespread infringements with a Union dimension will also ensure that penalties can be applied in an effective, efficient</p>

and coordinated manner, as required by Article 21 of the CPC Regulation. Furthermore, as regards the proposed common criteria, Article 9 of the revised CPC Regulation already requires Member States to give due regard to the nature, gravity and duration of the infringement in question when imposing fines.<sup>143</sup>

Introducing turnover-based fines will also be more consistent with the rules on penalties in other closely related policy areas – notably data protection and competition – where turnover-based penalties have been or are being introduced (for further information see Annex 7). Especially in the DSM context, breaches often entail intertwined elements of consumer protection, personal data protection and competition. It is therefore important that similar tools are available in these policy areas.

### **Social impacts**

Strengthening the deterrent effect of public enforcement and improving the effectiveness of the injunctive procedure would have positive social impacts. This option will contribute to fewer breaches of EU consumer law, and therefore be particularly beneficial for consumers who would otherwise have lacked the means to seek legal redress if their consumer rights had been violated.

Consumer vulnerability patterns are complex (multi-dimensional), have multiple drivers and are highly context-dependent. It is not possible to strictly associate consumer vulnerability with specific groups or socio-demographic characteristics.<sup>144</sup> However, increased compliance by traders with consumer rights effectively improves the situation of vulnerable consumers, because they are more likely than average to report exposure to unfair commercial practices and online shopping problems, and less likely to obtain satisfactory redress.<sup>145</sup> Thus, compliance by traders can help reduce the relative disadvantage that vulnerable consumers face on the market.

### **Environmental impacts**

The Consumer Conditions Scoreboard 2017 reports that consumers' purchase behaviour is slightly less influenced by environmental claims than previously. Yet, consumer trust in these claims has increased by 12.2 percentage points to 65.8%.<sup>146</sup> This would expose them to more detriment in case the environmental claims are misleading. Better compliance with consumer legislation could reduce the number of misleading environmental claims. This could lead consumers to adopt more sustainable consumption patterns and allow compliant traders to benefit from the competitive advantage of valid green claims.

Better compliance could also reduce unfair practices (misleading omission or action) regarding planned (built-in) obsolescence of products requiring their replacement earlier than what should normally be the case. As a result, there would be some positive impacts on the environment and positive contribution to the implementation of the Circular Economy Action Plan.

## **6.1.2. Option 2: Improving enforcement and individual consumer redress<sup>147</sup>**

The impacts of option 2 come in addition to the impacts of option 1.

### **HOW OPTIONS MEET OBJECTIVES**

<sup>143</sup> In addition, recital 16 of the revised CPC Regulation expressly refers to the need to strengthen the level of penalties: "[...] 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".

<sup>144</sup> Study on consumer vulnerability that researched consumer vulnerability in-depth, including through focus groups, expert assessments, surveys and behavioural experiments, <https://publications.europa.eu/en/publication-detail/-/publication/d1af2b47-9a83-11e6-9bca-01aa75ed71a1/language-en/>, [https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/market-studies\\_en](https://ec.europa.eu/info/strategy/consumers/consumer-protection/evidence-based-consumer-policy/market-studies_en).

<sup>145</sup> Consumer Conditions Scoreboard (2017 edition) pp.63, 81.

<sup>146</sup> Consumer Conditions Scoreboard 2017, p. 36.

<sup>147</sup> In addition to the information in this section, see Annex 8, section 3 for further details about stakeholder views.



<b>Specific objectives</b>
<b>Improve compliance with EU consumer law</b>
<p>By adding individual rights for consumers to seek redress when they have been harmed by unfair commercial practices to the interventions included in option 1, this option would further improve compliance with consumer law.</p> <p>Potential impacts of individual UCPD remedies were studied in a multivariate analysis.<sup>148</sup> Based on data from the Consumer Conditions Scoreboard 2017, this analysis suggests that the introduction of individual remedies in the UCPD is likely to lead to fewer unfair practices. Specifically, it shows that, all other things being equal, the probability for consumers to encounter an unfair commercial practice from domestic retailers is 4 percentage points lower in EU countries with links between remedies and breaches of the UCPD compared to Member States without such links.<sup>149</sup> Results are similar for the probability of experiencing problems when buying or using goods or services. In Member States with links between breaches of the UCPD and remedies, the probability of experiencing a problem with the product/service purchased is lower (by 3.2 percentage points) with respect to other countries, other things being equal. The influence of remedies tends to be magnified (more than four-fold, to 13.6 percentage points) in countries with the highest level of public monitoring.</p> <p>The multivariate analysis also shows that the effect of remedies linked to UCPD breaches on the likelihood of experiencing an unfair commercial practice is strongly amplified in countries imposing a high level of sanctions.<sup>150</sup> Regression estimates show that, in countries where higher penalties for UCPD infringements have been imposed, the introduction of remedies is associated with a decrease of the probability to encounter an unfair commercial practice that is roughly 3 times bigger than in countries with medium or low penalties. This suggests that combining strengthened penalties (Option 1) with UCPD remedies (Option 2) is likely to have positive impacts on improved compliance.</p>
<b>General objectives</b>
<b>Protect the economic interests of consumers and ensure a high level of consumer protection</b>
<p>This option would contribute further to the protection of economic interests of consumers, since it would provide consumers with individual rights to seek redress when their rights under the UCPD have been infringed, in addition to the measures to improve enforcement in Option 1.</p> <p>According to the above-mentioned multivariate analysis, the likelihood of consumers getting a satisfactory outcome when complaining to a retailer/provider for a problem encountered with the good/service purchased seems to be influenced by UCPD remedies. There is a difference of 8.7 percentage points of satisfied consumers between countries having links between breaches of the UCPD and remedies and those not having them. In economic terms, if consumer remedies were linked to unfair commercial practices in all the 28 countries of the EU, the reduction in consumer detriment for the 14 Member States currently not foreseeing any links to UCPD</p>

<sup>148</sup> Source: "An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems" - JRC Technical Report. A general description of the methodology is given in Annex 4 and Annex 14 includes the full JRC report.

<sup>149</sup> Actually, according to the model regression, the probability of encountering a UCP is equal to 50.061% in countries with remedies and equal to 54.056% in countries without remedies. Consequently, the difference between the two groups of countries is equal to - 3.99 percentage points and to -7.39% in relative terms.

<sup>150</sup> For the purposes of this analysis, 15 MS (for which the information on fines actually imposed for the breaches of the UCPD was available) were regrouped into 3 categories according to the level of the fine. It should therefore be considered that the analysis covers only these 15 countries. The same analysis, however, does not show that penalties alone have a marginal effect on the probability of encountering a UCP. Detailed information on how the countries were regrouped in the 3 categories is available in Annex 4.

remedies would be equal to EUR 560 million per year (see Annex 4 for explanations of this estimate). This should be considered very conservative, since it does not take into account likely synergies between remedies and strengthened penalties. As shown by the results of the regression analyses (see section 8.1), the effect of remedies seems to increase strongly when there are also high levels of penalties.

Stakeholder views on introducing rights to remedies under the UCPD to contribute to better consumer protection are presented in Section 5.1.5 and Annex 8 Section 3.

### **Promote the smooth functioning of the internal market**

This option would reduce costs for traders because national rules on individual remedies would become less divergent. 25% of the (205) respondent SMEs stated that introducing an EU-wide right to remedies under the UCPD would encourage their enterprise to enter other EU markets. Empowering consumers to take action against traders that infringe their rights under the UCPD is also likely to increase consumer trust. This could lead to more cross-border purchases. In the public consultation, all consumer associations, most Member State authorities and most citizens agreed that introducing such rights would contribute to greater consumer trust. More companies agreed than disagreed with this, whilst more than half of business associations disagreed. Similarly, all consumer associations, most MS authorities and citizens agreed that such new rights would create a more level playing field for compliant traders. Among the companies replying to this question, 9 of 15 SMEs and 4 of 6 large companies agreed. More than half of business associations disagreed. See Section 3 of Annex 8 for a further breakdown of this data.

## **ADDITIONAL EFFECTS OF THE OPTIONS**

### **Costs and savings for traders**

Beside the positive effect on cross-border trade, the introduction of individual UCPD remedies would also lower costs for complaint handling due to a simpler and more uniform legal framework. In addition, there would be increased clarity on possible consequences for non-compliant traders, which would lead to lower and more accurate risk-assessment costs. In the SME panel consultation, SMEs indicated one-off savings of EUR 1 405 on average<sup>151</sup> (median: zero)<sup>152</sup> and annual savings of up to EUR 10 000 (average: EUR 704, median: zero)<sup>153</sup>. The four responding large companies estimated one-off savings of maximum EUR 1 682 (average EUR 250), with no annual regular savings. In terms of turnover, expected savings tend to decrease by company size, e.g. one-off savings ranging between zero and 5.9% for micro-enterprises to close to zero for large companies.

There would be initial familiarisation costs for traders. However, these costs are difficult to quantify. Only two traders responded to a question about this in the public consultation. In the same vein, very few stakeholders provided estimates of running costs.

The average one-off costs, such as costs for legal advice, assumed by SMEs is EUR 12 293<sup>154</sup> (median: EUR 638). Average annual running cost estimates for these businesses is EUR 8

<sup>151</sup> Arithmetic mean.

<sup>152</sup> Estimates ranged between zero to EUR 24 176. Ranges were widest in responses from EL with EUR 0 to 17 000, HU with EUR 500 to 24 176 (3 responses) and ES with 0 to 21 675.

<sup>153</sup> The four highest estimates reported one respondent from HU (outlier with EUR 10 000, the two other HU respondents estimated 0), one from ES (EUR 5 000) and two with each EUR 4 000 from GR and PL.

<sup>154</sup> This figure is strongly influenced by a micro enterprise from DK reporting EUR 572 484 (the mean/median of all 4 responses from this country being EUR 149 734/EUR 13 227). The next highest estimates originate from GR with EUR 160 000 (the mean/median of the 8 responses from GR being EUR 24 375/zero), ES: EUR 101 674 (the mean/median of the 7 responses from ES being EUR 16 052/EUR 1 796) and PT: EUR 25 637 (the mean/median being EUR 3 282/EUR 733). Companies from DE and IT estimated at most EUR 3 000 (no responses received from FR, NL UK).

<p>484<sup>155</sup> (median: EUR 655). The three responding large companies expect one-off costs between zero and EUR 5 000 (median: EUR 1 703) and annual running costs of zero to EUR 15 000. This IA only addresses compliance costs for compliant traders, including possible ex ante risk-assessment costs in case of non-compliance. It does not address costs for non-compliant traders, such as likely amounts of compensation provided to consumers through UCPD remedies.</p>
<p><b>Costs and savings for authorities</b></p>
<p>There would be initial familiarisation costs for national authorities and courts.</p> <p>Costs for public enforcement authorities and courts would include a possible increase in the number of enforcement and court cases. However, these costs are likely to be offset by an overall reduction in breaches of the UCPD due to the deterrent effect of the UCPD remedies. The existence of UCPD remedies could be sufficient to deter wrongdoing or to trigger voluntary redress from traders, without any need to approach courts or enforcement authorities. According to the Consumer Market Study for the Fitness Check, traders are currently unlikely (16%) to voluntarily offer remedies if they have engaged in a misleading commercial practice.<sup>156</sup> Strong civil remedies and the possibility of escalating the complaint to courts and authorities could incentivise traders to settle more complaints on a voluntary basis.</p>
<p><b>Degree of legal change required in MS</b></p>
<p>Requiring Member States to ensure that the specific remedies of contract termination and compensation for damages are available for breaches of the UCPD would require amendments of national law in all Member States.<sup>157</sup> Among the 14 Member States that have ensured links between breaches of the UCPD and remedies, only the UK has ensured that the link includes contract termination and damages. However, these remedies are not provided for misleading omissions in the UK. Different degrees of legislative changes would be required in the remaining 13 Member States that have ensured such links, depending on which remedies are currently covered. The 14 Member States that have no links between breaches of the UCPD and remedies would need to amend their legislation both to ensure such links and that the links cover the required remedies. Requiring Member States to ensure that victims of unfair commercial practices have access to non-contractual remedies will require legal change in some Member States. Access to damages is the most practical non-contractual remedy and a reasonable indicator for the degree of legal change required in the different Member States. 10 of the 14 Member States that have remedies linked to breaches of the UCPD have ensured that consumers have the right to seek damages. The remaining 4, as well as the 14 Member States that do not have links to remedies, would probably need to amend their legislation to ensure access to damages and thus to non-contractual remedies.</p>
<p><b>Legal coherence</b></p>
<p>Introducing remedies for breaches of the UCPD would not constitute a novelty within the broader framework of EU consumer law. Civil remedies exist in several instruments, such as the Package Travel Directive 2015/2302/EU, the CSGD and in the Commission Proposals (amending and replacing the CSGD) for a Directive on certain aspects concerning contracts for the sales of goods and for a Directive on Digital Content. These Directives harmonise the exact remedies that Member States must ensure.</p>

<sup>155</sup> Also this figure is strongly influenced by the maximum amount estimated by a micro enterprise from DK (the mean/median of all 4 responses from DK being EUR 49 542/EUR 3 835). The next highest estimates originate from PT with EUR 171 551 (the mean/median of the 6 responses from PT is EUR 18 102/EUR 1 609), HU: EUR 88 600 (the mean/median of the 6 responses from HU being EUR 20 504/EUR 500). Companies from DE and IT estimated at most EUR 1 949/EUR 1 402 (no responses received from FR, NL and UK).

<sup>156</sup> Lot 3 Report, p. 246.

<sup>157</sup> An overview of the legal situation in the different Member States is available in Table 8 in Annex 8.

<b>Social impacts</b>
The UCPD (Article 5(3)) aims at ensuring vulnerable consumers, defined as "a clearly identifiable group of consumers who are particularly vulnerable to the practice (...) because of their mental or physical infirmity, age or credulity", a higher level of protection from unfair commercial practices. While the Consumer Conditions Scoreboard 2017 reported a slight decrease in unfair commercial practices, <sup>158</sup> there was an increase in vulnerable consumers that were exposed to such practices. By ensuring a more effective mechanism for consumers to get redress when their rights under the UCPD have been infringed, this measure would empower all consumers to protect themselves better. However, given that the number of vulnerable consumers that become victims of unfair commercial practices is increasing, this could have particularly positive impacts on them. As for option 1, the deterrent effects of option 2, leading to fewer infringements, will be particularly beneficial for consumers who would otherwise have lacked the means to seek legal redress if their consumer rights had been violated.
<b>Environmental impacts</b>
The positive impacts of option 1 would be strengthened by option 2. Individual remedies for breaches of the UCPD would empower consumers to take legal action against traders that engage in unfair commercial practices such as misleading environmental claims and planned (built-in) obsolescence of products. This would increase the deterrence of the UCPD and have positive impact on the environment. In case of non-compliance, consumers would be able to receive redress, which would remove a share of the illegally obtained profits from the infringing traders and encourage sustainable consumption patterns in line with the Circular Economy Package.

### 6.1.3. Option 3: Improving enforcement and individual and collective consumer redress

The impacts of option 3 come in addition to the impacts of options 1 and 2.

<b>HOW OPTIONS MEET OBJECTIVES</b>
<b>Specific objectives</b>
<b>Improve compliance with EU consumer law</b>
The strengthened mechanisms for collective redress under this option would further improve compliance, in particular concerning businesses that are sensitive to reputational damage. As highlighted in the Study supporting the Collective Redress Report, the possibility of a collective redress claim would incite businesses to comply with the law. In the ID survey, 53% of all respondents considered that collective redress possibilities would increase deterrence of non-compliance, whereas only 4% predicted a negative impact and 14% no impact. Most Member States authorities (81.6%) and all consumer organisations shared this view, while business associations did not (9.1%).
<b>General objective</b>
<b>Protect the economic interests of consumers and ensure a high level of consumer protection</b>
Strengthened mechanisms for collective redress would ensure a higher level of consumer protection in mass harm situations. The Study supporting the Fitness Check suggested that Member States that have introduced redress orders have experienced an increase in the effectiveness of injunction procedures and reduced consumer detriment. The possibility to bring action for damages or redress within the injunctions procedure was viewed by qualified entities

<sup>158</sup> Between 2014 and 2016 consumer exposure to unfair commercial practices by domestic retailers fell by 6.9 percentage points in the EU-28 to 16.8%.

responding to the Fitness Check survey as the most beneficial procedural element to be added to the ID.

A key reason for representative collective redress mechanisms is that consumers may rationally decide to forego individual legal action due to its expected negative balance of costs and benefits. By adding a mechanism for collective redress to the injunctions procedure, obstacles to individual consumer redress would be significantly reduced.

In the ID survey, 50% of all respondents considered that the addition of a collective redress mechanism would have positive impacts on consumer awareness and empowerment, due to publicity requirements for traders. 1% predicted negative impacts and 20% no impact. Most Member State authorities (81.6%) and consumer organisations (91.7%) agreed, while business associations did not (9.1%).

56% of all respondents agreed that the possibility of redress would have positive impacts on reducing consumer detriment. 2% predicted a negative impact and 13% no impact. Most Member State authorities (89.5%) and all consumer organisations shared this view, while business associations did not (9.1%). Furthermore, a majority of consumer organisations considered that added redress mechanisms would significantly reduce consumer costs for seeking redress. In addition, the possibility for out-of-court negotiations for redress, together with the other procedural amendments that would increase the deterrent effect of the ID under options 1 and 3, would lead to increased likelihood of achieving amicable redress outcomes.

### **Promote the smooth functioning of the internal market**

This option would contribute to a better functioning internal market. In the ID survey, 49% of all respondents considered that the addition of collective redress mechanisms would have a positive impact on fair competition between compliant and non-compliant traders. 7% predicted a negative impact and 13% no impact. Most Member State authorities (83.7%) and consumer organisations (90.9%) shared this view, while business associations (9.1%) did not. In the 2017 Study on collective redress, 57.69% of business respondents did not consider collective redress procedures to have any negative impact on their businesses' competitiveness.

## **ADDITIONAL EFFECTS OF THE OPTIONS**

### **Degree of legal change required**

This option would require legal changes in all Member States. The extent of these changes would depend on whether Member States choose to integrate the proposed mechanism into existing national schemes or establish it as a separate alternative scheme.

Introducing a single procedure for injunctions and redress would require changes in at least 19 Member States. According to the Study supporting the Fitness Check, 9 Member States (AT, BG, CZ, DK, HU, LT, PT, ES, UK) have the possibility to provide decisions on injunctions and redress in a single procedure. However, this is often a theoretical possibility governed by general procedural rules and not by specific legislation.

The introduction of redress mechanisms, which may include compensatory relief, would require changes in at least 9 Member States. According to the Study on the 2013 Recommendation on Collective Redress, 19 Member States provide for some form of compensatory collective redress (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK). In AT, there is no specific legal framework but an extension of traditional multiparty litigation devices to mass claims developed in case law. In NL, the available mechanism provides only for an out-of-court settlement approved by the court, but there is no specific judicial compensatory collective redress mechanism. In DE, the existing mechanism is limited to investor claims. Among the different models of compensatory collective redress, representative action models are available in 12 Member States (BE, BG, EL, FI, FR, LT, IT, HU, PL, RO, ES, SE).



<p><b>Costs and savings for authorities</b></p>
<p>This option would enable economies of scale in the preparation and litigation of cases and may reduce coordination and transaction costs of bringing consumers together for redress purposes.</p> <p>In most Member States, courts/authorities would benefit from procedural efficiencies if both injunctive relief and redress claims could be assessed within a single procedure. In the ID survey, 53% of all respondents agreed that introducing redress mechanisms within the injunctions procedure would have a positive impact on procedural efficiencies due to the collective resolution of mass claims. 10% predicted a negative impact and 9% no impact. Most Member State authorities (86.8%) predicted a positive impact.</p> <p>National authorities responding to the ID survey were divided when assessing implementation costs of for courts (41% predicted a moderate increase) and administrative authorities (43% predicted a moderate increase), but did not consider these costs significant. They did also not consider running costs for courts (41% predicted a moderate increase) and administrative authorities (43% predicted a moderate increase) significant. Expected costs may be slightly higher under option 3 than option 1, due to the additional procedural redress elements. However, national authorities responding to the ID survey considered that, when taking into account the possible benefits for consumers, these costs are reasonable (40% agreed, 10% disagreed).</p>
<p><b>Costs and savings for qualified entities</b></p>
<p>Under this option, qualified entities would experience procedural efficiencies from the possibility of assessing injunctive and redress claims in a single procedure, which would enable them to bear the costs of preparing a single action. In the hypothetical mass harm case study, the qualified entities responding to the ID survey held mixed views about the impact of this option on their legal advice costs (28.5% predicted a reduction of costs, 33% predicted an increase) and litigation costs (23% predicted reduction, 28.5% predicted increase). The precise impact on such costs would depend on the financial and legal capacities of the qualified entity in question, as well as the circumstances of the mass harm case.</p> <p>Qualified entities would benefit from increased possibilities to represent the interests of victims with due fairness safeguards. This was reflected in the 2017 Study on collective redress, where 63% of respondents agreed that collective redress enhances access to justice and 60% considered such actions to be capable of ensuring the fairness of proceedings.</p>
<p><b>Costs and savings for traders</b></p>
<p>Option 3 would produce no costs for compliant traders, other than regular costs to ensure that business practices are within the law. Business associations responding to the ID survey considered that insurance premiums for coverage against claims in mass harm situations would increase (91% predicted a significant increase, 9% predicted no impact). The expected insurance figures are higher under option 3 than option 1, due to the possibility of receiving redress claims.</p> <p>Improvements of the effectiveness of the injunctions procedure and strengthened mechanisms for collective redress could lead to increased use of the ID, possibly, but not likely, including an increase in frivolous claims. See Section 8.3.1 for an assessment of risks related to frivolous claims.</p> <p>Overall, costs under option 3 would be insignificant for compliant traders. Costs for cross-border traders would go down due to further harmonisation of national procedures.</p>
<p><b>Social impacts</b></p>
<p>Improving collective redress possibilities in mass harm situations could have positive social impacts, particularly concerning protection of vulnerable consumers. As under options 1 and 2, the deterrent effects of option 3, leading to fewer infringements, would also be particularly</p>

beneficial for consumers who would otherwise have lacked the means to seek legal redress if their consumer rights have been violated.
<b>Environmental impacts</b>
Improving collective redress possibilities in mass harm situations would have positive environmental impacts that would come on top of the environmental impacts of options 1 and 2. The combination of effective and deterrent penalties, improved injunctions procedures and strengthened mechanisms for individual and collective redress will ensure powerful tools to address unfair commercial practices, such as misleading environmental claims and planned (built-in) obsolescence of products.

## 6.2 Modernise consumer protection and eliminate unnecessary costs for compliant traders

### 6.2.1. Options to address lack of transparency and legal certainty for B2C transactions on online marketplaces (driver 1)

#### *Option 0: Promoting self and co-regulation*

<b>HOW OPTIONS MEET OBJECTIVES</b>
<b>Specific objectives</b>
<b>Modernise consumer protection</b>
<p>Self and co-regulation can be effective as a complement to legislation. For instance, the initiative to prevent the sale of counterfeits online is a successful example of complementarity between regulatory and non-regulatory interventions. The "Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet"<sup>159</sup> enhanced cooperation among stakeholders and significantly contributed to preventing offers of counterfeit goods from appearing on online marketplaces. It demonstrated that, together with legislation, voluntary cooperation can contribute to prevent online counterfeiting, meaning that it can improve the enforcement of existing legislation.</p> <p>The Commission has already encouraged businesses, and online marketplaces in particular, to ensure greater transparency for consumers. This was notably done through issuing Commission guidance on the UCPD in May 2016, which calls for transparency on online marketplaces through purposeful application of the general transparency and professional diligence requirements under the UCPD.<sup>160</sup></p> <p>Although online marketplaces generally did not object to the transparency recommendations in the UCPD guidance, analyses on national level indicate that they have done little to follow-up on the recommendations in practice.<sup>161</sup> Consumer organisations confirm that there has been no improvement of transparency in B2C transactions on online marketplaces<sup>162</sup> and that the application of EU consumer law when online marketplaces enable the conclusion of contracts is still unclear, leading to a low legal standard for ensuring the correctness and validity of information provided.<sup>163</sup></p> <p>Experience from a multi-stakeholder group on online comparison tools, set up in 2012 by the European Commission, confirms this lack of engagement by online businesses. It brought together industry representatives, operators of comparison tools, NGOs and national authorities</p>

<sup>159</sup> <http://ec.europa.eu/DocsRoom/documents/18023/attachments/1/translations/>

<sup>160</sup> UCPD Guidance, SWD(2016) 163 final of 25.05.2016.

<sup>161</sup> Platform transparency study.

<sup>162</sup> Position paper of VzBv in the public consultation.

<sup>163</sup> Position paper of BEUC in the public consultation.

to develop principles to help comparison tool operators comply with the UCPD. The principles developed by the group<sup>164</sup> later fed into the UCPD Guidance.<sup>165</sup> However, several leading online platform operators did not take part in the initiative. This was a significant impediment to the possibilities for the agreed principles to create impact on business practices to the benefit of consumers. Moreover, following their adoption, improvements seem to have been limited. Whilst important objectives such as raising awareness among traders and building a common understanding were achieved throughout this initiative, there was limited change on the market regarding. This was confirmed by preliminary results of a 2017 sweep on comparison websites in the travel sector, which identified several irregularities on websites.<sup>166</sup>

The reluctance by online traders to implement recommendations on platform transparency from the UCPD Guidance and to engage in the multi-stakeholder group on comparison tools suggest that it is unlikely that further co- or self-regulatory initiatives in this area would be successful to ensure increased transparency for consumers.

Furthermore, it is difficult to ensure that voluntary initiatives are adequately representative in highly dynamic markets like the online one, where many new enterprises are not organised in professional associations.

### **General objectives**

#### **Protect the economic interests of consumers and ensure a high level of consumer protection**

Since it is unlikely that the online marketplace industry would introduce relevant transparency measures on a voluntary basis, this option would not improve the overall level of consumer protection. Online marketplaces, like other traders, are likely to be attached to their business models. The non-binding character of the UCPD guidance and the principles for online comparison tools seems to lack deterrent effect to persuade them to change their behaviour.

#### **Promote the smooth functioning of the internal market**

Member States have different information requirements for online marketplaces. Co- and self-regulation does not seem sufficient to address such divergent rules and reduce related costs. Several businesses associations take the view that the fragmented nature of the EU market for (digital) goods, content and services is a stumbling block for consumers and businesses.<sup>167</sup> Self and co-regulation alone cannot address this fragmentation.

### **ADDITIONAL EFFECTS OF THE OPTIONS**

#### **Costs and savings for traders**

Not applicable.

#### **Costs and savings for authorities**

Not applicable.

#### **Degree of legal change required in MS**

Not applicable.

<sup>164</sup> See the "Principles for better self- and co-regulation" available at: <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf>

<sup>165</sup> [https://ec.europa.eu/info/live-work-travel-eu/consumers/unfair-treatment/unfair-treatment-policy-information\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumers/unfair-treatment/unfair-treatment-policy-information_en)

<sup>166</sup> [http://europa.eu/rapid/press-release\\_MEMO-17-845\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-845_en.htm)

<sup>167</sup> They observe significant differences in Member State implementation of the CRD and the UCPD. While they also consider fully harmonized rules to address this, they prefer adopting further guidelines and recommendations. See position paper of BusinessEurope and EDiMA.

<b>Legal coherence</b>
Not applicable.
<b>Social impacts</b>
No significant effects are foreseen in areas such as employment, health & safety, income distribution and good governance & administration.
<b>Environmental impacts</b>
No significant impacts are foreseen.

***Option 1: Providing specific transparency requirements for contracts concluded on online marketplaces***

<b>HOW OPTIONS MEET OBJECTIVES</b>
<b>Specific objectives</b>
<b>Modernise consumer protection rules</b>
<p>A behavioural experiment<sup>168</sup> showed that introducing information about the name of the third party supplier on online marketplaces lead 74% of respondents to remember who was selling the product. 72% of these respondents remembered it accurately (see Figure 3 in Annex 10). This is a clear improvement compared to the finding that currently 60% of consumers entering into transactions on platform markets are unsure about who is responsible for the contract.<sup>169</sup> Around 70% of respondents to the behavioural experiment believed that knowing who the seller was made them more confident and trustful towards the online marketplace. Around 68% stated that such information was important in their decision making (see Figure 4 in Annex 10). Other data suggests that 85% of consumers consider it important that online marketplaces are clear and transparent about who is responsible when something goes wrong and about their rights in case of a problem with price and quality of products and services.<sup>170</sup></p> <p>Full information about the identity of the supplier and related consumer rights also increases the probability of consumers making a purchase. Compared to a situation where no information about the contractual partner is included (baseline scenario), the probability of a consumer purchase increases by 47%.<sup>171</sup> Information that the contract is concluded with a third party supplier and that consumer rights apply (or do not apply) allows consumers to make an informed choice and increases their trust. Making the implications of choosing a specific contractual partner more prominent on the online marketplace is likely to engage consumers better in this process.<sup>172</sup> In the same vein, if consumers are informed that the ranking of search results is based on a well-known criterion, such as popularity, the probability that they will make a purchase increases 2.15 times (115%).<sup>173</sup></p> <p>81% of respondents to the behavioural experiment agreed that information about who is selling the product would make users more confident and trusting in online marketplaces and that this would translate in a better service for users (79%) (see Figure 5 in Annex 10).</p>
<b>General objectives</b>
<b>Protect the economic interests of consumers and ensure a high level of consumer</b>

<sup>168</sup> For the Platform Transparency Study.

<sup>169</sup> Platform Markets Study, Final Report, p. 73.

<sup>170</sup> Platform Markets Study, Final Report p. 77 and 117.

<sup>171</sup> Calculations based on the Platform Transparency Study, p. 36.

<sup>172</sup> Platform Transparency Study, p. 58.

<sup>173</sup> Platform Transparency Study, pages 28-29.

<b>protection</b>
<p>Knowing whom to address in case of problems is a first condition for consumers to seek redress. If they seek redress, it is likely that their detriment decreases.<sup>174</sup> More transparency on online marketplaces would therefore increase consumer protection by reducing consumer detriment. In the public consultation, all consumer associations and public authorities, as well as almost all citizens agreed that this would bring benefits for the consumers. On the business side, roughly two thirds of responding business associations (around 35 of 45) and large companies (around 6 of 9), together with more than two thirds of SMEs (around 9 of 16), agreed too.<sup>175</sup></p> <p>Transparency about ranking criteria is also important for consumer trust and confidence in the online environment. It increases the likelihood of consumers making purchases on online marketplaces. In a survey, 70% of 4800 internet users that correctly remembered information about selection criteria agreed that this information was important in their decision to make a purchase. 69.9% of those who correctly recalled this information agreed that it made them more confident and trusting.<sup>176</sup></p>
<b>Promote the smooth functioning of the internal market</b>
<p>Specific EU wide transparency requirements for online marketplaces would ensure fairer competition. On the one hand, it would ensure clearer rules to support better enforcement and, on the other, it would prevent some traders from having unfair competitive advantages.</p> <p>The number of consumers using online marketplaces and the volume of trade on online marketplaces is likely to continue increasing. Whilst the exact impacts of the transparency measures in this option are not easily measurable, initial evidence indicates that transparency should increase consumer trust, and thus have a positive impact on the internal market by increasing the number of consumers using online marketplaces and the volume of trade.</p> <p>The probability of consumers making a transaction is 2.15 times higher (115%) if they are informed that the ranking of search results is based on a well-known criterion, such as popularity. Ensuring such information for consumers could be expected to lead to growth in transactions on online marketplaces, as a result of increased consumer confidence and trust.<sup>177</sup></p> <p>35% of respondents in the SME panel consultation agreed that platform transparency would encourage them to enter other EU markets, while 39% did not expect any significant impact on that decision and 22% did not know.</p>
<b>ADDITIONAL EFFECTS OF THE OPTIONS</b>
<b>Costs and savings for traders</b>
<p>There would be initial familiarisation costs. However, these are likely not to be significant since the transparency obligations concern basic information about the contracting parties and, depending on what a third party supplier has declared, standard information about whether consumer rights apply. The online marketplace would not be required to monitor information</p>

<sup>174</sup> Data suggests that financial consumer detriment is reduced by taking redress: Study on measuring consumer detriment in the European Union, European Commission 2017, figure 17.

<sup>175</sup> More precisely, all 16 consumer associations and all 19 public authorities, 31 of 32 citizens, 37 of 45 business associations, 11 of 16 SMEs, 6 of 9 large companies agreed with the benefit of knowing whom to contact in case of a problem. All 16 consumer associations and all 19 public authorities, 30 of 31 citizens, 35 of 45 business associations, 9 of 14 SMEs, 7 of 9 large companies agree with the benefit of understanding who is responsible for the performance of the contract. All 16 consumer associations, 17 of 19 public authorities, 30 of 31 citizens, 28 of 45 business associations, 9 of 16 SMEs, 5 of 8 large companies agreed with the benefit that the consumer understands if consumer protection rules apply in case of a problem. All 16 consumer associations, 18 of 19 public authorities, 28 of 30 citizens, 32 of 45 business associations, 9 of 16 SMEs, 6 of 9 large companies agreed that this information would increase consumer trust.

<sup>176</sup> Platform Transparency Study, page 53.

<sup>177</sup> Platform Transparency Study, pages 28-29.



<p>provided by suppliers. Major running costs for online marketplaces are therefore not likely.</p> <p>Only few respondents to the targeted and public consultations provided quantitative cost estimates. Of the four online marketplaces responding to the question on costs, two found that 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.<sup>178</sup> In the SME panel, SMEs estimated one-off costs of EUR 2 179 on average (median: EUR 50)<sup>179</sup> and annual regular/running costs of EUR 3 887 (median: zero).<sup>180</sup></p> <p>Consequences for online marketplaces of not making it sufficiently clear to consumers that they enter into a contract with a third party supplier vary between Member States (see Table 2 in Annex 10). Uniform transparency obligations would provide clarity on who the contractual partner is and thus eliminate risks of online marketplaces being held liable for the performance of contracts. Transparency requirements should also reduce costs for online marketplaces due to the need to clarify the situation to consumers when problems arise. When consumers know who their contractual partner is and that they need to contact him/her in case of a problem, there should be fewer queries to be handled by online marketplaces.</p> <p>Some major online marketplaces replying to the targeted consultations took the view that fully harmonised information obligations would bring some cost reduction. Others did not know. SMEs in the SME panel consultation anticipated one-off savings of EUR 214 on average<sup>181</sup>, while annual savings reported would amount to EUR 391 on average.<sup>182</sup> In terms of turnover, one-off savings would represent up to 32 %, annual savings up to 38% for micro enterprises.</p>
<p><b>Costs and savings for authorities</b></p>
<p>There could be a reduction of enforcement costs, as there would be more clarity about the identity and legal status of contractual partners, which is currently often difficult to establish. Given that consumers will find it easier to address their contractual partners directly, they would probably turn to authorities for help less frequently. In cases where consumer law does not apply, because the third party supplier is a consumer, information about this fact will increase awareness. This can reduce the number of unsubstantiated claims to consumer authorities.</p>
<p><b>Degree of legal change required in MS</b></p>
<p>To the extent that Member States do not already require the relevant information (see Table 1 in Annex 10), they would have to add an additional provision in their laws transposing the CRD.</p>
<p><b>Legal coherence</b></p>
<p>Transparency requirements for online marketplaces would be complementary to the Commission Platform-to-Business (P2B) initiative, which aims to fight unfair trading practices. The two initiatives pursue the same overarching goals of enhanced transparency and fairness of transactions on online platforms.</p> <p>However, contrary to the B2B area, EU consumer law applies to all traders, including on-line platforms which qualify as traders, and protects consumers who use these platforms.<sup>183</sup> Therefore, this IA deals only with specific problems identified within this otherwise well-functioning body of EU law. The first is that consumers often do not know who their contractual</p>

<sup>178</sup> Question 77 in the public consultation, see the question in Annex 10, subsection 2.

<sup>179</sup> Estimates ranged from zero to EUR 48 000. Notable is that the maximum amount was reported by the (only) respondent from DK, a micro enterprise. The next highest value reported the (only) respondent from SK (EUR 7 933).

<sup>180</sup> Based on around 30 replies. Estimates ranged from zero to EUR 84 301. The three respondents from PT estimated costs of zero, EUR 5 782 and EUR 84 301, the 2<sup>nd</sup> highest estimate (EUR 20 000) originates from a self-employed, the (only) respondent from DK, the 3<sup>rd</sup> highest from PL (EUR 10 000).

<sup>181</sup> Estimates ranged from zero to EUR 3 192 with median of 0.

<sup>182</sup> Estimates ranged from zero to EUR 3 830 with median of 0.

<sup>183</sup> See in particular Chapter 5.2 of the revised Guidance on the UCPD of 25.05.2016.

partner is and what their rights are when they shop through online marketplaces. The suggested new transparency rules would only apply to "online marketplaces", which are already defined and subject to specific consumer information requirements in EU law.

Like the CRD Evaluation, studies for the P2B initiative identified a case for enhancing the transparency of ranking criteria for offers on online marketplaces. The two initiatives both address this issue and are complementary, with this IA assessing what could be done to ensure transparency in the presentation of search results in B2C settings and the P2B initiative approaching the topic from a B2B angle.

The proposed obligation for online marketplaces to ensure that third party traders self-declare their status is supported by the UCPD prohibition (No. 22 of Annex I) for traders to falsely claim not to be acting as traders. This prohibition will be the legal tool for enforcement authorities to handle situations where traders do not truthfully report their legal status to online marketplaces. The envisaged transparency requirements would also be complementary to the recently published Commission Guidance to facilitate the effective removal of illegal content, increased transparency and the protection of fundamental rights online.<sup>184</sup>

### **Social impacts**

No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration. Consumers acting as suppliers on online marketplaces will be confronted with fewer complaints related to consumer law (not applicable to their transactions), thus facilitating their activity on the marketplaces.

### **Environmental impacts**

The introduction of transparency obligations could have some environmental impacts due to a likely increase in transport and the use of energy for the purposes of delivering tangible goods, which would result from the expected increase in cross-border trade. Increased transparency could also make sellers and online marketplaces more aware of their responsibilities in case of selling faulty products, thus serving as an incentive to increase the number of goods that will not be returned, and ultimately reducing the overall transport of goods.

## **6.2.2. Options to address lack of transparency, consumer protection and legal certainty for "free" digital services (driver 2)**

### ***Option 0: Promoting self and co-regulation***

#### **HOW OPTIONS MEET OBJECTIVES**

##### **Specific objectives**

##### **Modernise consumer protection rules**

Self-regulatory initiatives by "free" digital service providers could alleviate consumer detriment, but only to the extent that providers decide to abide by self-regulatory principles.

Self and c-regulation can be effective as complements to binding legislation, facilitating enforcement and contributing to achieve its objectives. This was the case for the initiative to prevent the sale of counterfeits online. The "Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet"<sup>185</sup> significantly contributed to preventing offers of counterfeit goods from appearing on online marketplaces. It demonstrated that, together with legislation, voluntary cooperation can contribute to prevent online counterfeiting.

<sup>184</sup> Communication on "Tackling Illegal Content Online" of 28 September 2017, COM(2017) 555 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0555&rid=1>

<sup>185</sup> <http://ec.europa.eu/DocsRoom/documents/18023/attachments/1/translations/>

<p>However, for "free" digital services it would first be necessary to establish a clear and coherent legal framework to increase consumer protection. In the public consultation, business associations expressed resistance to extending protections, particularly as regards the right of withdrawal. Such reluctance suggests that industry will also find it difficult to agree and implement such improvements on a self- or co-regulatory basis. The likely lack of participation of major providers of "free" digital services in a voluntary initiative would significantly impair its effectiveness, since representativeness is one of the key factors in order for "soft" policy instruments to be successful.<sup>186</sup></p> <p>The existing voluntary initiatives in the online area, such as the principles developed by the multi-stakeholder group on comparison tools, show the difficulty of bringing together major online traders.<sup>187</sup> It is also difficult to ensure that voluntary initiatives are adequately representative in highly dynamic markets like the online one, where many new enterprises are not organised in industry associations.</p>
<p><b>Eliminate unnecessary costs for compliant traders</b></p>
<p>Replies to the targeted consultations indicate that traders already face unnecessary costs linked to the need to check and comply with possible national rules on pre-contractual information and right of withdrawal for "free" digital services. At least in three Member States "free" digital services are regulated and discussions are ongoing in other Member States about introducing new rules. Self and co-regulation will not be able to remove this legal fragmentation and reduce related costs.</p>
<p><b>General objective</b></p>
<p><b>Protect the economic interests of consumers and ensure a high level of consumer protection</b></p>
<p>Since it is unlikely that the industry would extend the CRD scope to "free" digital services, or at least the right of withdrawal, on a voluntary basis, this option will not be likely to improve the overall level of consumer protection.</p>
<p><b>Promote the smooth functioning of the internal market</b></p>
<p>At least in three Member States "free" digital services are regulated and discussions are ongoing in other Member States about introducing new rules. Self and co-regulation cannot remove this legal fragmentation.</p>
<p><b>ADDITIONAL EFFECTS OF THE OPTIONS</b></p>
<p><b>Costs and savings for traders</b></p>
<p>Not applicable.</p>
<p><b>Costs and savings for authorities</b></p>
<p>Not applicable.</p>
<p><b>Degree of legal change required in MS</b></p>
<p>Not applicable.</p>
<p><b>Legal coherence</b></p>
<p>The non-legislative option would fail to address incoherencies with the upcoming DCD, as only</p>

<sup>186</sup> See the "Principles for better self- and co-regulation" available at: <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf>

<sup>187</sup> [https://ec.europa.eu/info/live-work-travel-eu/consumers/unfair-treatment/unfair-treatment-policy-information\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumers/unfair-treatment/unfair-treatment-policy-information_en)

a legislative intervention would ensure that the objectives of the intervention are met.
<b>Social impacts</b>
No significant effects are foreseen in areas such as employment, health & safety, income distribution and good governance & administration.
<b>Environmental impacts</b>
Not applicable due to the digital nature of the services, e.g. no increased use of transport and energy.

*Option 2: Extending the CRD to cover "free" digital services*

<b>HOW OPTIONS MEET OBJECTIVES</b>
<b>Specific objectives</b>
<b>Modernise consumer protection rules</b>
<p>Extending the CRD to "free" digital services would address current realities of digital transactions for consumers through content neutral and future-proof rules. Filling this gap in consumer protection would reduce consumer detriment by ensuring clearer rules, which would complement EU data protection rules, particularly in the Member States where such rights do not yet exist.</p> <p>When asked about the key reasons for introducing pre-contractual information obligations and a right of withdrawal for "free" digital services, a strong majority of individuals, consumer organisations and MS authorities highlighted improved protection of consumers of digital services with similar functionalities. 38.9% of traders, 26.9% of business associations highlighted such reason for pre-contractual information requirements, and 35.3% of traders and 19.65 of business associations stressed this for the right of withdrawal.<sup>188</sup></p> <p>In its response to the targeted consultation, one large provider of "free" digital services highlighted possible complications for consumers as a result of these new rules. It mentioned a risk of "over-notification and a bad user experience" if consumers are prompted to provide their consent or acknowledgement. Yet, as indicated by the strong support from other stakeholders, the possible consumer benefits are likely to outweigh this concern. Furthermore, these rules already apply to "free" digital content, and no such concerns were identified in the CRD evaluation.</p> <p>Increasing consumer protection for "free" digital services and the resulting reduction of detriment is likely to increase consumer trust in those services. As a consequence, the use of "free" digital services is likely to further increase, supporting the completion of the DSM.</p>
<b>Eliminate unnecessary costs for compliant traders</b>
<p>By providing a clearer legal framework for "free" digital services across the EU, traders would face reduced costs related to diverging or uncertain information requirements and incoherent rules for digital content products. It would particularly help alleviate the perceived barriers to online cross-border trade, which include differences in national contract law (38.1%) and national consumer protection law (37.4%).<sup>189</sup> It would reduce unnecessary costs of compliant traders of checking and complying with possible national rules on pre-contractual information</p>

<sup>188</sup> For more details on questions and responses, see subsection 3 of Annex 11.

<sup>189</sup> Consumer Conditions Scoreboard 2017, p. 113.

and right of withdrawal for "free" digital services. Existing costs were considered unreasonable by 7 of 10 business associations in the public consultation.<sup>190</sup>

This option would also ensure fairer competition between traders that compete in the market for similar services, for instance between traders offering "free" digital content and "free" digital services, and between traders that offer paid digital services and "free" digital services. This was highlighted in the context of the DCD proposal: *"In the digital economy, digital content is often supplied without the payment of a price and suppliers use the consumer's personal data they have access to in the context of the supply of the digital content or digital service. Those specific business models apply in different forms in a considerable part of the market. A level playing field should be ensured"*.<sup>191</sup>

In the public consultation, 85.2% of individuals, 52.9% of traders, and all responding national authorities and consumer organisations highlighted the level playing field between paid and "free" digital products as a key reason to introduce pre-contractual information obligations. Similarly, 82.2% of individuals, 47.1% of traders, 31% of business associations, 75.1% of national authorities and all responding consumer organisations considered the same benefit for introducing the right of withdrawal. Business associations were less supportive, with 38.1% and 31% considering the level playing field between paid and "free" digital products as a key reason respectively for the introduction of pre-contractual information obligations and the right of withdrawal.

Furthermore, barriers to cross-border e-commerce require action due to the strong growth potential of "free" digital services. Taking no action at EU level entails the risk that legal fragmentation and barriers will increase, as three Member States have already regulated "free" digital services in national law, others are in the process of doing so and yet others are expected to follow if no EU action is taken. Addressing new market developments, regulatory gaps and inconsistencies in EU consumer law in an uncoordinated manner is likely to generate further fragmentation and exacerbate the problems.

### **General objective**

#### **Protect the economic interests of consumers and ensure a high level of consumer protection**

Providing EU-wide consumer protection for "free" digital services would have a positive impact on the fulfilment of the right to a high level of consumer protection, enshrined in Article 38 of the Charter, Article 169 of the Treaty on the Functioning of the EU and Article 1 CRD, particularly as it would raise the level of consumer protection in most Member States, where such rights are currently lacking.

#### **Promote the smooth functioning of the internal market**

Introducing a consistent legal framework for "free" digital services would contribute to fairer competition for businesses. Whilst this is not measurable in quantitative terms, the increase in consumer protection is likely to enhance consumer trust in "free" services, which may lead to more digital transactions.

Amending the existing framework in the CRD would ensure consumers in all Member States the same consumer protection in contracts for "free" digital services, as they already do in contracts for "free" digital content. As a consequence, there will be increased legal clarity for users and providers of such services.

### **ADDITIONAL EFFECTS OF THE OPTIONS**

<sup>190</sup> Question 3 in section C.3 of the SME panel consultation, see question and summary of responses in Annex 11, subsection 3.

<sup>191</sup> DCD Council general approach.



<b>Costs and savings for traders</b>
<p>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. Regarding potential yearly costs, in the SME panel, SMEs estimated on average EUR 8 367 (median: EUR 33)<sup>192</sup> for new pre-contractual information requirements and EUR 9 119 (median EUR 50) for right of withdrawal.<sup>193</sup></p> <p>There would be savings for cross-border traders, due to more legal certainty and harmonised rules. In the SME panel, SMEs expected yearly savings of EUR 622 and EUR 396 on average, for pre-contractual information and right of withdrawal respectively.<sup>194</sup></p> <p>In the public consultation, 7 of 10 business associations considered current costs due to diverging national requirements unreasonable. These costs are likely to increase over time if more Member States decide to regulate "free" digital services individually. 9 of 12 business associations also estimated future implementation costs as unreasonable.</p> <p>In the SME panel, SMEs gave estimates regarding current one-off cost of on average EUR 2 485 (median: zero)<sup>195</sup> for both suggested new rights. The average estimate for annual regular/running costs due to diverging national requirements was EUR 1 392 (median: zero).<sup>196</sup> SMEs also indicated that both current and potential future costs related to rules on "free" digital services have no impact on their decision to enter other EU markets. However, whilst current costs are likely to increase over time if more MS decide to regulate "free" digital services, future implementation costs would decrease due to familiarisation with the new rules and would be at least partially offset by the benefits of greater legal certainty and harmonised rules.</p>
<b>Costs and savings for authorities</b>
<p>There would be initial familiarisation costs for public enforcement authorities and courts. Such costs would not be significant, since the extension of the CRD involves existing rules, with which the enforcers are already familiar and that already apply to the similar category of contracts for "free" digital content. Enforcement costs and costs for complaint handling would go down with the introduction of clearer and more consistent rules.</p>
<b>Degree of legal change required in MS</b>
<p>Member States would be required to amend their laws transposing the CRD.</p>
<b>Legal coherence</b>
<p>This option would extend the scope of the CRD to "free" digital services, ensuring a coherent regulatory framework for digital content and digital services in line with the DCD. The introduction of a general right to terminate contracts for "free" digital services within 14 days would complement and increase the protection already provided under EU data protection rules, ensuring, together with the DCD proposal, a consistent legal framework and EU-wide enhanced protection for consumers (see subsection 2 on the interplay of the CRD with the GDPR in Annex 11).</p> <p>In the public consultation, when asked about the key reasons for introducing pre-contractual</p>

<sup>192</sup> Estimates ranged from zero to EUR 168 602. The maximum estimate was provided by a small enterprise in PT, 2nd highest estimate (EUR 20 000) came from a self-employed in DK.

<sup>193</sup> Estimates ranged from zero to EUR 168 602. The maximum estimate was provided by a small enterprise in PT, 2nd highest estimate (EUR 20 000) came from a self-employed in DK.

<sup>194</sup> Estimates ranged from zero to EUR 5 242 and zero to EUR 3 932 for pre-contractual information and right of withdrawal, respectively. Maximum estimate reported by a Polish micro enterprise.

<sup>195</sup> Estimates ranged from zero and EUR 48 000. The highest estimate was provided by the (only) respondent from DK. The next highest value reported is from SK (EUR 7 933).

<sup>196</sup> Estimates ranged from zero to EUR 20 000. The maximum estimate was reported by the (only) respondent from DK. The next highest value reported is from PT (EUR 5 782).

information obligations for "free" digital services, 83% of individuals, all responding consumer organisations and 65% of national authorities highlighted better synergies between EU consumer law and EU data protection rules. 78.5% of individuals, all responding consumer organisations and 69% of national authorities stressed this benefit from introducing the right of withdrawal. 28% of traders and 17% of business associations highlighted such synergies as key reasons for introducing pre-contractual information requirements, and 28% of traders and 17% of business associations considered the same benefit for introducing the right of withdrawal.

**Social impacts**

No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration. Enhancing consumer protection in the digital area might be more effective for vulnerable consumers that are more likely to experience problems when using "free" digital services.

**Environmental impacts**

Due to the digital nature of the services, the extension of the CRD to "free" digital services would not produce significant environmental impacts related to the increase in cross-border trade, such as increased use of transport and energy.

**6.2.3. Options to address overlapping and outdated B2C information requirements (driver 3)**

*Option 1 (single option): targeted changes to UCPD and CRD to modernise B2C information requirements*

**HOW OPTIONS MEET OBJECTIVES**

**Specific objectives**

**Eliminate unnecessary costs for compliant traders**

For overlapping information requirements in advertising (qualifying as "invitation to purchase") and pre-contractual stages of transactions, most business associations (30 of 48) agreed in the public consultation that the removal of the requirement to inform consumers at the advertising stage about complaint handling procedures would give some or significant savings for companies. Very few replies quantified estimated savings.

Removing the obligation to display a fax number is primarily a "house-cleaning" measure to remove an obsolete EU rule that will not change the situation on the ground for a vast majority of traders. This is because the obligation to display the fax number applies, according to the CRD, "where available", i.e., it is mandatory only for those traders that still use fax in communication with consumers.

In contrast, enabling traders to use more modern online communication tools, such as web-forms or chat as alternative to e-mail, should enable traders to make efficiency gains. The fact that a large number of traders already offer these alternative means of online communication to consumers (in parallel with e-mail address) suggests that they do generate efficiency gains compared to the use of e-mail and that the obligation to maintain a parallel e-mail communication channel may constitute some burden. However, no estimates of these gains are available. Under the proposed amendment, business will be able to provide their e-mail address and e-mail is likely to remain an important means of online communication with consumers. However, business will be able to use either e-mail or any other, more technically advanced and efficient means of online communication with consumers – provided they ensure the same functionality for consumers, i.e. allow them to keep a record of the communication.

**General objective**

**Protect the economic interests of consumers and ensure a high level of consumer protection**

<p>Business stakeholders and most national authorities considered that information about complaint handling procedures is not needed at the advertising stage. In contrast, consumer associations were almost unanimous (15 out of 16) in considering that such information should still be included in the advertisement even if repeated as pre-contractual information. This contrasts with the opinion of consumers responding to the Fitness Check behavioural experiment and consumer survey, where a majority of respondents did not consider this information relevant at the advertising stage.</p> <p>This minimal reduction of the current level of consumer protection would not lead to noticeable negative consequences. It is reasonable to assume that, when seeing product advertising, the consumer's attention is focused on other, more material elements and that information about dispute resolution procedures will only become relevant in case of a subsequent problem. In that case it is likely that the consumer will not remember the advertisement, but rather look for this information in the contract confirmation or check other sources, such as the trader's website.</p> <p>The suggested removal of the requirement to indicate fax number would not lead to any practical changes, since this means of communication is already largely outdated and rarely used.</p> <p>The consumers should also not suffer any detriment from removing e-mail as a mandatory means of online communication, since this change would be accompanied with a requirement for traders to ensure, for any online means of communication, that the consumers retain the same functionalities that when using e-mail, namely to keep record of the communication on a durable medium.</p>
<p><b>Promote the smooth functioning of the internal market</b></p>
<p>Although the exact amount of cost savings cannot be estimated, the potential cost reduction for traders following these simplification measures could lead to price reductions and increase of consumer sales, including cross-border.</p>
<p><b>ADDITIONAL EFFECTS OF THE OPTION</b></p>
<p><b>Costs and savings for traders</b></p>
<p>No costs for traders; potential savings due to efficiency gains in communication with the consumers and due to fewer information requirements (no estimates available).</p>
<p><b>Costs and savings for authorities</b></p>
<p>None.</p>
<p><b>Degree of legal change required in MS</b></p>
<p>Since the relevant requirements are laid out in UCPD and CRD, all Member States will have to make minor adjustments in their national laws.</p>
<p><b>Legal coherence</b></p>
<p>The reduction of overlapping information requirements will enhance the consistency between the UCPD and CRD. Changing CRD rules on means of communication will be technology neutral and therefore future-proof, as reference will be made to other means of online communication that enables the consumer to retain the content of the communication rather than to specific technology.</p>
<p><b>Social impacts</b></p>
<p>No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration or for vulnerable consumers particularly.</p>
<p><b>Environmental impacts</b></p>

Not applicable.

#### 6.2.4. Options to address imbalances in the right to withdraw from distance and off-premises sales (driver 4)

*Option 1 (single option): Removing specific obligations for traders related to the right of withdrawal in the CRD*

HOW OPTIONS MEET OBJECTIVES
<b>Specific objectives</b>
<b>Eliminate unnecessary costs for compliant traders</b>
<p>Losses due to the CRD obligations (Article 14(2)) for traders to accept the return of goods that have been used during the right of withdrawal period more than authorised by the CRD ("unduly tested goods") and to reimburse consumers before having had the possibility to inspect the returned goods (Article 13) ("early reimbursement"), were investigated in the SME panel. SMEs reported annual losses on average of EUR 2 223 (median: EUR 100)<sup>197</sup> caused by the obligation to accept the return of "unduly tested goods". Four respondents estimated their losses to be on average EUR 1 212 (median: 0)<sup>198</sup> due to the "early reimbursement" obligation. The losses reported by the two responding large enterprises were EUR 1 000 and EUR 500 000 for the return of "unduly tested goods" and EUR 1 000 due to the "early reimbursement" obligation (1 response).<sup>199</sup></p> <p>This burden is likely to increase due to growing e-commerce and increasing consumer awareness about their withdrawal rights, as attested by the Consumer Conditions Scoreboard 2017.</p> <p>Whilst it is not possible to quantify the exact amount of costs savings, repeal of these obligations would reduce costs for traders.</p>
<b>General objective</b>
<b>Protect the economic interests of consumers and ensure a high level of consumer protection</b>
<p>The proposed changes would formally represent a reduction of consumer protection. In the public consultation, most consumer associations (14 of 15 respondents) and Member State authorities (12 of 16 respondents) considered the right of withdrawal for "unduly tested goods" and the right to early reimbursement as "rather" or "very important".</p> <p>However, this reduction of the protection would reduce the burden experienced by the SMEs, which was also recognised by a significant number of respondents from consumer associations and public authorities (see results of the SMS panel and public consultation in Chapter 2.4.5.).</p> <p>The removal of the "right to early reimbursement" is only relevant for consumers who would take the extra trouble of separately sending to the trader the proof that they have sent the returned goods back to the trader (rather than simply sending the goods back and waiting for the trader to receive them). Among these consumers, the removal of this right will only affect those that notify the trader of their withdrawal early in the 14-day withdrawal period, but then delay the sending of the good and of the proof of dispatch to the trader (according to the CRD, the consumer has to send the good back to the trader within 14 days from notifying the withdrawal). Only in these cases, since the CRD requires traders to reimburse the consumer within 14 days</p>

<sup>197</sup> Estimates ranged between zero and EUR 13 500. The highest estimate gave a micro enterprise from DK. The next highest estimates stemmed from a respondent in ES (EUR 12 000) and RO (EUR 10 000).

<sup>198</sup> Estimates ranged from zero to EUR 10 000.

<sup>199</sup> Question 1b in section C.1 of the SME panel consultation, see question in Annex 11, subsection 2.

<p>from the notification of the consumer's withdrawal, the trader may currently need to reimburse the consumer before actually receiving the returned goods. All other categories of consumers that exercise the right of withdrawal will not be affected by this proposed change.</p> <p>Repeal of the obligation to accept the return of unduly tested goods would also have the positive effect of eliminating disputes regarding the diminished value of the good and the resulting consumer's liability, which can go up to 100% of the value where the good cannot be resold.</p> <p>The removal of the right to return such goods would not affect the burden of proof as to whether the good has been unduly tested. This aspect is not regulated in the CRD. Under current rules, the burden of proof is relevant in: 1) deciding whether the good has been unduly used and 2) assessing the "diminished value" due to such a use. The removal of the consumer's right to return unduly tested good (in exchange for the obligation to pay for the diminished value) would eliminate disputes as to the diminished value, but would not affect the application of the burden of proof as to whether the good has been unduly used. As is the case already now, in the event of a dispute on this issue, consumers will have all the available redress opportunities (e.g. ADR, ODR, small claims procedure).</p>
<p><b>Promote the smooth functioning of the internal market</b></p>
<p>Although the exact amount of costs savings cannot be estimated, the potential cost reduction for traders could lead to price reductions and increase of consumer sales, including cross-border. The CRD evaluation concluded that, if consumers at a large scale exercise their right of withdrawal even after having used a good more than allowed, this affects the competitiveness of companies and leads to higher prices for consumers.</p>
<p><b>ADDITIONAL EFFECTS OF THE OPTIONS</b></p>
<p><b>Costs and savings for traders</b></p>
<p>See above.</p>
<p><b>Costs for authorities</b></p>
<p>Costs for dispute resolution bodies and public authorities are likely to diminish, since there will not be disputes about the calculation of the diminished value of returned goods.</p>
<p><b>Degree of legal change required in MS</b></p>
<p>All Member States will have to change their national law by removing the two relevant obligations on traders.</p>
<p><b>Legal coherence</b></p>
<p>The removal of the right to return unduly tested goods would increase legal clarity for consumers who currently may only discover their liability for the diminished value after exercising the right of withdrawal and returning the unduly tested goods (liability that may go up to 100% of the good's value).</p>
<p><b>Social impacts</b></p>
<p>No significant effects are foreseen in areas such as employment, health and safety, income distribution and good governance and administration.</p>
<p><b>Environmental impacts</b></p>
<p>The removal of the right to return unduly tested goods could contribute to more sustainable consumption patterns and reduce waste, since in many cases the unduly tested goods cannot be re-sold and have to be disposed of.</p>



## 6.3 Expected impacts on SMEs

### 6.3.1. Interventions to improve compliance with EU consumer law

Companies (almost all SMEs from 18 Member States) responding to the SME panel consultations showed support for stronger penalties and UCPD remedies. This is often in contrast to the critical views expressed by business associations in the public consultation and in general. It is also noteworthy that the views expressed by individual companies (from 15 Member States, most of which are SMEs and around 23% are large companies) responding to the public consultation were sometimes different from those expressed by business associations, with individual companies (around 23% of which are large companies) being usually less sceptical than business associations, although the difference is less striking there. A similar discrepancy had already been observed when assessing the replies from business associations and individual companies to the 2016 public consultation for the Fitness Check. Furthermore, SME panel's support for stronger penalties does not seem surprising in light of the finding of this IA that the current penalty systems, which are in most cases based on absolute maximum amounts, treat large and small companies in a highly disproportionate manner, to the disadvantage of the smaller ones.<sup>200</sup> This is also confirmed by the results of the SME panel indicating that only 20% to 25% of the SMEs considered the current level of fines as proportionate (p. 16, Chapter 2.3.3) and that around 80% of the SMEs support a turnover-based system (and only 16% prefer the maximum fine as a lump sum). It is also important to note some differences in the process of the consultations (public and SME panel): while public consultations are, in principle, purely self-selective, in the SME panel, Enterprise Europe Network partner organisations select the relevant companies that are best suited to respond to a given consultation from their region, based on the subject of the consultation. EEN partner's understanding of the topic of consultation, the ability to establish the relevance of the consultation for individual companies and the ability to convince those companies to respond are essential drivers for collecting replies. See further details on the SME panel process in Annex 2 point 4.3, and information on the respondents (profile, geographical coverage, size of companies) to consultations (OPC and SME panel) in Annex 2. points 4.2 and 4.3 respectively.

Based on the findings of the SME Panel, between 65% and 76% of (208) SMEs agree that stronger rules on **penalties** would contribute to a more level playing field.<sup>201</sup>

No less than 86% of (216) SMEs support introducing EU-wide rights to **remedies** under the UCPD.<sup>202</sup> 25% stated that the introduction of such EU-wide rights would encourage them to enter other EU markets, as it would eliminate current national regulatory fragmentation<sup>203</sup>. Indeed, when asked to assess the level of savings they could benefit of, if a new EU-wide rule would be introduced, Yearly savings of zero up to EUR 10 000, up to 40% in terms of turnover, are expected.<sup>204</sup> When asked to quantify costs linked to the resources they would need SMEs estimated on average yearly running costs, such as costs for legal advice, of EUR 8 484 (median: EUR 655) on average.<sup>205,206</sup>

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<sup>200</sup> See section 2.3.3.

<sup>201</sup> Question 3 in section B.2 of the SME Panel, see question in Annex 7, subsection 2.

<sup>202</sup> See Table 14 in Annex 8, subsection 2.

<sup>203</sup> Question 4 in section B.1 of the SME panel consultation, for information on the question see Annex 8, subsection 2.

<sup>204</sup> The highest percentage corresponded to a response from PL (absolute amount: EUR 4 000), the 2nd highest share 19.2% corresponded to EUR 1 915, estimated by a respondent from DE. Question 6 in section B.1 in the SME panel consultation, for information on question and responses see Annex 8, subsection 2.

<sup>205</sup> Estimates ranged from zero to EUR 190 497. Highest amount by a self-employed from DK. The 2nd highest value reported a small Portuguese enterprise (EUR 171 551). Also this value is considered as outlier. The average of the 12 estimates from this country amounts to EUR 18 102, the median is EUR 1 609.

<sup>206</sup> Values are based on responses to question 5 of section B.1 of the SME panel consultation see question and summary of responses in Annex 8, subsection 2.

Whilst no SME panel consultation has been conducted to specifically assess the impacts of strengthened **injunctives** for stopping breaches of EU consumer law, it is reasonable to assume that this measure would not lead to increased costs for compliant traders.

### 6.3.2 Interventions to modernise consumer protection rules and eliminate unnecessary costs for compliant traders

A majority of SMEs replying to the SME panel agrees that consumers should be informed about the identity (82% in favour) and legal status (81% in favour) of their contractual partner when buying on **online marketplaces**.<sup>207</sup> 84% agree that consumers buying on online marketplaces should be informed about whether EU consumer rights apply to their transaction. 35% of SMEs stated that introducing transparency requirements for online market places would encourage them to enter other EU markets, while 40% did not expect any significant impact on that decision and 22% did not know. Regarding yearly costs stemming from the possible introduction of such new transparency requirements, data show that the average and the median of estimates provided by the SMEs is, respectively, EUR 3 887 and EUR 0. Regarding the yearly savings, the average is EUR 391, with the median of such estimated savings being zero.<sup>208</sup>

In relation to "**free**" **digital services**, between 40% and 60% of SMEs replying to the SME panel said that the possible extension of the CRD rules to such services would have no impact on their decision to enter other EU markets, with between 8% and 13% stating that such harmonised rules would encourage them to enter other EU markets, whilst between 6% and 33% stated that this new regime would actually discourage them from doing so. Regarding yearly costs stemming from the possible extension of the CRD to free digital services, data show that the average of the estimates provided by the SMEs is EUR 8 367 for pre-contractual information and EUR 9 119 for the right of withdrawal, with the median of such estimates being EUR 33 (pre-contractual information) and EUR 50 (right of withdrawal)<sup>209</sup> Regarding the yearly savings, the averages are EUR 622 (pre-contractual information) and EUR 396 (right of withdrawal), with the median of such estimated savings being EUR 0 in both cases.<sup>210</sup> Such quantitative data, to be interpreted cautiously in light of their significant variance, nonetheless point to a reasonable cost-benefit balance emerging from the possible extension of CRD rights to the provision of free digital services too.

When it comes to the possible simplification of the rules on the **right to withdraw**, SMEs reported annual losses on average of EUR 2 223 (median: EUR 100)<sup>211</sup> caused by the obligation to accept the return of "unduly tested goods". Four respondents estimated their losses to be on average EUR 1 212 (median: 0)<sup>212</sup> due to the "early reimbursement" obligation. 50% of SMEs selling to consumers online (46 out of the 92 respondents) stated that they face disproportionate burdens at least 'sometimes' or 'rarely' due to their obligations related "unduly tested goods" and 40% (36 out of 90 respondents) stated that they face disproportionate burdens at least 'sometimes' or 'rarely' due to their obligation related to the "early reimbursement". This means that the possible removal of such imbalances would lead to corresponding yearly savings.

As regards **overlapping and outdated information requirements**, there was no SME panel consultation on these issues. In the public consultation, 9 of 15 SMEs agreed that information about the geographical address is necessary already at advertising stage but only 2 found so for the

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<sup>207</sup> Question 6 in section C.2 of the SME panel consultation, see question in Annex 8, subsection 2.

<sup>208</sup> Yearly costs estimates ranged from to EUR 84 300 (the maximum estimate stemmed from a small enterprise from PT, the other two estimates from that country amounted to zero and EUR 5 782), savings from zero to EUR 3 830.

<sup>209</sup> Indeed, SMEs estimates ranged from EUR 0 to 168 602 and such very diverging outcome appears to be strongly influenced by the very high maximum value estimated by a small enterprise from PT.

<sup>210</sup> Indeed, SMEs estimates ranged from EUR 0 to 5 242 for pre-contractual information and EUR 3 932 for right of withdrawal. When it comes to one-off savings, mainly linked to adjustments of the websites, SMEs estimated them, to amount to EUR 0 up to EUR 655, both for pre-contractual information and right of withdrawal.

<sup>211</sup> Estimates ranged between zero and EUR 13 500. The highest estimate gave a micro enterprise from DK. The next highest estimates stemmed from a respondent in ES (EUR 12 000) and RO (EUR 10 000).

<sup>212</sup> Estimates ranged from zero to EUR 10 000.

information about the complaint handling. However, the proposed removal of the obligation for traders to display the fax number will remove an obsolete EU rule that is unlikely to change the situation on the ground. By contrast, introducing the possibility for traders to use more modern communication tools, such as web-forms instead of e-mail address, should enable traders to make efficiency gains in their communication with consumers. However, no estimates of these gains are available.

## 7 COMPARISON OF THE OPTIONS

### 7.1. Improve compliance with EU consumer law

**Option 1** would address problem drivers 1 (ineffective mechanisms to stop and deter infringements) and 3 (ineffective mechanisms to tackle mass harm situations). Ensuring well-functioning enforcement mechanisms is key to improve compliance with EU consumer law.

**Option 2** would address the same problem drivers as package 1. In addition, it would also partially address problem driver 2 (ineffective mechanisms to ensure that consumers get redress for the harm suffered).

**Option 3** would address all three problem drivers, by also ensuring strengthened mechanisms for collective redress in mass harm situations..

As option 1 only addresses some of the drivers behind the problem of lack of compliance it cannot provide a full solution to this problem. It would contribute to improving compliance by strengthening enforcement, but it would not facilitate neither individual nor collective consumer redress, which could be another important incentive for traders to comply with consumer law.

Option 2 builds on option 1 and would ensure the synergetic effects of combining dissuasive penalties with UCPD remedies. Data shows that in Member States with higher penalties for UCPD infringements, introducing UCPD remedies make it roughly 3 times less likely to become a victim of unfair commercial practice than in countries with medium or low penalties.<sup>213</sup>

Option 3 builds on options 1 and 2. In addition, it includes strengthened mechanisms for collective redress. It would therefore provide stronger incentives for traders to comply with EU consumer law than options 1 and 2. The deterrent effect of remedies for victims of unfair commercial practices will be stronger with option 3 than with option 2: The 2017 Consumer Conditions Scoreboard<sup>214</sup> confirmed that consumers would be more likely to use UCPD remedies if they are also given access to a practical collective mechanism for a qualified entity to handle their case on their behalf.

The same reasoning applies if the aim is to reach the general objectives of **protecting the economic interests of consumers and ensuring a high level of consumer protection**. They would be best met by option 3, since this option would have the strongest impact in terms of improving compliance with EU consumer law. Stronger penalties, more effective injunctions procedures and better individual and collective redress possibilities are all ingredients for improving compliance with consumer law. For example, as the current situation shows, the existence of strong penalties alone does not guarantee better consumer conditions. Acting in all these areas is most likely to improve compliance and hence the overall level of consumer protection.

As concerns the general objective of promoting the **smooth functioning of the internal market**, all three options would contribute to fairer competition by not creating an unfair advantage for non-compliant traders versus compliant ones. However, the best overall results for compliant traders

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<sup>213</sup> See Section 6.1.2. on impacts of Option 2.

<sup>214</sup> The 2017 Scoreboard found that the main reasons for consumers not to act in case of problems are: excessive length of the procedures (for 32.5% of those who didn't take action); perceived unlikelihood of obtaining redress (19.6%); previous experience of complaining unsuccessfully (16.3%); uncertainty about consumer rights (15.5%); not knowing where or how to complain (15.1%); psychological reluctance (13.3%).

would be achieved by option 3, since the introduction of strengthened mechanisms for collective redress would further contribute to fair competition to the benefit of compliant traders.

Other positive effects can also be expected from option 3. This option would ensure more effective mechanisms for consumers to get redress when their rights under the UCPD have been infringed, both through individual and collective actions. This would be specifically helpful to vulnerable consumers and to deter misleading environmental claims, which would encourage sustainable consumption patterns in line with the Circular Economy Action Plan. Option 2 would also include positive impacts of UCPD remedies, but to a lesser extent since it does not include a strengthened mechanism for collective redress.

As concerns **efficiency**, all 3 options could lead to initial familiarisation costs, but also to savings for compliant traders. Data on costs and savings were gathered via the consultations for this IA. Overall, relatively few respondents provided quantitative estimates. For option 1, most respondents said that strengthening penalties will have no impact on their costs or could not reply to this question. Most business associations considered that the revision of the injunctions procedure (option 1) could increase the insurance premiums for coverage against claims in mass harm situations and could lead to increased use of the ID.<sup>215</sup> Option 2 includes the costs of option 1 and in addition those related to new rules on individual UCPD remedies. The median of the one-off costs, such as costs for legal advice assumed by SMEs for such remedies is EUR 638. The median of the annual running costs estimates is EUR 655. 9 of 15 MS authorities think the costs of administrative and judicial enforcement would increase to some extent.<sup>216</sup> Option 3 includes the costs of options 1 and 2, and also costs related to collective redress. National authorities were divided in their assessment of the implementation and running costs for courts and administrative authorities, but did not consider such costs significant. Qualified entities held mixed views, similar shares predicted increased and decreased costs. For compliant traders, the costs of introducing Option 3 would be insignificant and lowered for traders engaging in cross-border trade due to further harmonisation among the national procedures.<sup>217</sup>

Given that option 3 is the broadest, it also entails more costs than the other options. On the other hand, under all options there would be savings for traders when trading cross-border due to increased harmonisation of the rules. In particular, there would be increased clarity on the possible consequences for traders in case of non-compliance, which would lead to lower and more accurate risk-assessment costs. These savings would be bigger under option 3, as it has a wider scope than the other options. Costs for public enforcement authorities and courts under all options would include a possible increase in the number of enforcement and court cases. However, these costs are likely to be off-set by an overall reduction of breaches of EU consumer law and by the streamlining effects and procedural efficiencies introduced by all options. Such savings would be higher under option 3 due to its broader scope and greater deterrent effect.

As concerns **proportionality and subsidiarity**, all three options would require legal changes in Member States. Under option 1, a majority of Member States will need to change their legislation to introduce turnover-based penalties or to remove absolute caps where they exist, and to change their legislation transposing the ID to introduce improved procedural features for injunctive relief. This could be sensitive in some of these Member States. Options 2 and 3 would require all Member States to adjust their legislation. Firstly, requiring Member States to ensure that the specific remedies of contract termination and refund, as well as compensation for damages are available for breaches of the UCPD (options 2 and 3) would require amendments of national law in all Member States. Secondly, strengthening collective redress (option 3) would also require a degree of legal change in certain Member States, particularly in the nine Member States that do not have any

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<sup>215</sup> See detailed data in Section 6.1.1.

<sup>216</sup> See detailed data in Section 6.1.2.

<sup>217</sup> See detailed data in Section 6.1.3.

collective redress mechanisms. These EU interventions are likely to be sensitive in some Member States. Under option 2, legal changes to ensure collective redress mechanisms will not be required. EU action can therefore be expected to be less sensitive than with option 3, although the introduction of UCPD remedies could still raise concerns in some Member States.

The measures included in the different options also 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, whereas only a few business associations agreed. In contrast, in the SME panel, no less than 80% of the respondents considered that the most proportionate, effective 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.<sup>218</sup>

In the public consultation for the Fitness Check, most consumer associations, consumers and public authorities agreed that the ID should be made more effective. 45% of businesses agreed, compared to 12% of business associations.<sup>219</sup>

In the public consultation for this IA, a large majority of responding public authorities, consumer associations and consumers indicated that an EU-wide right to UCPD remedies should be introduced to ensure that traders comply better with consumer protection rules. On the other hand, support was low among business associations (35%) and individual companies (31%). In the SME panel consultation, 87% of respondents supported introducing an EU-wide right to UCPD remedies.<sup>220</sup>

In the ID survey, national authorities (88.6%) and consumer organisations (93.8%) strongly supported the addition of collective redress to the ID, whereas business associations were less supportive (15.8%).<sup>221</sup>

**Table 1: Comparison of the Options**

Comparison criteria	Detailed comparison criteria	Option 1	Option 2	Option 3
Effectiveness	Specific objective: improve compliance	+	++	+++
	General objective: High level of consumer protection	+	++	+++
	General objective: Smooth functioning of the internal market	+	++	+++
	Social impacts (vulnerable consumers)	0/+	+	++
	Impact on the environment	0/+	+	++
Efficiency <sup>222</sup>	Costs	0/-	0/-	-
	Savings	0/+	0/+	+
Proportionality and	Legal change required in	-	--	---

<sup>218</sup> See further data in Section 5.1.4.

<sup>219</sup> Idem.

<sup>220</sup> See further data in Section 5.1.5.

<sup>221</sup> See further data in Section 5.1.6.

<sup>222</sup> Data on costs and savings gathered via SME panel and targeted and public consultation. Relatively few respondents provided quantitative estimates.



subsidiarity	MS			
	Sensitivity in Member States	--	--	---
<b>Stakeholders' views:</b>	Consumer associations	+	+	+
	Citizens	+	+	+
	Public authorities	--+	--+	--+
	Business associations	-	-	-
	SMEs	+	+	+
	Large companies	-	-	-

The comparison shows that option 3 scores best in terms of effectiveness. This applies to both the specific and general objectives. Consequently, if the objective is to improve compliance with EU consumer law, option 3 should be the preferred option. This package has the highest costs, but these are likely to be off-set by savings. Overall, costs are not likely to be significant. However, option 3 would require the highest level of legal change in the Member States and will probably raise most political sensitivity.

Our consultations show that most business associations do not support any of the proposed measures, and hence do not support any of the options. In contrast, consumer associations and public authorities are generally supportive of all the options. Many SMEs support the measures on which they were expressly consulted, i.e. turnover-based penalties and individual remedies, which are both included in options 2 and 3 (no SME panel consultation was performed for the revision of the ID).

## 7.2. Modernise consumer protection and eliminate unnecessary costs for compliant traders

Four problem drivers have been identified in this area. For two drivers (overlapping or obsolete information requirements and imbalances in the right of withdrawal) only single options have been identified and analysed.

For the two other problem drivers (lack of transparency and legal certainty for B2C transactions on online marketplaces, lack of transparency, consumer protection and legal certainty for "free" digital services) there are two alternative options, of which one is promoting self- and co-regulation. Self- and co-regulation is not likely to achieve the objectives of modernising consumer protection rules and eliminating unnecessary costs for compliant traders. Options involving regulatory intervention are more likely to achieve these objectives.

Each of these options addresses problem drivers that other options do not address. They are therefore not mutually substitutable. The options could nevertheless be combined in different ways, such as for example by acting only on problem driver 2 and 4 or only on driver 3. However, acting only on some of the drivers would fail to address the other drivers, which would lead to keeping ineffective consumer protection rules and/or unnecessary costs for compliant traders. As an example, extending the CRD to cover "free" digital services will not help increase transparency on online marketplaces. It will also not, for example, remove imbalances in the right of withdrawal.

As a consequence, if the aim is to modernise consumer protection rules and eliminate unnecessary costs for compliant traders to the greatest extent possible, the best approach would be a package including all the relevant options, i.e.:

1. Providing transparency requirements for contract conclusion on online marketplaces.
2. Extending the CRD to cover "free" digital services.
3. Modernising overlapping and outdated B2C information requirements.
4. Removing specific obligations for traders related to the right of withdrawal in the CRD.

This package would contribute to a high level of consumer protection. It would strengthen consumer protection in B2C transactions on online marketplaces and in contracts for "free" digital services. It would also remove one specific information requirement that most consumers do not consider relevant before the pre-contractual stage of the transaction and would enable traders to use more efficient means of online communication with consumers. It would also remove obligations on traders to accept the return of unduly tested goods and to reimburse the consumer on the basis of a mere proof of sending the returned goods (early reimbursement).

Although some of these changes constitute a formal reduction of the level of consumer protection, the removal of the right for consumers to return unduly tested goods would have the positive effect of eliminating disputes regarding the diminished value of the goods. The removal of the "right to early reimbursement" is only relevant for those consumers who would take the extra trouble of separately sending to the trader the proof that they have sent the returned goods back. Among these consumers, the removal of this right will only affect those that notify the trader of their withdrawal early in the 14-day right of withdrawal period but then delay the sending of the good and proof of dispatch to the trader.

This package would also simplify EU consumer rules and thereby reduce unnecessary costs for compliant traders. The proposed interventions for online marketplaces and "free" digital services would ensure greater legal clarity in B2C relations and reduce costs for traders stemming from legal differences between Member States. Eliminating overlapping and outdated information requirements and removing specific obligations related to the right of withdrawal would reduce costs for traders due to current imbalanced rules.

Many stakeholders support new transparency requirements for contract conclusion on online marketplaces. Consumer associations and public authorities, citizens and the vast majority of companies and business associations agree that consumers buying on online marketplaces should be informed about the identity and status of the supplier. They also agree that platform transparency would increase consumer trust. Also a vast majority of SMEs is in favour of informing about the identity and legal status of the contractual partner. There is also support for platform transparency from business associations.<sup>223</sup> Some major online marketplaces report that the suggested new rules would bring some cost reduction, whilst others do not know. SMEs anticipated one-off savings of EUR 214 on average, while annual savings reported would amount on average to EUR 391. Of the four online marketplaces responding to a question on costs, two found that the costs for complying with new information requirements (one-off and running costs) were reasonable, one did not find them reasonable and one did not know. SMEs reported one-off costs of EUR 50 (median), and annual regular/running costs of EUR 0 (median).<sup>224</sup>

Most stakeholders support extending the CRD to cover "free" digital services. Traders support introducing information requirements, but are divided on the right of withdrawal. Business associations do not support the introduction of a right of withdrawal. SMEs estimated annual costs for new rules on "free" digital services at EUR 33 (median) for pre-contractual information and EUR 50 (median) for the right of withdrawal, yearly savings on average of EUR 622 for pre-contractual information requirements and EUR 396 for rules on the right of withdrawal. SMEs indicate that potential future costs related to rules on "free" digital services would have no impact on their decision to enter other EU markets. Business associations estimated future implementation costs as unreasonable.<sup>225</sup>

Business associations support the deletion of overlapping B2C information requirements from the UCPD. Consumer associations are against this proposed intervention. Most of the public authorities

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<sup>223</sup> See Section 5.2.3 for detailed breakdowns of this data.

<sup>224</sup> See further data in Section 6.2.1.

<sup>225</sup> See further data in Section 6.2.2.

consider that information about the trader's address is important also at the advertising stage and should therefore be kept in the UCPD, but that information about complaint handling is not important at that stage.<sup>226</sup> Stakeholders largely support replacing the current requirement for e-mail address with a technologically neutral reference to means of online communication and removing the requirement to provide a fax number. No costs are foreseeable for traders. Most business associations agree that the removal of the requirement to inform consumer already at the advertising stage about complaint handling procedures would give savings for companies. However, very few replies quantified the estimated savings.<sup>227</sup>

35% of online companies report significant problems due to specific obligations for traders related to the right of withdrawal. A majority of business associations confirmed that traders face disproportionate/unnecessary burden resulting from these obligations. In the SME panel, close to half of self-employed, micro, small companies selling to consumers online reported disproportionate burdens. However, the majority of consumer associations, MS authorities and citizens do not support removing these trader obligations. SMEs report annual losses on average of EUR 2 223 caused by the legal obligation to accept the return of "unduly tested goods". Four SMEs estimated on average losses of EUR 1 212 due to the "early reimbursement" obligation. Losses estimated by the two responding large enterprises were EUR 1 000 and EUR 500 000 respectively for the return of unduly tested goods" and EUR 1 000 due to the "early reimbursement" obligation.<sup>228</sup>

**Table 2: Comparison of the Options**

Comparison criteria	Detailed comparison criteria	Transparency on online marketplaces		Free digital services		Overlap and outdated information requirements	Imbalances in the right of withdrawal
		Option 1	Option 2	Option 1	Option 2	Option 1	Option 1
Effectiveness	Specific objective: Modernise consumer protection	0	+++	0	+++	+	0
	Specific objective: eliminate unnecessary costs for compliant traders	0	+	0	+	+	+++
	General objective: High level of consumer protection	0	+++	0	+++	0	0/-
	General objective: Smooth functioning of the internal market	0	+++	0	+	+	++
	Social impacts (vulnerable consumers)	0	+	0	+	0	0
	Impact on the environment	0	+	0	0	0	+

<sup>226</sup> See further data in Section 2.4.4.

<sup>227</sup> See further data in Section 6.2.3.

<sup>228</sup> See further data in Sections 5.2.6 and 6.2.4.

Efficiency <sup>229</sup>	Costs	0	0/-	0	0/-	0	0
	Savings	0	0/+	0	0/+	+	+++
Proportionality and subsidiarity	Legal change required in MS	0	-	0	-	0/-	-
	Sensitivity in Member States	0	0	0	0	0	0/-
<b>Stakeholders' views</b>	Consumer associations	0	++	0	++	0	--
	Citizens	0	+	0	+	0	-
	Public authorities	0	+	0	+	+	0
	Business associations	+	+	+	-	+	++
	SMEs	+	+	+	0	+	++
	Large companies	+	+	+	0	+	++

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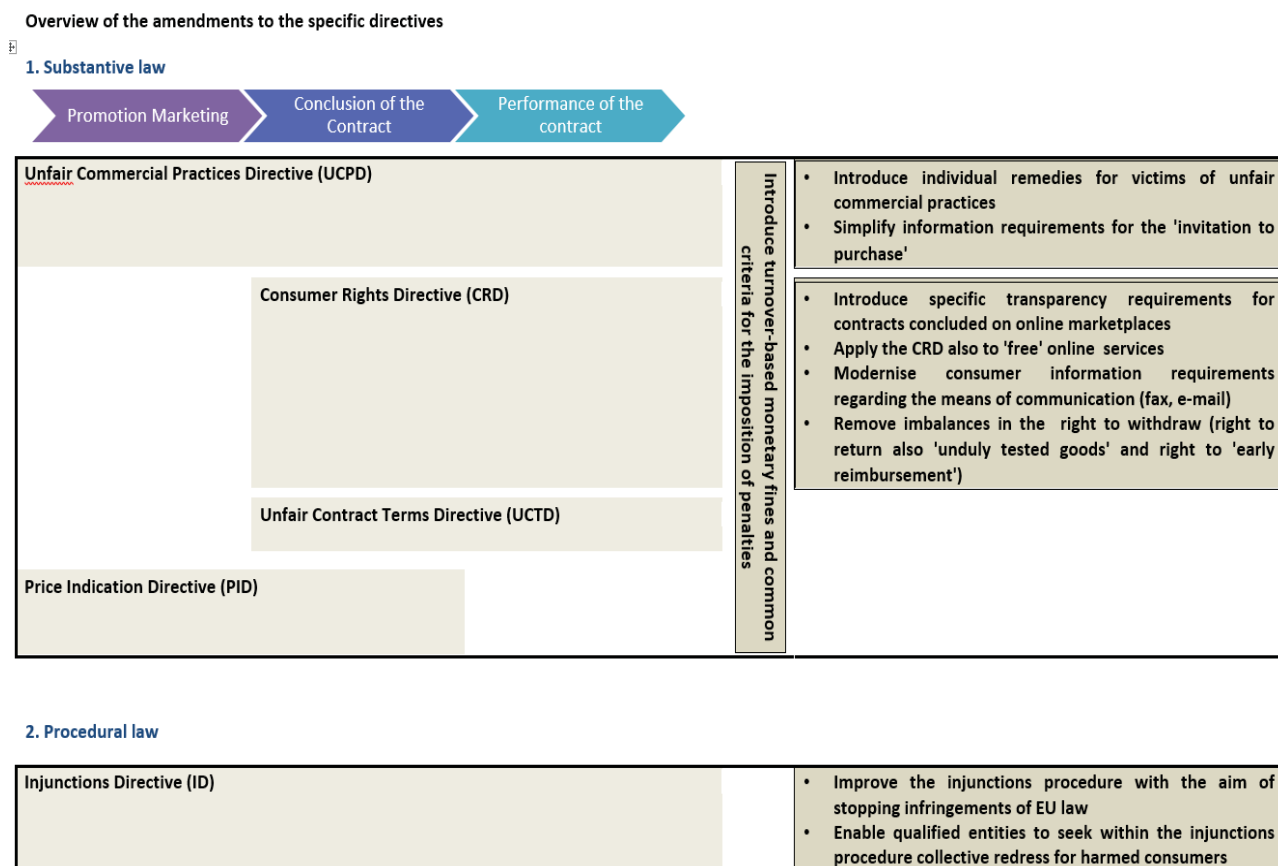
<sup>229</sup> Data on costs and savings gathered via SME panel and targeted and public consultation. Relatively few respondents provided quantitative estimates.

### 7.3 Preferred package of Options

Having compared the options, the preferred package would include:

- To improve compliance with EU consumer law:  
**Option 3** (improving enforcement and individual and collective consumer redress).
- To modernise consumer protection rules and eliminate unnecessary costs for compliant traders:  
 A package including all the relevant interventions (providing specific transparency requirements for contract conclusion on online marketplaces, extending the CRD to cover "free" digital services, modernising outdated and overlapping B2C information requirements and removing specific obligations for traders related to the right of withdrawal in the CRD).

**Figure 4. Overview of proposed amendments to specific directives<sup>230</sup>**



## 8 PREFERRED PACKAGE OF OPTIONS AND OVERALL IMPACTS

### 8.1 Brief overview of the impacts of the preferred packages of Options

In the area ensuring better compliance with consumer legislation the preferred Option 3 should lead to a reduction of consumer detriment and greater consumer trust. There should also be a positive impact on the protection of vulnerable consumers and on the environment. As regards traders, it will promote fairer competition to the benefit of compliant traders. Certain costs are expected for both traders and authorities to familiarise with the new rules and to implement them. Legal changes will be required in national laws but these should result in better legal coherence both among the consumer law instruments at stake and with other relevant EU law.

<sup>230</sup> For the CSGD, impact on the progress of the legislative negotiations on the amended proposal COM(2017)637 of 31 October 2017 would need to be taken into account.



In the area of modernising consumer protection rules and eliminating unnecessary costs for compliant traders, the package of preferred options should lead to better consumer protection when using online marketplaces and free digital services. For traders, it will eliminate costs related to diverging requirements but also raise some implementation costs in area of online marketplaces and "free" digital services. The modernisation and simplification of information requirements will provide some savings for businesses without reducing the level of consumer protection in practice. The intervention regarding the right of withdrawal is important to alleviate the unjustified burden on businesses, in particular SMEs. It entails a formal reduction in the level of protection but its impacts are limited and it also has some positive effects such as reduction of disputes. In general this reform is needed to instil more balance in the right of withdrawal now that the levels of eCommerce have significantly increased and consumers are more aware about their withdrawal rights. Some legal changes will be required in national laws but these should result in better legal coherence both among the consumer law instruments at stake and with other relevant EU law.

## 8.2. Synergies of the proposed interventions

In addition, the combined package of preferred Options in both areas of better compliance and modernisation/burden reduction are expected to lead to strong synergies.

To illustrate the synergies of this combined package, both the suggested new rules on transparency for contract conclusion on online marketplaces and for "free" digital services would introduce new specific requirements for online traders to provide information to consumers. The suggested new rules on enforcement and redress would give traders strong new incentives to avoid breaching these information requirements. Firstly, in case of a widespread infringement, the trader would be subject to deterrent and proportionate turnover-based fines for breaches of the new information rules. Secondly, in addition to breaching the specific new information requirements the trader could omit "material" information required by the UCPD (Article 7(5) UCPD). With the suggested new rights to UCPD remedies, consumers could then take individual action against the trader to ensure effective redress.<sup>231</sup> Thirdly, if several consumers have been affected by the breach of the new information requirements, the revision of the ID would create an effective tool to enforce their rights collectively by stopping breaches and ensuring redress for the victims.

The combined package of Options would also lead to greater awareness about consumer rights, which is a major factor for their effective exercise. For instance, greater transparency when using online marketplaces would ensure that consumers are informed about the important differences between consumer rights and rights in consumer-to-consumer contracts. Stronger rules on public enforcement and consumer redress would mean that consumer rights infringements could attract more media attention. With the proposed new rules on the injunction procedure, traders would be obliged to inform, at their expense, the affected consumers about the breach as established by a definitive injunction order, the legal consequences of the breach and redress opportunities under the collective redress order or approved collective settlement. Such publicity would likewise improve consumer redress and contribute to greater awareness among consumers and traders about their rights and obligations.

Strengthened penalties and more effective redress opportunities for consumers would also be essential for enforcement co-operation in cross-border cases under the revised CPC Regulation. Specifically, the implementation of all the measures contained in the preferred package of Options that relate to improving compliance would increase deterrence for traders that could otherwise breach consumer law in several Member States. With this package, they would get incentives to offer voluntary commitments to settle infringement cases in the context of coordinated CPC enforcement actions.

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<sup>231</sup> If it can be established – on a case-by-case basis – that the trader has committed an unfair commercial practice by omitting this information.

A multivariate analysis has been conducted on data from the Consumer Conditions Scoreboard 2017 regarding UCPD remedies.<sup>232</sup> It suggests that the effect of remedies is positively correlated with the effectiveness of public monitoring (enforcement).<sup>233</sup> For countries showing the highest level of public monitoring, the estimated effect of linking remedies to breaches of the UCPD corresponds to a reduction of 21.4 percentage points in the probability of experiencing an unfair commercial practice, i.e. more than five-fold the estimated unconditional effect of remedies.<sup>234</sup> Equally, the effect of remedies linked to UCPD breaches on the likelihood to have experienced an unfair practice is strongly amplified in countries imposing a high level of sanctions for such breaches. This indicates that when combined with effective enforcement and/or dissuasive sanctions, redress can be a powerful driver for better compliance with the UCPD.

There are also strong synergies between rights to UCPD remedies and collective injunctions and redress. Since consumers are generally reluctant to initiate individual redress actions, more consumers would be likely to use new rights to remedies under the UCPD if they also have access to a mechanism where a qualified entity can handle their case on their behalf.

### **8.3. Potential risks, unintended consequences and trade-offs under the Preferred Options**

#### **8.3.1 Improve compliance with EU consumer law**

As described in Section 2.5, these proposed interventions aim at aspects of the problem that many traders do not comply with EU law that cannot be adequately addressed through non-legislative interventions. This preferred Option is intended to complement other actions that are or have been taken to meet the needs identified in the Fitness Check, CRD Evaluation and Collective Redress Report to ensure better knowledge about EU consumer law, strengthened enforcement and easier possibilities for consumer redress. Accordingly, there could be a risk that this preferred Option will not achieve its full potential if other interventions that form part of the same puzzle, such as awareness raising activities and stepped-up enforcement through common actions by national enforcers under the revised CPC Regulation, are not ensured. However, as described in Sections 2.1 and 2.2, a number of measures have been undertaken to ensure that these initiatives will deliver successfully.

There is also a risk that the potential of this preferred Option may not be fully reached if Member States fail to allocate enough resources to ensure their adequate implementation. This is notably the case for the proposed new rules for penalties. If Member States do not ensure that the competent authorities have sufficient capacity to deal with infringements, the deterrent effect of stronger penalties will not be achieved.

Some stakeholders have also expressed concerns that approximating rules on penalties could take some flexibility away from competent national authorities and make it more difficult for them to apply the most adequate penalty. These concerns are addressed by requiring the existence of fines and harmonising their level only for the most important cross-border infringements of EU consumer rules, which are subject to coordinated action by national authorities through the CPC network. Even in these cases, Member States may go beyond the proposed minimum rules if they consider that even stronger penalties are appropriate. For all other infringements, the preferred option only envisages common criteria for the imposition of penalties, stressing the cross-border aspect, without, however, harmonising the level or type of penalties.

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<sup>232</sup> Source: JRC Technical Report "An analysis of the influence of remedies and sanctions on consumers' exposure to unfair commercial practices and shopping problems". A general description of the methodology is provided in Annex 4 and the full JRC report is included in Annex 14.

<sup>233</sup> Measured through the following indicator from the CCS2017: "% of retailers who agree that public authorities actively monitor and ensure compliance with consumer legislation in their sector".

<sup>234</sup> The unrounded figure is -21.4358.

As concerns the suggested new rules for collective consumer redress, some stakeholders have argued that strengthened mechanisms for private redress could lead to increased costs for traders because of abusive litigation (frivolous claims). The 2017 Study on collective redress found that stakeholders' views were split when it came to possible risks of abusive litigation associated with collective redress, with 51% of respondents agreeing and 49% disagreeing that there are such risks. However, when asked about the actual materialisation of such risks, 77% of all respondents reported that they had never experienced any instance of abusive litigation. This suggests that these concerns are rather hypothetical. The Fitness Check did also not find evidence to suggest that qualified entities have displayed any form of frivolous action in the context of the ID or that they would risk their status as qualified entities to bring such claims. Any such risks under the suggested new rules would also be mitigated by proposed safeguards against abusive litigation, notably specific criteria for the designation of qualified entities and requirements for qualified entities to be transparent about the origin of the funds used to support litigation. In redress cases, the court/authority would also scrutinize the merits and extent of the mass harm alleged by the qualified entity.

It has also been argued that the envisaged wide scope of the revised ID could involve a risk of decreased legal certainty for traders, as it could be unclear how to identify which provisions of EU law could be enforced through the revised injunctions procedure and strengthened mechanisms for collective redress. However, this risk is mitigated by the fact that the ID would not create any substantive rights or obligations. It would only provide procedural mechanisms for the protection of the collective interests of consumers. It would only be possible to bring representative actions for redress under the ID where EU or national law provides for such substantive rights. As a consequence, the revised ID would not decrease legal certainty when it comes to which obligations traders need to respect vis-à-vis consumers or which infringements could trigger litigation.

Some stakeholders have raised concerns that strengthened mechanisms for individual and collective consumer redress could lead to increased costs for Member States due to more consumers taking their cases to court. However, such costs are likely to be mitigated by fewer infringements following the increased deterrent effect of the Preferred Option in the area of better compliance, which would improve enforcement and individual and collective consumer redress. The proposed procedural mechanisms would also lead to judicial and administrative efficiency, by ensuring a single procedure for measures to stop infringements and eliminate their continuing effects.

### **8.3.2 Modernise consumer protection and eliminate unnecessary costs for compliant traders**

As regards online marketplaces, stakeholders such as consumer associations and some public authorities have argued that there is a need to go beyond the suggested new rules on transparency and also introduce rules on liability for online marketplaces for the performance of contracts concluded by consumers with third party suppliers. However, such liability is not considered in this IA, as it could be incompatible with the approach laid down in Article 15(1) of the e-Commerce Directive.

The suggested rules for online marketplaces could possibly bring a risk of disproportionate costs for smaller platforms. Notably, changing the interfaces to enable third party traders to self-declare whether they act as traders or not could be relatively more costly for small marketplaces, which would not benefit from the same economies of scale as bigger companies. Similarly, small traders which sell on platforms might face relatively higher costs when complying with the new rules. These risks will be mitigated by a transition period until full application of the new requirements, during which small online marketplaces and traders can adapt their business models.

There is a risk that introducing requirements for specific sales-channels, such as online marketplaces, could be less future-proof than requirements that are completely technology neutral. In this case, this risk would be outweighed by the benefits of the proposed transparency requirements. Online marketplaces are central actors in the current economy and there is ample evidence that both consumers and traders suffer from lack of transparency when concluding

contracts on such marketplaces. There is therefore a clear case for a legal intervention on this technology-specific topic.

Some business associations consider extending CRD rights to pre-contractual information and to withdraw from contracts to “free” digital services as over-regulation, since consumers do not pay for such services with money and there would be some costs for traders. However, these concerns would be outweighed by the added value of ensuring users of “free” digital services these key consumer rights, and by added legal clarity from coherent rules for digital services with or without payment and for digital content under the CRD and the future Digital Contracts Directive.

Some business associations also claim that a right of withdrawal for contracts for “free” digital services under the CRD is not necessary, since it overlaps with EU data protection rules. However, as can be seen from the description of the interplay with the GDPR in subsection 2 of Annex 11, the extension of the CRD right of withdrawal proposed in this IA would rather complement than duplicate the rights stemming from EU data protection rules. Furthermore, not granting consumers with an EU right of withdrawal would entail the risk that barriers will increase, as it would be left to the Member States to determine whether any consumer protection should exist on this aspect. Consumers would not be as protected as they are for similar products concerning the right to change their mind and withdraw from the contract. Without EU intervention on the right of withdrawal for "free" digital services, the legal framework would become even more fragmented, with EU harmonised rules on pre-contractual information - identical to those applicable to similar products such as paid services and digital content and differing rules regulating only one aspect of "free" digital services.

As concerns reducing burdens for traders, some consumer associations and Member States will be critical to changing the right of withdrawal, particularly as regards the right to return unduly used goods. Although there is a trade-off between consumer protection and reduction of burdens for traders on this point, the changes will affect only those consumers who are not diligent or even abuse the withdrawal right by not exercising the required level of care. Many consumer associations (7 of the 16 responding to a question about this in the public consultation) acknowledge that the current right of withdrawal for unduly tested goods creates disproportionate burdens for traders. This revision will also be in line with the original purpose of this consumer right, which is, as clarified in Recital 37 of the CRD, that there should be a right to withdraw from distance sales because “the consumer is not able to see the goods before concluding the contract” and from off-premises contracts because of “the potential surprise element and/or psychological pressure”. By adjusting the right to return goods that consumers have tested more than necessary, this intervention would lead to a better balance between the obligations of traders and rights of consumers.

#### 8.4. REFIT (simplification and improved efficiency)

<i>REFIT Cost Savings – Preferred Option(s)</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
More dissuasive and proportionate <b>penalties</b>		No quantified data on efficiency gains are available but in the SME Panel consultation, an overwhelming majority of respondents (between 66% and 76 %) agreed that stronger rules on penalties would increase the level playing field between traders.
Require MS to ensure <b>remedies</b> for victims of unfair commercial practices	Average of estimated one-off savings: EUR 1 405 (range: 0 - EUR 24 176) for SMEs; EUR 250 (range: 0 - EUR 1 000) for large enterprises  Average of estimated annual savings: EUR 704 (range: 0 - EUR 10 000) for	Estimated one-off and annual savings for traders, based on responses to the SME panel consultation.

	SMEs; 0 for large enterprises.	
Strengthened <b>collective injunctions and redress</b>		No quantified data on efficiency gains are available. In the ID survey, 53% of all respondents considered that the introduction of Option 4b would have a positive impact on procedural efficiencies; 49% of all respondents considered that Option 4b would have a positive impact on creating a more level playing field.
Increase transparency on <b>online marketplaces</b>	Average of estimated one-off savings: EUR 214 (range: 0 – EUR 3 192) for SMEs. <sup>235</sup>  Average of estimated annual savings: EUR 391 (range: 0 – EUR 3 830) for SMEs. <sup>236</sup>	Estimated one-off and annual savings for traders, based on responses to the SME panel consultation.
Improve fair competition and consumer protection for <b>"free" digital services</b>	Average of estimated one-off savings: EUR 109 for pre-contractual information, EUR 74 for right of withdrawal (range: 0 – EUR 655, both for pre-contractual information/right of withdrawal), for SMEs. <sup>237</sup>  Average of estimated annual savings: EUR 622 (range: 0 - EUR 5 242) for pre-contractual information, EUR 396 (range: 0 - 3 932) for right of withdrawal, for SMEs. <sup>238</sup>	Estimated one-off and annual savings for traders, based on responses to the SME panel consultation.
Modernise some B2C information requirements – removal of trader's obligation to provide <b>information about complaint handling</b> at the advertising stage		Very limited quantitative data available, however views expressed by business associations suggest some to significant savings for companies.
Modernise some B2C information requirements – removal of trader's <b>obligation to display the fax number</b> and enable <b>more modern means of communication</b> (such as web-form) instead of email address		Very limited quantitative data available, however the fact that a large number of traders already offer these modern means of communication to consumers (in parallel with e-mail address) suggests that they do generate efficiency gains compared to the use of e-mail. Removal of the obligation to display fax number may have no effects on costs as currently it is mandatory information only for those – rather few – traders that might still use fax in their communication with consumers.
Remove some	Average of estimated annual losses due to	Estimated annual losses for traders, based

<sup>235</sup> No estimates received from large enterprises.

<sup>236</sup> No estimates received from large enterprises.

<sup>237</sup> No estimates received from large enterprises.

<sup>238</sup> No estimates received from large enterprises.



<p>imbalances in the right of withdrawal – removal of trader's <b>obligation to accept the return of the goods under the right of withdrawal even when the consumer has used such goods more than permitted</b></p>	<p>this obligation: EUR 2 223 (range: 0 – EUR 13 500, median: EUR 100) for SMEs.<sup>239</sup></p>	<p>on responses to the SME panel consultation. Besides the limited number of cost savings estimates, views from business associations and companies also suggest that traders and in particular SMEs will benefit from a reduction of the burden.</p>
<p>Remove some imbalances in the right of withdrawal - removal of trader's <b>obligation to reimburse consumers before having had the possibility to inspect the returned goods</b></p>	<p>Average of estimated annual losses due to this obligation: EUR 1 212 (range: 0 – EUR 10 000, median: 0) for SMEs.<sup>240</sup></p>	<p>Estimated annual losses for traders, based on responses to the SME panel consultation. Besides the limited number of cost savings estimates, views from business associations and companies also suggest that traders and in particular SMEs will benefit from a reduction of the burden.</p>

## 9 MONITORING AND EVALUATION

The Commission will evaluate the effectiveness, efficiency, relevance, coherence and EU added value of this intervention. In order to monitor and evaluate the progress made towards the objectives of this initiative, core progress indicators have been identified and are listed in the below Table. 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<sup>241</sup>. 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 as indicated in the Table below with specific groups of stakeholders (consumers, qualified entities, online marketplaces, traders providing "free" digital services). 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.

The costs of this monitoring should be borne by DG JUST within their operational expenditure. 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 indicators on the table below 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

<sup>239</sup> Only two large enterprises provided estimates: EUR 1 000 and EUR 500 000, the outlier stemming from an estimate of a large enterprise in EE (both the other two responding SMEs from that country estimated zero losses).

<sup>240</sup> The only large responding enterprise from EE estimated EUR 1 000.

<sup>241</sup> Their methodology was statistically audited and developed with scientific support from the JRC, leading to robust indicators that correlate well with other relevant economic indicators.

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.

The following Table 2 provides an overview of the monitoring indicators, sources of data and targets. The date indicated for target indicators is "5 years after entry into application" to enable data processing and preparation of the evaluation 5 years after entry into application, as indicated above.

**Table 2: monitoring of general and specific objectives**

Objectives		Monitoring indicators	Sources of data and/or collection methods	Baseline
General	Promote the smooth functioning of the internal market	% of retailers thinking that <b>differences in national consumer protection rules constitute an obstacle</b> to the development of online sales to other EU countries	Consumer Scoreboard; Bi-annual retailers survey (Q3.a2 in 2016)	37.4% (2016)
		% of consumers <b>feeling confident purchasing goods or services</b> via the Internet from retailers or service providers in other EU country	Consumer Scoreboard; Bi-annual consumer survey (Q17 in 2016)	57.8% (2016)
Specific	Improve compliance with EU consumer law	% of consumers having <b>experienced any problem</b> when buying or using any goods or service (where they thought they had a legitimate cause for complaint)	Consumer Scoreboard; Bi-annual EU-wide Consumer survey (Q9 in 2016)	20.1% (2016)
		% of retailers who agree that <b>competitors comply with consumer legislation</b> in the their country	Consumer Scoreboard; Bi-annual retailers survey (Q10 in 2016)	67.1%(2016)
		Number of consumers <b>taking action to solve their UCPD-related problems</b>	Consumer survey 4 years after entry into application (similar to the consumer survey for the Fitness Check)	27%(2016)
		Number of consumers who <b>could not solve their UCPD-related problems</b> (did not get remedies)	Consumer survey 4 years after entry into application (similar to the consumer survey for the Fitness Check)	18% (2016)
		Number of <b>actions</b> brought by qualified entities under the revised ID	Survey of qualified entities 4 years after entry into application  According to the Recommendation on collective redress MS should collect statistics on annual basis	29 qualified entities from 21 MS brought 5 763 actions under the ID in the five year period since June 2011. These cases included amicable settlements.
Specific	Modernise consumer protection rules and eliminate unnecessary costs for compliant traders	Number of consumers understanding who their contractual partner is and what their rights are when using online marketplaces	Survey 4 years after entry into application	Almost 60% of consumers using online platforms are not sure who is responsible when something goes wrong

Objectives		Monitoring indicators	Sources of data and/or collection methods	Baseline
		Number of online marketplaces reporting costs due to diverging national requirements regarding identity and legal status of third party suppliers and the applicability of consumer law	Survey 4 years after entry into application	Around a third of online marketplaces report costs due to diverging information requirements
		Number of consumers experiencing problems when using " <b>free</b> " <b>digital services</b>	Consumer survey 4 years after entry into application	48%(CRD study 2016); 30% (Digital Content Study, 2015)
		Costs for traders due to diverging rules on information requirements and right of withdrawal for " <b>free</b> " <b>digital services</b>	Survey 4 years after entry into application	60% of business associations stated that companies incur such costs (2017)