Public consultation on the targeted revision of EU consumer law directives

Answer of the poles of expertise "Contract, Consumer, E-commerce Law" and "Intellectual Property and Digital Law" of the network "Trans Europe Experts" https://www.transeuropexperts.eu

2.1 Clearer consumer rules for the digital economy

2.1.1 Platform transparency

General Observation

Questions 61 to 80 of the consultation on the transparency of platforms are not based on a general definition of platforms, but rather on the definition of a specific category of platforms: "marketplaces". These marketplaces are defined as follows: "An 'online marketplace', in the following questions, is a service provider which allows consumers and traders to conclude online sales and service contracts on its website".
This definition is followed by the assertion that: "The Fitness Check and the evaluation of the Consumer Rights Directive (CRD) showed that some consumers are confused when using online marketplaces. Firstly, it often seems unclear whether consumers buy from the platform itself or from someone else. Secondly, it is often not clear whether the contracting partner acts as trader and is therefore subject to EU consumer law or as a non-trader, against whom EU consumer rights cannot be invoked. For example, in a case leading to a reference for a preliminary ruling at the Court of Justice of the European Union, a consumer buying on a platform was denied the right to withdraw from the contract under the Consumer Rights Directive. Only then did the consumer learn that the seller was claiming not to be a trader (Case C-105/17 Kamenova)".

Limiting the scope of this consultation on the revision of consumer law directives to marketplaces, while it might apply to other types of platforms, could present a missed opportunity.

For these reasons, French law has adopted a broad definition of online platform operators which can be found in article L.117-7 of the Consumer Code[1], and which is not solely limited to marketplaces. This extensive definition highlights distinctive features of online platforms as intermediaries and "infomediaries" to deal with all types of platforms, whether they are a marketplace, a social network, a search engine, or a platform based on collaborative economy principles. Besides, the general legal obligation is adapted by the decrees implementing the law, depending on platform activities, on the marketplace being considered, and on the very nature of their activities.

[1] Article L111-7 of the French Consumer Code, as amended by the Macron Act of 6 August 2015 and the Digital Republic Act of 7 October 2016, defines as an online platform operator "any natural or legal person offering on a professional basis, on a monetary or non-monetary basis, an online communication service to the public based on:
1. The classification or referencing, by means of computer algorithms, of contents, goods or services proposed or put online by third parties;
2. The connection of several parties in order to sell a good, provide a service, or exchange or share a content, a good or a service."

Observations on questions 65 to 68 of the Consultation

To enable consumers to identify who is really the other party when contracting through an online platform, it may be desirable to develop at European level a rule inspired by French solutions that tend to platforms transparency.

Due to the lack of transparency on the functioning of platforms, the new articles L.111-7, L. 111-7-1 and L.111-7-2 of the Consumer Code impose a duty of loyalty upon the platform. Specifically, the new article L.111-7 of the Consumer Code not only provides a definition of online platforms, but it also places a duty of trustworthiness towards consumers from the platform operators to help reducing the informational asymmetry that exists between platforms and users. This obligation is two-folded in order to better tackle the different practices.

First, this duty to inform relates to the general terms and conditions of use, or to the arrangements for referencing, classification and dereferencing online offers (especially the existence of a contractual relationship, a capitalist link or remuneration for benefit, if they influence the ranking or referencing of content, goods or services offered on the platforms).

Second, article L.111-7-2 contains a provision requiring websites upon which online opinions are posted to indicate explicitly whether the opinions the website publishes have been subject to a checking process. It states that, if the website makes such checks, it has the obligation to clearly specify the main methods used as part of the checking process. Making this information available in advance should therefore enable consumers to assess the extent to which they should trust the opinions made available to them, and, by extension, the website publishing them.

These various duties to inform are accompanied by the traditional sanctions of the Consumer Code in the event of a violation of the duties to inform[2], but also by incentives for good practices.

To ensure that the principles of trustworthiness and transparency are fully effective, article L.111-7-1 of the Consumer Code encourages platforms with large audiences to define best practices, to reference indicators, and to regularly publish assessments of their own practices. This aims at making them play the role of virtuous leaders, and at avoiding the introduction of high market entry barriers for new entrants.
To ensure that the measure is reserved to the most important platforms, the article also provides for a decree to set the connection threshold beyond which online platforms will be subject to these obligations.
The assessment mechanisms of these best practices are entrusted to the regulators. The competent authority has the power to investigate and to assess the best practices of online platforms, to make their assessment public, and to establish a list of platforms that do not respect their obligations. With this "naming and shaming" tool, the reputational lever could be used to promote fair practices by platforms and enhance consumers' confidence.

[2] Art. L.131-1 et seq. Consumer Code.

Observations on question 79 of the Consultation

To the question: "If a new EU rule was introduced requiring online marketplaces to inform consumers about who their contracting party is and whether they enjoy EU consumer rights vis-à-vis that person, what should be the consequences if an online marketplace fails to comply with these requirements?", the ECJ *Wathelet* Case[3] brings an answer full of potential and promise.

In its Decision, the Court states that "the concept of "seller", for the purposes of article 1(2)(c) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, must be interpreted as covering also a trader acting as intermediary on behalf of a private individual who has not duly informed the consumer of the fact that the owner of the goods sold is a private individual, which it is for the referring court to determine, taking into account all the circumstances of the case. The above interpretation does not depend on whether the intermediary is remunerated for acting as intermediary".

This solution could also apply to online platforms that have not adequately informed the consumer that they are not their true supplier.

2.1.2 Free online services

General observation: there is a need to combine the scope of the existing directives with the future directives regarding consumer law

Questions 81 to 102 regarding free online services refer to the following definition: « "Free" online services in the following questions refer to online services for which consumers do not pay with money but provide data (e.g. cloud storage, e-learning, social network services, when consumers allow the trader to use their pictures) ».

This definition is followed by the statement that « The rules under the Consumer Rights Directive (CRD) on pre-contractual information requirements for traders and the 14-days right of withdrawal for consumers apply to all contracts for online provision of digital content (e.g. downloads of software, movies or songs) irrespective of consumer's payment with money. On the other hand, these CRD rules currently only apply to contracts for the supply of online services (such as subscription to cloud storage or social networks) for which the consumer pays with money. This calls for discussion as to whether the protection under the CRD should be extended to contracts for online services for which the consumer provide data and does not pay with money. In this respect, the upcoming EU rules on consumer remedies regarding 'defective' digital contents and services (rules that are currently negotiated by the European Parliament and the Council) may cover online services, irrespective of whether the consumer pays with money ».

This statement, which scope should be clarified in light of the wording of the 2011 Directive on consumer rights, highlights the need to combine the pre-existing directives on consumer law with the future directives on the same topic, in particular with the proposal for a Directive concerning contracts for the supply of digital content. Within the scope of this proposal, these contracts could be concluded indifferently in exchange of the payment of a price or without the payment of a price.

[3] ECJ Decision of 9 November 2016 in Case C‑149/15, Sabrina Wathelet v. Garage Bietheres & Fils SPRL.

Moreover, at this stage of the negotiating process (version of June 2017), the proposal concerning contracts for the supply of digital content is expected to tackle the questions of conformity and of termination of the contract with regard to both[4] the supply of digital content and the supply of digital services[5].

In this context in which economic operators who have chosen different, but equally viable, economic models will be treated in the same way, it appears difficult not to extend to free online services contracts the pre-existing consumer law rules, if this extension seems relevant. In this regard, this extension should be considered as relevant when it would allow to draw to the consumer attention the prerogatives and protections granted under consumer law (information about the main characteristics of the goods or services, right of withdrawal, guarantee of conformity…).

In addition, it seems desirable to adapt the pre-existing consumer law rules to the specific free provisions of services contract.

Finally, it is necessary to underline the question of the appropriate terminology: it is important not to establish, through all these reforms, a "patrimonialization" of the personal data, which would be contrary to the approach adopted by other instruments of the European Union (Charter of Fundamental Rights, art. 8 and GDPR).

Observations on questions 81 to 84 of the Consultation:

This being said, when using « free » online services, consumers should benefit from the following rights:

1) The provider's obligations regarding the pre-contractual information should in particular allow the consumers to identify clearly:

- the main characteristics of the service they want to obtain, beyond notions of functionality and interoperability, regarding a precise description of the provided service, its duration and all the provider duties and obligations,
- the nature of the data to be collected during the contractual relationship, in compliance with the instruments about data protection,
- the hypotheses in which the service will be provided in exchange of the payment of a price or without the payment of a price, specifying in each case whether a collection of data will also take place,

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4 *Article 3:* **Scope**
1. This Directive shall apply to any contract where the supplier supplies **or undertakes to supply** digital content **or a digital service** to the consumer (...).
It shall not apply (...) **to the supply of digital content or a digital service for which the consumer does not pay or undertake to pay a price and does not provide or undertake to provide personal data to the supplier.**
It shall also not apply where personal data are exclusively processed by the supplier for supplying the digital content or digital service, or for the supplier to comply with legal requirements to which the supplier is subject, and the supplier does not process these data otherwise.

5 *Article 2:* **Definitions**
For the purposes of this Directive, the following definitions shall apply: 1. 'digital content' means data which is produced and supplied in digital form, for example video **files**, audio **files**, applications, digital games and any other software,
1a. 'digital service' means
(**a**) a service allowing **the consumer** the creation, processing or storage of**, or access to,** data in digital form (...)**; or**
(**b**) a service allowing **the** sharing of **or** any other interaction with data in digital form **uploaded or created** by **the consumer and** other users of **that service**;

- where appropriate, the way the consumer will be able to move from the « free » phase to the "paid (with a price)" phase of the contractual relationship,
- the hypotheses in which the consumer will be able to choose either to provide data or to pay with money in order to minimise the data supply.
- the cases in which the customer will not benefit from the protection of consumer law,
- the identity of the co-contracting party : it is desirable that this obligation shall be linked to the transparency duty of online platforms and in particular to the *Wathelet* decision of the Court of Justice (November, the 9th, 2016, C- 149/15), Cf. paragraph 2.1.1 about platforms transparency.
- the identity of the debtor in charge of the conformity of the service in the event of a contractual non-performance.

These information should be given without prejudice to the obligations of the data controller deriving from data protection instruments.

2) The consumers should also benefit from a 14-days right of withdrawal (right to cancel the contract).

This consumer withdrawal right would allow him/her to recover the data he/she could have previously transferred to the online service.

The right of withdrawal should be made consistent with the rules governing the withdrawal of consent for the processing of personal data, or with portability rights, as prescribed by the GDPR.

3) The consumers should not only benefit from information and right of withdrawal when they conclude "free" services contracts. The silo-based approach, which seems to be promoted in the question 81 of the consultation, does not seem sufficient to reach the reality of the « free » services model. Therefore, consumers should benefit from all the consumer law rules that appear to be relevant when such a service is provided.

It is noteworthy that some Member states have already apply consumer law provisions to these « free » services contracts, in particular for contracts for the supply of services regarding social networking (see for example in France: Decision from the Paris Court of appeal, 12 February 2016, n°15/08624 – or even the recommendation of the 'French Unfair Terms Commission', 7 November 2014, n°14/2).

Consumers should thus benefit from the consumer law provisions that protect them in particular from unfair terms and unfair commercial practices (ECJ Decision of 28 July 2016 in Case C-191/15, Verein für Kensumenteninformation v. Amazon).

Moreover, a reflection should be undertaken on the procedural formation of such contracts by questioning the need to re-examine the strict scope of the e-commerce directive on this particular point.

Observations on question 85) of the consultation: Question 85 is partly ambiguous. The question in french version states as follows : 'Pourquoi serait-il important que les consommateurs disposent de la possibilité de résilier [terminate] leurs contrats de services «gratuits» en ligne?'. In the English version, the question makes use of the term 'withdraw' that could be a reference to the right of withdrawal of the consumer.

In any way, termination and withdrawal from a contract may have similar consequences.

Nevertheless, while withdrawal is linked to existing consumer law instruments, the termination is a notion linked to the future directive concerning contracts for the supply of digital content and services.

To the question « Why would it be important that consumers have a possibility to withdraw from contracts for "free" online services (or to terminate)? », several answers are possible:

The withdrawal from a contract - such as the termination - should allow the consumers to change of services provider. In this context, one should tackle the question of the modalities to be defined to make sure consumers have the possibility to switch/change from one service to another. In order to organize the certainty of this possibility, it would be appropriate to use the solution established by the GDPR regarding data portability (in a structured, commonly used and machine-readable format).

Moreover, the consumer, through withdrawal or termination, should be guaranteed that his/her data will no longer be available online, if he/she so wishes.

Observation on questions 88 to 102 of the consultation: it is regrettable that many questions are being focused on the costs for traders for the implementation of consumer law and not on the costs incurred by the consumers because of the failure to respect the consumer law to their benefit.

2.2 Better enforcement and direct redress/remedies opportunities for consumers

2.2.1. Right to individual redress/remedies for victims of unfair commercial practices

Key idea: In order to reinforce the effectiveness of the law on unfair commercial practices coming from Directive 2005/29/EC of 11 May 2005, the creation of civil penalties is recommended. These civil penalties must be harmonized at the European Union level. Consideration should be given to the types of civil penalties, with the consumer having direct access to automatic civil penalties without the involvement of a consumer law judge or mediator.
Developments: Article 13 of the Directive 2005/29/CE has given leeway to Member States who are the ones to determining the system of penalties applicable to infringements of the national provisions adopted pursuant to the Directive, and taking all necessary measures to ensure that they are implemented. These penalties must be effective, proportionate and dissuasive.
As currently drafted, the European rules do not confer any right to individual action by consumers having suffered a prejudice due to unfair commercial practices. Repressive, criminal or administrative proceedings have been favored to sanction unfair commercial practices without any general provisions being made for civil penalties. Certain States, such as France, have nevertheless been able to provide, marginally, for civil penalties regarding certain unfair commercial practices. Thus, article L. 132-10 of the French Consumer Code provides for the nullity of a contract entered into, following an aggressive commercial practice.
The establishment of civil penalties for unfair commercial practices is recommended for the following reasons. From the perspective of consumer protection, consumers currently suffer a prejudice, as they cannot obtain damages for the consequences of unfair commercial practices. Moreover, the introduction of civil penalties at the European level for victims of unfair commercial practices would lead to increased respect for consumer protection rules by businesses, wishing to avoid multiple customer actions. In terms of development of the internal

market, the establishment of civil penalties would reinforce consumer confidence thereby increasing the frequency and the volume of commercial exchanges for consumers and traders. The rules of the game would therefore be more equitable which is beneficial to law abiding traders.

Civil penalties for unfair commercial practices must be harmonized at European level. On the one hand, the harmonization of civil penalties would avoid the distortion of competition between businesses which, by default, would incur costs for cross-border transactions, due to the need to adapt to different national legislations regarding damages. On the other hand, it would allow consumers to obtain individual compensation, no matter where the business they contracted with is located. This will thereby increase consumer confidence at the time of purchase.

Which civil penalties are appropriate for unfair commercial practices?

The standard civil penalties are nullity of the contract entered into and indemnification of the consumer through the intervention of the trader's liability insurance. In addition to the questions raised by these two sanctions (e.g. the conditions for nullity, the requirement of a text expressly providing for the nullity, the amount of damages which may be limited to the compensation of the prejudice suffered or to be extended to punitive damages), consideration must be given to the effectiveness of these standard civil penalties. In fact, in either case, the consumer must request a ruling from the court for these penalties to be implemented. Yet, the length and cost of these proceedings are obstacles to consumer action, even if consumer mediation often allows a more rapid outcome to the dispute.

The creation of automatic penalties that the consumer could apply without taking court action is therefore necessary. Such effective penalties are already provided for in certain European laws. For example, article 18 of the Directive 2011/83/EU of 25 October 2011 on consumer rights provides that in case of failure to deliver the goods or performance of the service within the agreed date, the trader shall deliver within 30 days from the conclusion of the contract. After this deadline, the consumer has a unilateral right to terminate the contract after formal notice to the trader to make the delivery within a reasonable time period (transposition into article L. 216-2 of the French Consumer Code). Another example: article 10 of the Directive 2011/83/UE of 25 October 2011 on consumer rights states that if the trader has not provided the consumer with information on the right of withdrawal, the withdrawal period shall expire 12 months from the end of the initial withdrawal period (transposition into article L. 221-20 of the French Consumer Code).

Several automatic penalties should be examined, particularly the automatic nullity of certain clauses of the contract (for example a misleading clause on after sales service), which would require that the consumer is informed on the conditions of this nullity; the automatic unilateral right to termination by the consumer, which will require a precise definition of the conditions and effects of the termination; the bearing by the trader of costs normally borne by the consumer (in this respect, see art. 14 1. Directive 2011/83/UE transposed into French law by article L. 221-23 al. 2 of the French Consumer Code = the failure to inform that the costs of returning goods after exercising the right to termination are to be borne by the consumer is sanctioned by the trader bearing these costs); the implementation of a flat rate system for the prejudice suffered

by the consumer (such a system already exists in a completely different area, that of passenger air travel, see. Regulation n° 261/2004 of 11 February 2004).

Coordination of European legislation on misleading commercial practices and the obligation to provide pre-contractual information: The dividing line between these two areas appears unclear, even though each comes from separate legislation (2005 Directive and 2011 Directive). Pre-contractual information is covered directly by legislation relating to various consumer contracts, but also indirectly from legislation on misleading commercial practices. This raises the question of a possible accumulation of penalties or their interaction, if specific civil penalties exist for the obligation to provide pre-contractual information.

Penalties for misleading commercial practices are in fact likely to apply to pre-contractual information on the main characteristics of the goods and services, through its classification as a misleading practice by act, or as a misleading practice by omission.

The misleading practice by act is, according to article L. 121-2, 2° of the French Consumer Code, the practice based on allegations, indications or presentations that are false or likely to deceive. The falseness or deception is characterized when it concerns notably "the essential characteristics of the goods or services".

The misleading practice by omission is, according to article L. 121-3 of the French Consumer Code the practice that "given the specific limitations of the means of communication used and the surrounding circumstances (...) omits, conceals or provides in an unintelligible, ambiguous or untimely manner such material information or (...) fails to identify the commercial intent of the commercial practice if not already apparent from the context". The text specifies the list of information considered as material in any commercial communication constituting an "invitation to purchase mentioning the price and the characteristics of the goods or the service offered". These include "main characteristics of the goods or services".

In specific terms, either the trader provides the consumer with pre-contractual information - on the main characteristics of the goods or service offered - that is false or of a deceiving nature (or that has as its intention to deceive), which would mean a failure to provide information, and in which case, the trader would be guilty of the offense of misleading commercial practice by act. Or, the trader provides the consumer with advertising constituting an "invitation to purchase" and in which case, the trader would be guilty of the offense of misleading commercial practice by omission if, given the specific limitations of the means of communication used and the surrounding circumstances, the trader omits, conceals or provides in an unintelligible, ambiguous or untimely manner the information on the main characteristics of the goods or services. In both cases, the commercial practices penalties are applicable.

Therefore, it is even more interesting to establish civil penalties in case of unfair commercial practices when the general obligation of pre-contractual information is not accompanied by specific civil penalties, at least in France (see. art. 24 Directive 2011/83/UE which provides Member States with the power to set down rules on penalties applicable to infringements; see articles L. 131-1 et seq. of the French Consumer Code which only envisages administrative fines, even if it is possible to refer to general contract law, specifically in article 1112-1 of the French Civil Code which provides for penalties for civil liability and nullity of contract for lack of consent). Yet, this pre-contractual information obligation is considered by European Union law as one of the

most important consumer rights. To allow the consumer to benefit from specific civil penalties of CRD would enhance the effectiveness of pre-contractual information obligations.

2.2.2 Strengthening penalties for breaches of consumer rules

One of the weaknesses of European consumer law is the lack of unified sanctions. The directives are too often delegating the power of adopting effective, dissuasive and proportionate sanctions to Member States (e.g. article 13 of the Directive 2005/29). Simply setting criteria for sanctions is not enough.
This approach shows two major disadvantages:

1. It happens that the chosen sanction is completely inadequate. For example, prior to the 2011 directive on consumer rights, the sanction for non-compliance with the information obligation was left to the Member States. For certain Member States, the sanction was nullity of the contract and, according to the decision of the ECJ from 17 December 2009[6], this nullity may be pronounced ex officio (however, in this case, the Spanish judge did not have this right according to the relevant internal rules). Nevertheless, this sanction was inadequate, as the consumer was running the risk of an imposed nullity, although this was not in his/her wish. Therefore, the 2011 Directive has modified this aspect. The choice of sanctions is not left to the Member States anymore, the sanction for such non-compliance is unified and leads today to a significant prolongation of the withdrawal period. This approach towards sanctions should be applied more often.
2. Leaving the choice of sanctions to the Member States also means compromising the overall objective of harmonisation, especially if we are faced with a directive that has as its objective the full harmonisation of rules throughout Europe. The sanction is the means to achieve the efficiency of a rule. It is meaningless to have substantive rules, if one is sanctioned through civil liability, and another through an administrative fine of 375.000 EURO, decided by a non-independent administrative authority, and doubled in case of recidivism (as it is the case in some Member States). In this case, the substantive rule will be much more efficient in some Member States and full harmonisation remains an illusion.

   Yet, if consumer law has as its objective the establishment of the Single European market, sanctions need to be uniform, in order not to result in a multitude of procedures and sanctions – differences in legislation that we aim to avoid.

   In this regard, the GDPR is a good step forward, as it creates unified sanctions throughout Europe (see article 83).

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[6] Judgment of the Court (First Chamber) of 17 December 2009, Eva Martín Martín v EDP Editores SL.,Case C-227/08.