

# EUROPEAN COMMISSION SEEKS TO STRENGTHEN EXISTING CONSUMER PROTECTION RULES

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Directive of the European Parliament and of the Council on amending the Unfair Terms in Consumer Contracts, the Price Indication, Unfair Commercial Practices and Consumer Rights Directives

COM (2018) 185 final

# New Europe wide tightening of consumer protection rules

## Overview

On 11 April 2018 the European Commission published a draft Directive seeking to amend 4 existing EU consumer protection directives. The stated purpose of the Directive is to ensure all European consumers benefit fully from their rights under EU law.

However, for financial services the application of the Directive could unwittingly be broader in scope than the European Commission has stated. This is because the proposal seeks to make clear that cross-border marketing of products with the same brand name but with different product characteristics is deemed to be an unfair commercial practice. This proposal is intended to catch branded food products which are sold across the EU but whose content differs depending on which country it is sold in.

The new definition is not limited in any way. As it stands a bank marketing a mortgage under one of its brands in a number of different EU countries, could fall foul of the new rules and risk enforcement action unless the product characteristics (such as fees, interest rates, rest periods, and so on) were the same in all countries where that branded product is sold.

This Directive has been sent to the European Parliament and the Council of Ministers for legislative scrutiny. The European Commission say this is a priority for the Juncker Commission. Its term of office runs out in June 2019. If the legislation is approved by then, it is proposed that the new EU wide rules come into effect 2 years later giving a long stop date of **1 June 2021**. When the Directive is approved the UK will need to bring forward legislation to implement it.

## Related proposals

The proposal has also to be viewed alongside another draft directive issued on the same day in which the European Commission wants new EU wide rules on consumer representative actions. Whilst this proposal is partly in response to what it labels '*Dieseltgate*' (with a nod to the problems which have surfaced with emissions testing), again the proposal is broadly framed and will apply to financial services.

Finally there are new proposals in relation to transparency in online platforms. The European Commission wants search engine results to make it clear which businesses appearing in a search have paid to appear there. Again this is a broad proposal and there is no special treatment proposed for financial services companies.

## The Likely Impact

The Directive's stated aims are to:

- have more effective, proportionate and dissuasive penalties for '*widespread*' cross-border infringements,
- grant a consumer right to individual remedies,
- have more transparency for consumers in the online market place,
- extend the reach of existing EU consumer rules to digital services,
- remove these 2 specific burdens on business:
  - ending the existing 14 day cancellation right where a consumer has used the goods, and
  - cancellation refunds only have to be paid once a trader has received ordered goods back
- clarify certain aspects of '*off-premises*' sales, and
- clarify the rules on misleading marketing of '*dual quality*' products.

## Scope

The draft Directive applies to all business that is presently caught by 1 or more of 4 existing EU Directives. These are those on Unfair Commercial Practices (UCPD), Consumer Rights (CRD), Unfair Terms in Consumer Contracts (UTCCD) or Price Indications.

### Impact on banks and financial services companies

The proposed amendment to the UCPD would mean that there would be a new '*misleading action*' inserted in the section dealing with '*misleading commercial practices*'.

The European Commission has framed this widely as '*any marketing of a product as being identical to the same product marketed in several other Member States, while those products have significantly different compositions or characteristics*'.

The impact on **Banks** include:

- ▶ Article 2(c) of the existing UCPD defines '*product*' as meaning '*any goods or service including immovable property, rights and obligations*'. It is not proposed to amend this definition. This means that the new proposed ban on '*dual quality*' products will apply to financial services.
- ▶ Unless the draft Directive is amended, it will not be possible to market an insurance product to consumers under the same brand in Europe where there are significantly different characteristics in different countries. This would mean that such an insurance policy would need to have the same cover, exclusions, minimum excess and so on to be able to be marketed under the same brand throughout Europe.
- ▶ Banks offering mortgages, loans or credit cards marketed under the same brand throughout Europe, would no longer be permitted to do so unless those products did not have significantly different characteristics such as interest rates, payment rests, default charges, and so on.
- ▶ After article 11 in the existing UCPD (dealing with enforcement) a new '*Redress*' requirement is proposed as new article 11a. In particular, this proposes to give a new right to consumers to '*unilaterally terminate the contract*' where the provisions of the UCPD are breached.
- ▶ The existing rules on penalties in article 13 of the UCPD will be changed in a number of significant ways:
  - ▶ fines for breaches will be based on the annual turnover and profits of a business,
  - ▶ where there is '*widespread infringements*' with an EU dimension, then any fine '*shall be at least 4% of the trader's annual turnover*' in that EU country. It should be noted that '*widespread*' is quite narrowly defined in article 3(3) of EU Regulation 2017/2394 as an act or omission that is likely to harm consumer collective interests '*residing in at least 2 member states*' only,
  - ▶ when setting the amount of a fine, then either the courts or trading standards should look not only at the nature, gravity and duration of any infringement, but also the number of customers affected. Although remedial action taken by a business can be taken into account, this has to be weighed against any previous infringements or financial benefits that a business has gained.
- ▶ A new Article 8b is proposed to be added to the 1993 UTCCD. This will have the same proposed provisions on fines and penalties for breaches of the UTCCD as that proposed for the UCPD. The same measure is also proposed for the Price Indication Directive.

## Impact on online platforms

Financial services companies will be hit by the proposal to add another commercial practice to the existing list in the annex I to the UCPD of practices that *'are in all circumstances unfair'*.

- ▶ This is defined as *'using editorial content in the media'* or simply *'providing information to a consumer's online search query'* to promote a product where a business has *'paid for the promotion'* without making that *'sufficiently clear'* in either the content or search results or by *'images or sounds clearly identifiable'* by a consumer.
- ▶ The Commission Communication COM (2018) 183 final says (page 5) that there should be more transparency for consumers online claiming that some consumers buying products from an online platform think they are contracting with that platform. It proposes that online marketplaces must clearly inform consumers about the identity of the party with whom a consumer will be contracting.
- ▶ This Communication also says that online market places should tell consumers about the *'main parameters determining ranking of the offers'*.

**The Communication helpfully says that businesses should be able to use web forms or chats with consumers provided that a consumer can keep track of the communications with the business.**

## Consumer Rights

A number of amendments are proposed to the 2011 Consumer Rights Directive (CRD). In its Communication to the Parliament and Council, the European Commission says that it wants to extend consumer protection to *'free services'* saying that there is a gap and that digital services are not free where instead of paying with money a consumer pays instead with their personal data.

### Amendments to CRD

In total 11 amendments are proposed to the CRD. Some of these are drafting ones to give effect to the 'free services' provisions. There are these changes proposed:

- ▶ The definition in Article 2(16) is changed to provide that *'price'* also includes contracts where a consumer *'provides or undertakes to provide personal data'* to the business unless that data is *'exclusively processed'* by a business for the purpose of supplying digital content and the business *'does not process this data for any other purpose'*.
- ▶ For distance contracts, a business will no longer have to provide its fax number.
- ▶ The new article 6a proposes that a consumer be provided with 4 things before he is bound by a contract concluded on an online market place. These are:
  - The main parameters determining ranking of offers presented to the consumer as a result of his search query,
  - Whether the third party offering the goods, services or digital content is a business or not,
  - Whether EU consumer rights apply to the contract or not, and
  - Which business is responsible for ensuring the application of EU consumer rights laws.

- ▶ Where only a 'limited space or time to display the information' is allowed before a contract is concluded then a business must provide at least pre-contractual information 'regarding the main characteristics of the goods or service' as well as the identity of the business, the total price, cancellation rights and contract duration.
- ▶ Article 13 of the CRD is proposed to be amended so that a business (unless it has offered to collect goods under a cancelled contract itself) can withhold reimbursement to a consumer until it has received the goods back.
- ▶ Again the provisions in relation to penalties for breach of the CRD mirror those of those proposed for breaches of the UCPD.
- ▶ Annex 1 of the CRD is amended to remove the requirement for either a business or consumer to provide a fax number.

## Representative actions

To complement the CRD as the European Commission proposes to amend it, at the same time it issued a proposal for another directive. This directive deals with representative actions for the protection of the collective interests of consumers.

## Impact of Brexit

Whether Brexit will make any difference remains to be seen.

The EU Withdrawal Bill, if enacted, would see all existing agreed EU legislation underpinned in UK law. If the UK wants a free trade deal with the EU it is likely to have to continue to apply EU law. In the event that the UK joins Norway in the EEA it will still have to comply with EU rules.

Even if the UK did decide to do something different, UK businesses wanting to take advantage of opportunities elsewhere in the EU would have to comply with these new EU rules anyway.

## UK implementation

When the text of the Directive is agreed it will be translated into all the official EU languages and will be published in the Official Journal. HM Treasury will need to draw up regulations to implement the final text. These regulations will be laid before the Westminster Parliament and are usually laid under the negative resolution procedure.

## Further information

All the documents below were issued on 11 April 2018

[Proposal](#) for a Directive COM (2018) 185 final and Explanatory Memorandum

[Communication](#) from the Commission to the European Parliament, the Council and the European Economic and Social Committee

[Press Release](#)

Behavioural study on transparency in online platforms – [Final Report](#)

Behavioural study on transparency in online platforms – [Executive Summary](#)

[Key findings](#) on behavioural study on transparency in online platforms

Impact Assessment in 3 parts – [part 1](#), [part 2](#) and [part 3](#)

[Executive Summary](#) of the Impact Assessment

[Opinion](#) of the Regulatory Scrutiny Board SEC (2018) 185

[Fact Sheet](#)

Series of 5 Fact Sheets

- [‘What is the European Commission doing for consumers?’](#),
- [‘What benefits will I get as a consumer?’](#),
- [‘What benefits will I get as a business?’](#),
- [‘How will the new collective redress mechanism work?’](#), and
- [‘How can public authorities boost consumer protection?’](#)

[Proposal](#) and [Annexes](#) for a Directive COM (2018) 184 final on representative actions for the protection of collective interests of consumers

On 6 February 2018 the European Commission also published its [summary](#) of the main results of the public consultation on the targeted revision of EU consumer law directives.

## KEY CONTACTS



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