



## NOTE

September 2016

### **Response by the Danish government to the open consultation for the Fitness Check of EU consumer and marketing law**

#### **General remarks**

The Danish government welcomes and supports the Commissions effort to check whether Unfair Commercial Practices Directive (2005/29/EC), Price Indication Directive (98/6/EC), Misleading and Comparative Advertising Directive (2006/114/EC), Injunctions Directive (2009/22/EC), Sales and Guarantees Directive (1999/44/EC) and Unfair Contract Terms Directive (93/13/EEC) are fit for purpose and have no unintended consequences.

It is important that the consumer legislation strikes a reasonable balance between the interest of the consumers and the traders. The fundamental rights for the consumers should be ensured while the companies should not be imposed unnecessary burdens. In this regard, the Danish government supports the Fitness Check in order to make the regulatory framework better by reducing barriers, and removing unnecessary burdens to make it easier for businesses to trade and for consumers to buy goods across borders.

#### *Activating consumers and reducing burdens*

The consumption expenditure of households accounted for at least half of GDP in the majority of EU Member States in 2014.<sup>1</sup> Thus, the consumers are a vital part of the growth creation in the EU and the behaviour of consumers is essential in creating well functioning markets.

The environment, in which consumers, act has changed over the past 20 years because of the digitisation and new technologies. New business

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<sup>1</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/National\\_accounts\\_and\\_GDP#Household\\_consumption](http://ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP#Household_consumption)

models challenge the traditional concept of producers, consumers and the point of sale. And new digital possibilities provide the consumer with tools to e.g. compare products, prices and share user reviews. The development has led to a change in relations in power between the consumers and the traders and empowered consumers.

The development in behavioural economics has led to recognition of the consumer not acting rational in every purchase situation, even when presented to adequate information. A modern consumer and marketing legislation should pay attention to the actual behaviour of the consumer and reducing burdens on companies by among others abolishing the approach on more information is better information.

#### *Coverage*

The Danish Government acknowledges the directives chosen, however we find one directive missing. The Commission has decided the E-Commerce Directive should not be a part of the Fitness Check. However, there are a number of information obligations in the E-Commerce Directive linked to the information obligations in the chosen directives which are subject to the Fitness Check. The Danish government is of the opinion that the Commission should include the information obligations in the E-Commerce Directive in the Fitness Check of the consumer acquis, see below.

#### *Information obligations*

The consumer legislation is comprehensive and places a great amount of information obligations on the traders. E-commerce companies are e.g. obliged to comply with a large number of different contractual or pre-contractual information obligations. Hence, consumer contracts are often long. This is burdensome to both the traders and the consumers, whom are expected to read and understand extensive contractual information in a purchase situation. The Danish government urges the Commission to look at the information obligations in the directives in order to streamline the obligations, including the information obligations stemming from the E-Commerce Directive. In this regard, the Danish government is of the opinion that only the most important and beneficial information should be given the consumers in a purchase situation and be presented in a simple and legible manner.

Behavioural insights should be used in creating optimal information at the right time and in the right context. Furthermore, the impact of the information on consumer behaviour should be tested in a true environment before implementing new rules in order to secure effectiveness. This could be done in selected countries.

#### *Enforcement of the EU-legislation*

In our dialogue with Danish businesses the lack of enforcement of the EU consumer legislation is frequently mentioned as an issue that might com-

plicate cross-border sales and distort competition. The Danish government therefore welcomes the revision of the CPC-regulation and a more formalized and coordinated cooperation between the enforcement authorities.

*Implementation guidelines should be published at the same time as new legislation*

When new legislation is published in the Official Journal it should be followed by implementation guidelines describing the intentions of the content of the legislation and why the co-legislators have crafted the legislation in a given way. It will help to ensure a more unified implementation and enforcement of the given legislation. Further, later guidelines published as a consequence of among others rulings of the European Court of Justice should be crafted together with the member states and not only by the Commission.

*Coherence within the consumer acquis*

It is important to ensure overall consistency and coherence between the different consumer instruments in order to avoid a fragmented legislation.

In this regard, several stakeholders have pointed out that it is undesirable that definitions differ from one consumer instrument to another. As an example it is mentioned that the definition of 'digital content' in the Commission proposal for a directive on certain aspects concerning contracts for the delivery of digital content differs from the Consumer Rights Directive's definition of the same concept. Further, it has been pointed out that the pre-contractual information requirements stemming from different consumer instruments often overlap and that they should be streamlined to the furthest extent possible.

On that basis, the Danish government invites the Commission to assess the possibility of aligning the consumer legislation in order to remove unnecessary burdens and to ensure greater coherence in the legislation to the benefit of both consumers and traders.

## **Specific remarks**

### Unfair Commercial Practices Directive (2005/29/EEC)

#### *The scope of the UCPD*

There is a need for clarification of when commercial practices fall outside the scope of the UCPD. According to the new guidelines, the UCPD does not cover national rules intended to protect interests which are not of an economic nature. Conversely, national rules that aim to protect the economic interest of consumers, in conjunction with other rules, do fall within the scope. It is not entirely clear when a national rule falls outside the UCPD. Even if the scope of a rule is to protect interest that relates to taste and decency, the same rule often also aims to protect the economic inter-

est of consumers, e.g. commercial solicitation in the streets (recital 7 in the UCPD). In this example the aim is to protect consumers against aggressive marketing from a cultural perspective. But it is also to ensure, that consumers do not feel pressured to make a deal with a trader.

Further, it is unclear, whether it is only provisions that aims to protect taste and decency, health and safety and contract law that falls outside the scope of the UCPD or if it is all national rules that intend to protect interests, which are not of an economic nature.

#### *Inconsistent in the use of terms*

The use of terms in the UCPD is inconsistent. As an example, article 5 (2) (b) states, that a commercial practice is unfair if it materially distorts or is likely to materially distort the economic behaviour. According to article 6 a commercial practice is misleading and thus unfair if it causes or is likely to cause the consumer to take a transactional decision that the consumer would not have taken otherwise. These two phrases should be interpreted uniformly. Since the wording is inconsistent, it may raise doubts.

Another example is the use of the term of "commercial communications". This term is defined differently in UCPD article 2 (d), compared to article 2 (f) in the E-Commerce Directive.

The terms "marketing" and "advertisement" are also used inconsistently in different directives.

#### *Hidden marketing in social media*

It is essential that the UCPD is evaluated in terms of the technological developments that have occurred since its creation. Social media such as Facebook, Instagram and blogs enable users to create profiles and communicate with each other. It is uncertain how the assessment of the term in article 7 (3) of "limitations of space or time" and the "measures as the operator has taken to make information available to consumers by other means" should be interpreted in relation to the new marketing opportunities in the social media.

#### *Vulnerable consumers*

In article 5(3) consumers can be vulnerable where certain characteristics such as age, physical or mental infirmity or credulity make them particularly susceptible to a commercial practice or to the underlying product. It is unclear whether the listing of vulnerable consumers in the UCPD is exhaustive. This leads to uncertainty in relation to the interpretation of the rule.

#### *Invitation to purchase*

It is unclear when something is “an invitation to purchase” according to article 2 (i), or whether it is only marketing. This is important in relation to the businesses obligations to provide the correct price information.

#### Price Indication Directive (1998/6/EC)

It is important to have regulation regarding price information. But there is a need to update the existing directive, which was adopted in 1998, when E-Commerce was practically non-existing. Therefore the directive has not taken a position on whether it applies in both physical stores and online. The rules should also be evaluated in conjunction with the rules in the UCPD and Directive 2006/123/EC on services in the internal market. For example pricing of services is highly relevant, especially when booking travel services on the internet.

#### Injunctions Directive (2009/22/EEC)

The Danish consumer enforcement authorities have never used the Injunctions Directive. In connection with the revision of the CPC Regulation it should be considered whether the Injunctions Directive is relevant, or if it might be appropriate to incorporate some of the provisions into the CPC Regulation.

#### Commission Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods

In the Consumer Sales Directive the deadline for pursuing remedies in case of non-conformity is set at two years from delivery of the goods. This corresponds to the deadline suggested in the proposal for a directive on online and other distance sales of goods. However, the possibility set out in the Consumer Sales Directive for a Member State to require that the consumer notifies the seller about the lack of conformity within a certain deadline is not included in the mentioned proposal for a directive. Furthermore, the proposal extends the period of time during which the consumer asking for a remedy in case of non-conformity does not have to prove that the defect existed at the time of delivery from 6 months to 2 years (presumption of non-conformity).

Some Danish stakeholders argue that the suggested extension of the period of presumption of non-conformity which lays the burden of proof exclusively on the trader for 2 years imposes an unnecessary burden on the traders, who in general already provide warranties with a warranty period longer than 2 years.

Other stakeholders argue that it is important to ensure uniform rules regardless of whether a sale happens online or offline and thereby avoid fragmentation of the regulation of consumer protection in connection with a sale.

As stated above, the Danish government finds it important that a reasonable balance is struck between the interest of the consumers and the traders, and that consistency between the different consumer instruments is ensured.

#### Unfair Contract Terms Directive (1993/13/EEC)

The Danish government supports rules on unfair contract terms. The Danish authorities are not aware of any malpractice in relation to the Unfair Contract Terms Directive. This is seen as an indication that the rules have the intended effect and therefore it is not deemed necessary to introduce a “black list” of contract terms that are always prohibited.

However, some stakeholders suggest that it might be relevant to examine whether – within certain sectors, including supply of digital content – there is a need for a black list of contract terms.

#### Consumer Rights Directive (2011//83/EU)

The Danish stakeholder organisations have on several occasions stressed the practical challenges related to the right to return used goods according to article 14 (2) in the Consumer Rights Directive. They argue that it is difficult for the traders to re-sell the returned used goods subsequently and that there is uncertainty about the calculation of the diminished value of the goods.

On that basis, the Danish government invites the Commission to examine the benefits of this specific article further in the light of the criteria set out for REFIT, including the criteria regarding efficiency, relevance and EU added value.

In this connection, it is noted that the rule in article 13 (3) (d) in the Commission Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods is almost similar to Article 14 (2) in the Consumer Rights Directive.