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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(Text with EEA relevance)

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Reasons for and objectives of the proposal

This Proposal aims at amending four EU Directives that protect the economic interests of consumers. Most of the amendments concern the Unfair Commercial Practices Directive 2005/29/EC and the Consumer Rights Directive 2011/83/EU. The other two Directives – the Unfair Contract Terms Directive 93/13/EEC and the Price Indication Directive 98/6/EC – are each amended on one single point, i.e. the penalties. This Proposal is being presented together with a Proposal to revise and replace the Injunctions Directive 2009/22/EC.

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 business-to-consumer (B2C) relations are fair and transparent, which ultimately supports the overall welfare of European consumers and the EU economy.

This Proposal is a follow-up to the REFIT Fitness Check of EU Consumer and Marketing law, published on 23 May 2017 (from now onwards: "Fitness Check")¹ and the evaluation of the Consumer Rights Directive 2011/83/EU, which was conducted in parallel and published on that same day (from now onwards: "CRD Evaluation")².

The Fitness Check and the CRD Evaluation concluded that the substantive EU consumer rules are overall fit for purpose. However, the results also stressed the importance of better applying and enforcing the rules as well as of modernising them in line with digital developments and reducing regulatory burden in some areas.

As regards the first objective, the evaluation findings are amplified by recent large-scale cross-border infringements of EU consumer law, such as the "Dieselgate" scandal and massive flight cancellations. These infringements undermine consumer trust in the Single Market. They have also sparked a debate about whether the European Union has robust mechanisms to handle such issues, namely mechanisms in public and private enforcement, and redress systems.

Consequently, in the 2017 State of the Union Address, the Commission President announced the "New Deal for Consumers" that aims at stepping-up enforcement of EU consumer law in the context of growing risks of EU-wide infringements. The present Proposal, which introduces targeted amendments in four existing consumer law directives, is a key element of this "New Deal". In summary, the Proposal aims at providing the following:

¹ The Fitness Check covered the Unfair Contract Terms Directive 93/13/EEC, Consumer Sales and Guarantees Directive 1999/44/EC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC and Injunctions Directive 2009/22/EC. See for results SWD (2017) 208 final and SWD(2017) 209 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

² See for results COM(2017) 259 final, SWD(2017)169 final and SWD(2017) 170 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

- **More effective, proportionate and dissuasive penalties for widespread cross-border infringements.** The recently adopted Regulation (EU) 2017/2394³ regulates how the national consumer enforcement authorities work together to address cross-border infringements, in particular widespread infringements harming consumers in several Member States and widespread infringements with a Union dimension. In this context, the national authorities may need to impose effective, proportionate and dissuasive penalties in a coordinated manner. However, the available penalties for infringements of consumer law are very different across the EU, and are often set at a low level. As a result, their deterrence in some countries is also low. According to the Proposal, the national authorities will have the power to impose a fine of at least 4% of the trader's turnover for such widespread infringements. More generally, the national authorities should decide on the level of penalties based on common parameters, in particular the cross-border nature of the infringement. These strengthened rules on penalties will be introduced in all four directives concerned.
- **Right to individual remedies for consumers.** The Proposal envisages that consumers should have the right to individual remedies when they are harmed by unfair commercial practices, such as aggressive marketing. In particular, consumers should have the right to terminate the contract and right to damages when there is no contract concluded. These rights will be added to Directive 2005/29/EC dealing with unfair commercial practices, which currently does not provide for means to eliminate the negative effects of such practices.
- **More transparency for consumers in online marketplaces.** Today, when a consumer is visiting an online marketplace, he/she is exposed to a variety of offers from third party suppliers (and the online marketplace itself). The consumer does not always know from whom he/she is buying (from a professional trader or another consumer) or whether the proposed products are the best answer to his query. Many consumers are under the impression that the online marketplace is their contract partner whilst in reality it is a third party supplier. As a result, the consumer may falsely think he/she is dealing with a professional trader (hence benefitting from consumer rights). In case something goes wrong with an online purchase, it is not always easy to establish who is responsible. The Proposal introduces additional information requirements in Directive 2011/83/EU, which require online marketplaces to clearly inform consumers about the criteria they use when ranking different offers, about whether the contract is concluded with a trader or an individual and about whether consumer protection legislation applies.
- **Extending protection of consumers in respect of digital services.** The Proposal extends the application of Directive 2011/83/EU to digital services for which consumers provide personal data, instead of paying with money, such as: cloud storage, social media and email accounts. Given the increasing economic value of

³ 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. It will make cross-border public enforcement more effective and give the relevant national authorities a uniform set of powers to work more efficiently together against widespread infringements. It also enables the European Commission to launch and coordinate common enforcement actions to address EU-wide infringements.

personal data, those services are not simply 'free'. Hence, consumers should have the same right to pre-contractual information and to cancel the contract within a 14-day right of withdrawal period, regardless of whether they pay for the service with money or whether they provide personal data.

- **Removing burdens for businesses.** The Proposal amends Directive 2011/83/EU by granting traders more flexibility in choosing the most appropriate means of communication with consumers using new means of online communication, such as web forms or chats instead of traditional e-mail as long as the consumer can keep track of the communication with the trader. It also removes two specific obligations on traders regarding the 14-day right of withdrawal, which have proven to constitute disproportionate burden, namely, to accept the right of withdrawal even where a consumer has made actual use of an ordered good instead of only trying it out in the same way as he/she could have done in a brick-and-mortar shop and reimbursing the consumer even before receiving the returned goods back.
- **Clarifying Member States' freedom to adopt provisions as regards certain forms and aspects of off-premises sales.** The Proposal clarifies that Directive 2005/29/EC does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to unsolicited visits by a trader for direct marketing purposes or commercial excursions organized by a trader with the aim or effect of promoting or selling products to consumers, where such restrictions are justified on grounds of public policy or the protection of the respect for private life.
- **[Issue of 'dual-quality' foods]**

1.2. Consistency with existing policy provisions in the policy area

This Proposal is consistent with several other legislative and non-legislative actions in the consumer protection area. In particular, in relation to the need to ensure stepped-up enforcement and easier redress, this Proposal is consistent with the recently revised Regulation (EU) 2017/2394 on consumer protection co-operation (CPC), which aims at boosting cross-border public enforcement. The strengthened rules on penalties for breaches to EU consumer law will increase the deterrent effect and effectiveness of the CPC coordinated actions regarding widespread infringements and widespread infringements with a Union dimension. It was highlighted during the negotiations for the revised CPC Regulation that "*effective, proportionate and dissuasive*" penalties in all Member States are essential for the success of the Regulation and 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.⁴

The rules on individual remedies to consumers affected by breaches to the UCPD will be complementary to the EU efforts to make it easier for consumers to seek redress thanks to the other Proposal of the 'New Deal for Consumers' package, i.e. the revision of the Injunctions Directive. In addition, individual consumers affected by breaches to the UCPD may rely on

⁴ 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."

the proposed remedies also within the small claims procedure and alternative/online dispute resolution. Under the Directive on consumer alternative dispute resolution (ADR)⁵ EU consumers have access to quality-ensured out-of-court dispute resolution systems for both domestic and cross-border contractual disputes. An online dispute resolution platform (ODR platform) set up by the Commission⁶ also helps consumers and traders resolve their domestic and cross-border disputes over online purchases of goods and services.

This Proposal goes hand-in-hand with efforts to ensure better knowledge among consumers, traders and legal practitioners about EU consumer law. The Commission will launch in 2018 an EU-wide awareness raising campaign on consumer rights, which will build upon the lessons learnt from a 2014-2016 Consumer Rights Campaign.⁷ Additionally, the Commission is carrying out a pilot project on training SMEs in the digital age (the "*ConsumerLawReady*" initiative⁸) and plans to roll out a number of training activities for judges and other legal practitioners within the revamped European Judicial Training Strategy for 2019-2025.⁹ Furthermore, to make it easier for all market actors to understand their contractual rights and duties, Commission is coordinating a self-regulatory initiative within the REFIT stakeholder group aimed at clearer presentation of both mandatory pre-contractual information and standard Terms and Conditions. Finally, to further enhance legal certainty for all market actors, the Commission has been working on several Guidance documents to ensure better compliance with EU consumer law¹⁰ 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 legislation.

1.3. Consistency with other Union policies

The four EU consumer law directives amended by this Proposal 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 general consumer law directives come into

⁵ 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>

⁶ 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>.

⁷ See also: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=30149

⁸ *ConsumerLawReady* training project is implemented thanks to the financing granted 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.

⁹ Strategy under preparation; a Roadmap is available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247_en

¹⁰ 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 93/13/EEC is planned for the end of 2018 and updated Guidance on the Consumer Rights Directive 2011/83/EU in 2019.

play only when the relevant aspects of B2C transactions are not disciplined by the provisions of sector-specific EU law. Consequently, these 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 sector-specific EU law.

The proposed amendments related to lack of transparency in B2C transactions on online marketplaces and of consumer protection in respect of digital services will contribute, first of all, towards the completion of the Digital Single Market (DSM)¹¹.

Within the DSM Strategy, the Commission proposed, in December 2015, a Directive on contracts for the supply of digital content (hereinafter: the DCD).¹² It defines consumer rights when the digital content and digital services acquired by the consumer are not in conformity with the contract, covering also contracts which do not include consumer's payment in money. There is notably a lack of conformity where the content or services do not correspond to the specifications provided as pre-contractual information. The pre-contractual information requirements are laid down in Directive 2011/83/EU, which, however, currently only applies to services, including digital services, provided against monetary payment. This makes it necessary to align the scope of application of Directive 2011/83/EU to that of the DCD in respect of contracts for digital services. The Justice and Home Affairs Council specifically invited the Commission to ensure consistency between Directive 2011/83/EU and the DCD, particularly as concerns the definitions of "digital content" and "digital services"¹³.

The extension of Directive 2011/83/EU to cover digital services irrespective of the existence of a monetary payment is complementary to the General Data Protection Regulation 2016/679 (GDPR). Specifically, the right to terminate the contract for digital services within the 14-day right of withdrawal period will remove the contractual basis for the processing of personal data under the GDPR thus triggering the application of the rights provided by the GDPR, e.g., right to be forgotten and right to data portability.

As regards the proposed amendment concerning online marketplaces, 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".¹⁴ In December 2016, the European Economic and Social Committee suggested to adapt the pre-contractual

¹¹ For further information on DSM see: https://ec.europa.eu/commission/priorities/digital-single-market_en.

¹² Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)0634 final of 9.12.2015. For further information: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en.

¹³ Outcome of the Council Meeting 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 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>.

¹⁴ 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>

information requirements to the needs linked to the "platform" phenomenon in general.¹⁵ The European Council supports this goal and, on 19 October 2017, underlined "*the necessity of increased transparency in platforms' practices and uses*".¹⁶

This Proposal 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.¹⁷ Indeed, this Proposal and the P2B initiative pursue overarching goals of enhanced transparency and fairness of the transactions taking place on online platforms. In this respect, this Proposal deals with specific problems, already identified by the CRD Evaluation, that consumers often do not know who their contractual counterpart is, when they shop through online marketplaces, and thus are often unclear as to whether and, if yes, vis-à-vis whom they can exert their EU consumer rights. The two initiatives are also complementary to the extent that they both address the transparency of ranking criteria of offers.

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 the Commission work on sustainable consumption, as addressed by the Commission's Circular Economy Action Plan.¹⁸ Here, misleading "green" claims and planned obsolescence are major issues. Although already captured under the UCPD, stronger enforcement and redress tools will allow combating infringements of consumer rights in these areas more effectively.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• 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. This Proposal is based on Article 114 TFEU, which refers to the context of the completion of the internal market, in conjunction with Article 169 TFEU.

• Subsidiarity (for non-exclusive competence)

This Proposal amends 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

¹⁵ 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>

¹⁶ 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.

¹⁷ 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>.

¹⁸ 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>.

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.

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)¹⁹ 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.

This Proposal amends the existing EU consumer protection rules. Directive 2005/29/EC ensures full harmonisation of national rules related to unfair commercial practices harming consumers' economic interests. Directive 2011/83/EU essentially 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,²⁰ which provides a powerful procedural framework for 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. 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.

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

¹⁹ World Trade Organization, International Trade Statistics 2015, available at https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf

²⁰ 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.

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. 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. In particular, consumer trust has increased significantly in recent years in the growing market of cross-border e-commerce.²¹

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. For instance, without further EU-level action to ensure that fines are "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 law. Synergies between these three fields, particularly with regard to the coordination of enforcement activities, have been increasingly acknowledged at the EU level.²²

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.

Clarifying, within Directive 2005/29/EC, Member States' freedom to adopt provisions to protect the legitimate interests of consumers with regard to unsolicited visits for direct marketing purposes or commercial excursions, where such restrictions are justified on grounds of public policy or the protection of the respect for private life, is also in line with the subsidiarity principle as it will ensure that Member States would be allowed to regulate in an area where impact on the Single Market is considered very limited.

- **Proportionality**

The measures provided in the Proposal are proportionate to the set objectives of improving compliance with consumer law and modernisation and burden reduction.

In the area of penalties, the Proposal harmonises the minimum level of penalties by requiring Member States to introduce pecuniary fines based on trader's turnover only for widespread

²¹ 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%.

²² 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.

infringements and widespread infringements of a Union dimension where such harmonisation is clearly necessary to ensure the coordination of penalties required by the revised CPC Regulation. For all other infringements, the Proposal limits itself to only setting non-exhaustive criteria that should be taken into account in the application of specific penalties without harmonising these penalties and even making it clear that these criteria do not necessarily apply to minor infringements.

As regards requirement in the area of individual remedies for the breaches of the UCPD, the Proposal leaves a margin for manoeuvre for the Member States as regards the specific remedies to be made available and only requires as a minimum the contractual remedy of contract termination and the non-contractual remedy of compensation of damages, which are the most common remedies already existing today in national civil law of the Member States.

The proportionality of the proposed extension of Directive 2011/83/EU to digital services not provided against monetary payment is ensured by aligning the scope of application with that of the future DCD, and also exempting the contracts for digital services under which the consumer merely provides personal data from some of the formal requirements of the CRD that are only relevant in case of paid-for contracts, i.e. the requirement to obtain the consumer consent for immediate provision of service which only has consequences in terms of the monetary payment for the services provided during the right of withdrawal period before the exercise of the right of withdrawal.

The proposed intervention on online marketplaces is proportionate in the sense that it does not impose on online marketplaces any obligation to monitor or verify the information provided by third party suppliers about their trader or non-trader status, i.e. it is based on pure self-declaration and the task of the marketplace is only to ensure that third party suppliers provide this information on the website and then pass it on to the consumer. As regards the ranking criteria, again, the obligations are proportionate since the online marketplace only has to inform about the criteria that it applies when ranking offers (e.g. information that offers with highest scores in user reviews or that offers with highest commissions paid by the third party suppliers on the transaction are displayed first), without prescribing any particular default ranking criteria.

The interventions on the burden reduction in the area of the right of withdrawal are proportionate because they only remove those two traders' obligations in this area that are proven to constitute disproportionate burden, in particular for SMEs, and where the reduction of the level of the consumer protection will only affect some consumers exercising the right of withdrawal. The burden reduction measures concerning information requirements are proportionate since they only concern one specific information requirement that is proved to be less relevant before the pre-contractual stage of the transaction. Finally, the measures regarding the means of communication between traders and consumers are proportionate, since they introduce greater flexibility for traders in line with the technological developments without at the same time reducing the protections for consumers.

- **Choice of the instrument**

As this Proposal amends four existing Directives, the most appropriate instrument is a Directive.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

This Proposal builds on the findings of the Fitness Check of EU Consumer and Marketing Law and the CRD Evaluation, both published in May 2017.

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.

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. As far as this Proposal is concerned, the Fitness Check 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 consumer remedies where they are victims of unfair commercial practices infringing Directive 2005/29/EC. The Fitness Check also recommended modernising the regulatory landscape and reducing the regulatory burdens by eliminating unjustified duplications of information requirements between Directive 2005/29/EC and Directive 2011/83/EU.

The CRD evaluation found that Directive 2011/83/EU 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.

- **Stakeholder consultations**

In the preparation of the Proposal, the Commission consulted with stakeholders via the feedback mechanism on the Inception Impact Assessment; the online public consultation; a targeted SME Panel consultation; targeted consultations with Member States and other stakeholders through surveys and meetings with DG JUST networks of Member States authorities and consumer organisations; consultation with consumer and business stakeholders via the REFIT Stakeholder Expert Group.

The objective of the consultations was to collect qualitative and quantitative evidence from relevant stakeholder groups (consumers, consumer associations, businesses, business associations, Member States authorities, legal practitioners) and the general public. It was

challenging to reach specific types of businesses, such as online marketplaces and free digital service providers. The consultations were publicised via Twitter, Facebook, emails to existing DG JUST networks, via regular meetings and speeches delivered by the Commissioner and other high-level Commission officials.

The Proposal also builds on the consultation activities that were carried out in the context of the Fitness Check and CRD evaluation²³.

The measures included in the Proposal 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.

In the public consultation, 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.

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 receive the information about the identity and status of the supplier and 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 has also been support for platform transparency from business associations. Some major online marketplaces report that the new rules would bring some cost reduction, whilst others did not know.

Most stakeholders support extending the CRD to cover digital services where no monetary payment is made. 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.

Business associations support the deletion of information requirements from Directive 2005/29/EC that overlap with pre-contractual information requirements in Directive 2011/83/EU. Consumer associations are against this intervention. Most of the public authorities considered that information about complaint handling is not important at the advertising stage.

²³ For more information on these consultation activities carried out for the Fitness check and the CRD evaluation, see the Annexes to the Report on the Fitness check of consumer and marketing law and Annexes to the Commission staff working document on the CRD, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

Stakeholders largely support replacing the current requirement to provide e-mail address with a technologically neutral reference to means of online communication and removing the reference to fax number in Directive 2011/83/EU.

In the public consultation 35% of online companies reported 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, public authorities and citizens do not support removing these traders' obligations.

- **Impact assessment**

This Proposal is based on an Impact Assessment (IA). The Regulatory Scrutiny Board (RSB) first issued a negative opinion with comprehensive comments on 12 January 2018. After a significant revision of the initial draft, the RSB provided a positive opinion with further comments on 9 February 2009. Annex I to the IA explains how the RSB comments were addressed.

The Impact Assessment deals separately with the options in the area of improving compliance with the consumer protection law and modernisation and burden reduction.

In the area of improving compliance, three options were considered besides the baseline scenario: 1) option of only increasing deterrence and proportionality of public enforcement through stronger rules on penalties and more effective injunctions procedure; 2) option of adding to these measures also consumer's right to individual remedies and 3) option of further adding also measures of collective consumer redress. The preferred option was option 3 combining all the measures. This Proposal addresses elements of the preferred option concerning strengthened rules on penalties and consumers' right to individual remedies for breaches of Directive 2005/29/EC

As far as penalties are concerned, the Proposal will increase the consistency in the application of penalties across the EU through a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones). 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 pecuniary 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 pecuniary fines of at least 4% of the trader's annual turnover.

As far as remedies are concerned, the Proposal requires 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.

In terms of costs of these measures, most respondents to the consultations indicated that strengthening penalties will have no impact on their costs or could not estimate them. For individual remedies the median one-off costs, such as costs for legal advice reported by SMEs in the SME Panel consultation is EUR 638. The median of the annual running costs estimates is EUR 655. In the public consultation 9 of 15 Member State authorities thought that the costs of administrative and judicial enforcement would increase to some extent. Costs for public enforcement authorities and courts 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 thanks to the increased deterrent effect of stronger penalties and remedies.

On the other hand, there are also 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.

In the area of modernisation and burden reduction, the IA assessed the options concerning the transparency of online marketplaces, the consumer protection in respect of digital services not provided against monetary payment and a number of burden reduction measures that are discussed in the following section on regulatory fitness and simplification.

As regards the transparency of online marketplaces, the IA assessed the option of promoting self and co-regulation and legislative amendment to Directive 2011/83/EU imposing additional information requirements on online marketplaces. Some major online marketplaces reported that new rules on transparency would bring some cost reduction, whilst others did not know. Out of the four online marketplaces responding to a question on costs, two indicated 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.

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. The median of the annual costs estimated by the SMEs due to extending Directive 2011/83/EU to cover digital services not provided against payment was EUR 33 regarding pre-contractual information and EUR 50 regarding right of withdrawal.

The proposed clarification in Directive 2005/29/EC that Member States may adopt provisions to protect the legitimate interests of consumers with regard to unsolicited visits for direct marketing purposes or commercial excursions, where such restrictions are justified on grounds of public policy or the protection of the respect for private life, was not specifically impact assessed. Recital 7 of Directive 2005/29/EC already recognises that commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons and that Member States should be able to continue to ban commercial practices in their territory, in conformity with Union law, for reasons of taste and decency. Some Member States have found it necessary to introduce bans or restrictions on specific types of off-premises selling, such as unsolicited doorstep selling also for reasons of the protection of private life and public policy. 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 off-premises selling) and therefore would have limited impact on the

single market, if at all. The proposed change would recognise the *status quo* that exists in some Member States that have adopted certain restrictions on doorstep selling and/or sales excursions, whilst any further impact would depend on other Member States making use of such possibility. Therefore, clarifying the possibility for Member States to introduce such restrictions based on public policy or protection of privacy of consumers is deemed not having an immediate impact, and in particular not on the Single Market, considering also the principle of subsidiarity.

- **Regulatory fitness and simplification**

As this Proposal is made in the context of the REFIT programme, the establishment of the regulatory burdens was a key element of the underlying evaluations. These showed that the general EU consumer legislation is not particularly burdensome, both in absolute terms and when compared to other areas of EU regulation²⁴. Therefore, in light of the important benefits of EU consumer legislation in protecting consumers and facilitating the Single Market, these evaluations identified only a limited scope in terms of burden reduction.

Considering that the underlying legislation that this Proposal amends applies to all traders, including micro-enterprises, no exemption is being made for micro-enterprises under this Proposal. It is likely that micro-enterprises will benefit in particular from the proposed burden reduction measures related to the right of withdrawal since they may have less flexibility in absorbing the losses due to the current obligations. Furthermore, micro-enterprises will likely be less affected by the proposed strengthening of the rules on penalties for widespread infringements and widespread infringements with a Union dimension since those are typically the practices of larger companies that are the object of the coordinated CPC enforcement actions.

As regards burden reduction, in particular for SMEs, the most important positive impact for businesses is expected from the proposed amendments to Directive 2011/83/EU regarding the right of withdrawal – removal of trader's obligation to accept the return of the goods under the right of withdrawal even when the consumer has used such goods more than permitted. The estimated annual losses due to this obligation were reported in the SME panel consultation in a range up to EUR 13 500 the median being EUR 100. The views from business associations and companies also suggest that traders and in particular SMEs will benefit from a reduction of the burden.

As regards the removal of trader's obligation to reimburse consumers before having had the possibility to inspect the returned goods, the average of estimated annual losses due to this obligation were reported in the SME panel consultation in a range up to EUR 10 000 the median being 0. Views from business associations and companies also suggest that traders and in particular SMEs will benefit from a reduction of the burden.

As regards the removal of trader's obligation to provide information about complaint handling at the advertising stage, very limited quantitative data were available; however, the views expressed by business associations suggest some to significant savings for companies. As regards the removal of trader's obligation to display the fax number and enable more modern

²⁴ For further information, see Chapter 6.2.4. of the Fitness Check Report.

means of communication (such as web-form) instead of email address, 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.

As regards the “Digital Check”, all the amendments under the Proposal are drafted in a technology neutral way to ensure that they are not rapidly overtaken by the technological developments. Thus, as regards the proposed transparency rules for online marketplaces, their existing definition in other EU legislation is being updated to remove specific references to a concrete technology, such as “websites” and ensure that it is future-proof. Extending the CRD to digital services not provided against monetary payment would address current realities of digital transactions for consumers through content neutral and future-proof rules, which would complement EU data protection rules. Changing CRD rules on means of communication will be technologically 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.

- **Fundamental rights**

The Proposal is in accordance with Article 38 of the Charter of Fundamental Rights whereby the Union must ensure a high level of consumer protection. Especially the measures aimed at improving compliance with consumer protection legislation and modernising the consumer protection rules regarding online marketplaces and digital services increase the level of consumer protection. Furthermore, the better individual redress opportunities against unfair commercial practices would also contribute to ensuring the right to an effective remedy enshrined in Article 47 of the Charter. The right of Member States to restrict certain forms and aspects of off-premises sales to ensure the respect for consumers’ private life is in accordance with Article 7 of the Charter. Finally, the burden reduction measures related to the right of withdrawal and to simplification of information requirements and modernisation of the means of communication will contribute to Article 16 of the Charter, which guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. At the same time, the simplification of information requirements and modernisation of the means of communication will not result in any substantial reduction of consumer protection and the measures on the right of withdrawal represent more balanced rights and obligations of traders and consumers since they will remove unjustified burdens whilst only affecting a minority of consumers.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will evaluate the effectiveness, efficiency, relevance, coherence and EU added value of this intervention according to the indicators identified in the Impact Assessment. 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-annually²⁵. 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 with specific groups of stakeholders (consumers, qualified entities, online marketplaces, traders providing digital services without monetary payment). 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.

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 monitoring indicators 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 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.

- **Explanatory documents (for directives)**

As the Proposal introduces specific amendments to four existing directives, Member States should either provide the Commission with the text of the specific amendments to national provisions or, in the absence of such amendments, explain which specific national law provision already implements the amendments provided in the Proposal.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 - Amendments to Directive 2005/29/EC

Article 1 of the Proposal amends Directive 2005/29/EC on three points: 1) national restrictions on off-premises sales, 2) introduction of remedies for consumers, and 3) strengthening the rules on penalties.

As regards **restrictions on off-premises sales**, amendment to Article 3 of the Directive authorises Member States to adopt provisions to protect the legitimate interests of consumers with regard to unsolicited visits by a trader for direct marketing purposes or commercial

²⁵ 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.

excursions organized by a trader with the aim or effect of promoting or selling products to consumers, where such restrictions are justified on grounds of public policy or the protection of the respect for private life. To ensure full transparency of such measures, Member States will have to notify them to the Commission that will make such notifications publicly available.

As regards **consumer remedies**, a new Article 12a is inserted in Directive 2005/29/EC to require 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.

As regards **penalties**, a list of common, non-exhaustive criteria for assessing the gravity of infringements (except for minor ones) is introduced in Article 13 of the Directive. 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 addition, for "widespread infringements" and "widespread infringements with a Union dimension", as defined in the revised CPC Regulation (EU) 2017/2395, Member States will be required to provide in their national law for fines the maximum amount of which should be set not below 4% of the infringing trader's turnover in the Member State or Member States concerned. This means that where national competent authorities co-operating under a CPC coordinated action designate one competent authority to impose a single fine, the maximum fine available in that case should be at least 4% of the trader's combined turnover in all the Member States concerned.

Article 2 - Amendments to the Consumer Rights Directive 2011/83/EU

Article 2 of this Proposal amends Directive 2011/83/EU on a number of points.

Amendments to Article 2 of Directive 2011/83/EU provide additional definitions of digital content and digital service and the respective contracts for the provision of these products, which are aligned with the definitions in the [Digital Content Directive]. These definitions bring within the scope of application of Directive 2011/83/EU also contracts for the provision of digital services under which the consumer does not pay with money but provide personal data above what is strictly necessary for the provision of the service. They also introduce a definition of "online marketplace" which is subject to specific additional pre-contractual information requirements under a new Article 6a.

Article 5 of Directive 2011/83/EU on pre-contractual information requirements for contracts other than off-premises and distance contracts is amended for consistency reasons in order to cover the newly defined digital services alongside the already existing notion of digital content as regards the pre-contractual information requirements about interoperability and functionality.

Article 6 of Directive 2011/83/EU on pre-contractual information requirements for off-premises and distance contracts is amended for consistency reasons in order to cover the newly defined digital services alongside the already existing notion of digital content as regards the pre-contractual information requirements about interoperability and functionality. In addition, Article 6 is amended by removing fax from the list of possible means of

communication and enabling traders to use other online means of communication instead of the traditional e-mail.

A new Article 6a is inserted in Directive 2011/83/EU providing specific additional pre-contractual information requirements for online marketplaces as regards (1) the criteria used for ranking offers, (2) whether the third party offering the product is a trader or not, (3) whether consumer rights stemming from EU consumer law apply to the contract and (4) 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.

Article 7 of Directive 2011/83/EU setting specific formal requirements for off-premises contracts is amended to specify that the obligation in paragraph 3 on traders to obtain consumer's express consent for immediate performance of services only applies to services provided against payment. This amendment is necessary in view of the extension of the scope of the Directive to cover also digital services not provided against monetary payment since the obligation of express consent is only relevant in the calculation of the monetary compensation that the consumer must provide to the trader for the use of the services during the right of withdrawal period if the consumer decides to exercise the right of withdrawal.

Article 8 of Directive 2011/83/EU setting specific formal requirements for distance contracts is amended on several points. First, in paragraph 4 a provision is made to exclude the model withdrawal form from the information requirements provided on a means of distance communication used for the conclusion of the contract that allows limited space or time for the provision of the information, including telephone calls. This is necessary because the written model withdrawal form cannot be provided to the consumer by means of the telephone call and it can be impossible to provide in a user friendly way over other means of communication covered by Article 8(4). In these cases, it suffices to make the model withdrawal form available to the consumer through other means, such as trader's website and to include it in the contract confirmation on a durable medium

Paragraph 8 is amended in a similar way as Article 7(3) described above.

Article 13 of Directive 2011/83/EU dealing with the trader's obligations in the event of withdrawal is amended to delete the trader's obligation to reimburse the consumer even before the trader has received back the returned goods. Consequently, the trader will be always entitled to withhold the reimbursement until the returned goods have arrived and the trader has had a chance to inspect them. References are added to the GDPR and the [DCD] as regards the trader's obligations in respect of the used of the consumer's data after the termination of the contract.

Article 14 of Directive 2011/83/EU dealing with the obligations of the consumer in the event of withdrawal is amended by removing the right of consumers to return the goods even where those have been used more than necessary to test them subject to the obligation to pay for the diminished value. A similar rule is added as in the DCD regarding consumer's obligations in respect of digital content or digital services in the event of the termination of the contract. Finally, paragraph 4(b), setting out contractual sanction in the event of trader's non-respect of the information obligations regarding digital content, is amended for consistency reasons by removing from the list of alternative reasons for this sanction the failure to provide confirmation that consumer has expressly consented and acknowledged the loss of the right of withdrawal in accordance with the exception laid down in Article 16(m). Since Article 14 deals with the consequences of the right of withdrawal, this condition is irrelevant since the

express consent and acknowledgement result in effective loss of the right of withdrawal under Article 16(m)

Article 16 dealing with exceptions from the right of withdrawal is amended on several points. First, there is amendment in point (a) to ensure consistency with Article 7(3) and 8(7) as regards the trader's obligations when consumer wants immediate performance of services. Second, point (m) providing exemption from the right of withdrawal regarding digital content supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses the right of withdrawal is amended to apply these two conditions only to content provided against payment. This is done in order to ensure consistency with Article 14(4)(b), which provides for a contractual sanction when these requirements are not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment is accordingly only relevant for digital content, which is provided against the payment of the price. Finally, a new point (n) is added to exempt from the right of withdrawal goods that the consumer has used more than necessary to test them.

Article 24 of Directive 2011/83/EU on penalties is amended in similar manner as Article 13 on penalties in Directive 2005/29/EC, described above.

Article 3 - Amendments to the Unfair Contract Terms Directive 93/13/EC

A new Article on penalties is inserted in Directive 93/13/EEC in similar manner as Article 13 on penalties in Directive 2005/29/EC, described above.

Article 4 - Amendments to the Price Indication Directive 98/6/EC

Article 8 on penalties in Directive 98/6/EC is amended in similar manner as Article 13 on penalties in Directive 2005/29/EC, described above.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 93/13/EEC of 5 April 1993, 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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²⁶,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.
- (2) Consumer protection legislation should be applied effectively throughout the Union. Yet, the comprehensive Fitness Check of consumer and marketing law directives carried out by the Commission in 2016 and 2017 in the framework of the Regulatory Fitness and Performance (REFIT) programme concluded that the effectiveness of the Union consumer legislation is compromised by lack of awareness both among traders and consumers and by insufficient enforcement and limited consumer redress possibilities.
- (3) The Union has already taken a number of measures to improve knowledge about consumer rights among consumers, traders and legal practitioners, and to improve enforcement of consumer rights and consumer redress. However, there are remaining gaps, most notably the absence in national legislation of truly effective and proportionate penalties to deter and sanction infringements, the lack of rights to individual remedies for consumers harmed by breaches of national legislation transposing Directive 2005/29/EC and shortcomings of the injunctions procedure under Directive 2009/22/EC. Revision of the injunctions procedure should be addressed by a separate instrument amending and replacing Directive 2009/22/EC.

²⁶ OJ C [...], [...], p. [...].

- (4) Directives 98/6/EC, 2005/29/EC and 2011/83/EU include requirements for Member States to provide for effective, proportionate and dissuasive penalties to address infringements of national provisions transposing these directives. Furthermore, Article 21 of Regulation (EU) 2017/2394 on consumer protection cooperation (CPC) requires Member States to take enforcement measures, including imposition of penalties, in an effective, efficient and coordinated manner to bring about the cessation or prohibition of widespread infringements or widespread infringements with a Union dimension. Regulation (EU) 2017/2394 also acknowledges that it might be considered necessary to strengthen the level of penalties for breaches of Union consumer law in view of the findings of the Fitness Check of consumer and marketing law.
- (5) Current national rules on penalties differ significantly across the Union. In particular not all Member States ensure that effective, proportionate and dissuasive [pecuniary] fines can be imposed on infringing traders for widespread infringements or widespread infringements with a Union dimension and that the cross-border nature of the infringement is taken into account in the imposition of penalties. Penalties should be addressed in a horizontal manner by revising the existing rules on penalties of Directives 98/6/EC, 2005/29/EC and 2011/83/EU and by introducing new rules on penalties in Directive 93/13/EEC.
- (6) To facilitate more consistent application of penalties, in particular in intra-Union infringements, widespread infringements and widespread infringements with a Union dimension referred to in Regulation (EU) 2017/2394, common non-exhaustive criteria should be introduced for the assessment of the gravity of the infringement. These criteria should include the cross-border nature of the infringement, in particular whether the infringement has harmed consumers also in other Member States. Any redress provided by the trader to consumers for the harm caused should also be taken into account. Repeated infringements by the same perpetrator shows its propensity to commit such infringements and is therefore a significant indication of the gravity of the conduct and, accordingly, of the need to increase the level of the penalty to achieve effective deterrence. The criterion of financial benefits gained, or losses avoided, through the infringement is especially relevant where the national law provides for [pecuniary] fines as penalties and sets the maximum fine as percentage of the trader's turnover and where the infringement concerns only one or some of the markets in which the trader is operating. Furthermore, any [pecuniary] fines imposed as penalties should take into account the annual turnover of the infringing trader and any fines that have been imposed on the trader in other Member States for the same infringement in, particular, in the context of the widespread infringements of consumer law and widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement in accordance with Regulation (EU) 2017/2394. These common non-exhaustive criteria do not need to be applied in deciding on penalties regarding every infringement, in particular regarding non-serious infringements.
- (7) To ensure that Member State authorities can impose effective, proportionate and dissuasive penalties in relation to widespread infringements of consumer law and to widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement in accordance with Regulation (EU) 2017/2394, [pecuniary] fines should be introduced as a mandatory element of penalties for such infringements. Furthermore, Member States should set in their national law the maximum [pecuniary] fine for such infringements at a level that is not less than 4% of the trader's annual turnover in the Member State concerned.

- (8) Where, as a result of the coordination mechanism under Regulation (EU) 2017/2394, a single national competent authority within the meaning of that Regulation imposes a [pecuniary] fine on the trader responsible for the widespread infringement or the widespread infringement with a Union dimension, it should be able to impose a [pecuniary] fine of at least 4% of the trader's annual turnover in all Member States concerned by the coordinated enforcement action.
- (9) Member States should not be prevented from maintaining or introducing higher maximum turnover-based fines for widespread infringements and widespread infringements with a Union dimension of consumer law, as defined in Regulation EU 2017/2394. They can also provide that the maximum fine for these infringements is at least 4% of the trader's turnover or a fixed lump-sum, whichever is higher in the specific case. The requirement to set the fine at a level of not less than 4% of the trader's turnover should not apply to any additional rules of the Member States on periodic penalty payments, such as daily fines, for non-compliance with any decision, order, interim measure, trader's commitment or other measure with the aim of stopping the infringement.
- (10) When deciding for which purpose the revenues from [pecuniary] fines are used, Member States should take into account the ultimate objective of consumer legislation and its enforcement which is the protection of the general interest of consumers. Member States should therefore consider allocating at least part of the revenues from fines to enhance consumer protection within their jurisdictions, such as supporting consumer movement or activities aimed at empowering consumers.
- (11) Access to individual remedies for consumers harmed by unfair commercial practices should be addressed in the context of Directive 2005/29/EC to put the consumer into the condition he would have been without the unfair commercial practice. While that Directive was originally designed mainly to regulate the market conduct of traders based on public enforcement, experience of more than ten years of application demonstrate the shortcomings of the lack of rights to individual remedies.
- (12) National rules on individual remedies for consumers harmed by unfair commercial practices are diverging. The current situation, where it is left to the Member States to determine if and how remedies should be available, keeps Directive 2005/29/EC from being fully effective. The Directive does not seem to fully reach its dual purpose, which is to contribute to the proper functioning of the Internal Market and achieve a high level of consumer protection. 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 that Directive have been breached. Accordingly, introducing individual remedies would facilitate private enforcement and be complementary to the existing requirement for Member States to ensure that adequate and effective means exist to enforce compliance with that Directive.
- (13) Member States should ensure that remedies are available for consumers harmed by unfair commercial practices in order to eliminate the effects of those unfair practices. In order to meet that objective, Member States should make both contractual and non-contractual remedies available. As a minimum, the contractual remedies provided by the Member States should include the right to contract termination. Non-contractual

remedies provided under national law should, as a minimum, include the right to compensation for damages. Member States would not be prevented from maintaining or introducing rights to additional remedies for consumers harmed by unfair commercial practices.

- (14) In addition to measures to improve the application and enforcement of the Union's consumer law, the Fitness Check of consumer and marketing law directives and the parallel evaluation of Directive 2011/83/EU identified a number of areas where the existing consumer protection rules should be modernised and disproportionate burden on traders reduced.
- (15) Online marketplaces are defined in Article 4(1)(f) of Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (Consumer ODR Regulation) as service providers allowing “consumers and traders to conclude online sales and service contracts on the online marketplace’s website”. They are also defined in Article 4(17) of the Directive 2016/1148/EU on security of network and information systems as “digital service that allows consumers and/or traders [...] to conclude online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace”.
- (16) Online marketplaces should be defined in a similar manner also for the purposes of this amending Directive. However, the definition should be updated and rendered more technologically neutral in order to cover new technologies. It is therefore appropriate to refer, instead of a "website", to the notion of an "online interface" as provided by Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC. Regulation (EU) 2018/302 defines 'online interface' means any software, including a website or a part thereof and applications, including mobile applications, operated by or on behalf of a trader, which serves to give customers access to the trader's goods or services with a view to engaging in a transaction with respect to those goods or services.
- (17) When products are offered to consumers on online marketplaces, both the online marketplace and the third party supplier are involved in the provision of the pre-contractual information required by Directive 2011/83/EU. As a result, consumers using the online marketplace may not clearly understand who their contractual partners are and how this affects their rights and obligations.
- (18) Furthermore, whilst Directive 2005/29/EC already requires online platforms, including online marketplaces, to clearly distinguish search results based on payments received from other traders from natural search results²⁷, the current consumer rules do not include an express requirement for online marketplaces to inform consumers about the criteria determining the ranking of different offers (including their own offers) in response to a search query by the consumer.
- (19) Specific transparency requirements for online marketplaces should therefore be provided in Directive 2011/83/EU to inform consumers using online marketplaces

²⁷ Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices, SWD(2016)163 final of 25.5.2016.

about the default ranking criteria when presenting offers, whether they enter into a contract with a trader or a non-trader (such as another consumer), whether consumer protection law applies and which trader is responsible for the performance of the contract and for ensuring consumer rights when these rights apply. This information should be provided in a clear and comprehensible manner, i.e. not merely in the standard Terms and Conditions or similar contractual document. The information about ranking criteria is without prejudice to any trade secrets regarding the underlying algorithms for processing the consumer's search request.

- (20) In conformity with Article 15(1) of the e-Commerce Directive, online marketplaces should not be required to verify the legal status of third party suppliers. Instead, the online marketplace should require third party suppliers of products on the online marketplace to indicate their status and to provide this information to the online marketplace.
- (21) Digital content and digital services are often supplied online under contracts where the consumer does not pay a price but provides personal data to the trader. Digital services are characterised by continuous involvement of the trader over the duration of the contract to enable the consumer to make use of the service, for instance, access to, creation, processing, storing or sharing of data in digital form. Examples of digital services are subscription contracts to content platforms, cloud storage, webmail, social media and cloud applications. The continuous involvement of the service provider justifies the application of the rules on the right of withdrawal provided in Directive 2011/83/EU that effectively allow the consumer to test the service and decide, during the 14-day period from the conclusion of the contract, whether to keep it or not. In contrast, contracts for the supply of digital content which is not supplied on a tangible medium are characterised by one-off action by the trader to supply to the consumer a specific piece or pieces of digital content, such as specific music or video files. This one-off nature of the provision of digital content is at the basis of the exception from the right of withdrawal pursuant to Article 16(m) of Directive 2011/83/EU, whereby the consumer loses the right of withdrawal when the performance of the contract is started, such as download or streaming of the specific content.
- (22) Directive 2011/83/EU applies to contracts for the supply of digital content which is not supplied on a tangible medium (i.e. supply of online digital content) regardless of whether the consumer pays a price in money or provides personal data. In contrast, Directive 2011/83/EU only applies to service contracts, including contracts for digital services, under which the consumer pays or undertakes to pay a price. Consequently, the Directive does not apply to contracts for digital services under which the consumer provides personal data to the trader without paying a price. Given their similarities and the interchangeability of paid digital services and digital services provided in exchange for personal data, they should be subject to the same rules under Directive 2011/83/EU.
- (23) Consistency should be ensured between the scope of application of Directive 2011/83/EU and the [Digital Content Directive], which applies to contracts for both digital content and digital services under which the consumer provides personal data to the trader.
- (24) Therefore, the scope of application of Directive 2011/83/EU should be extended to cover also contracts under which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data. Similar to contracts for the supply of digital content which is not supplied on a

tangible medium, the Directive should apply whenever the consumer provides or undertakes to provide personal data to the trader for other reasons than exclusively necessary for supplying the digital content or digital service.

- (25) Where digital content and digital services are not supplied in exchange for a price, this Directive should not apply to situations where the trader collects personal data exclusively to supply or maintain in conformity digital content or a digital service or for the sole purpose of meeting legal requirements. Such situations could include, for instance, cases where the registration of the consumer is required by applicable laws for security and identification purposes, or cases where the developer of open-source software only collects data from users to ensure the compatibility and interoperability of open-source software. This Directive should also not apply to situations where the trader only collects metadata, such as the IP address, browsing history or other information collected and transmitted for instance by cookies, except where this situation is considered a contract under national law. It should also not apply to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. However, Member States should remain free to extend the application of the rules of this Directive to such situations or to otherwise regulate such situations which are excluded from the scope of this Directive.
- (26) Article 7(3) and Article 8(8) of Directive 2011/83/EU require traders, respectively for off-premises and distance contracts, to obtain the consumer's prior express consent to begin performance before the expiry of the right of withdrawal period. Article 14(4)(a) provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the services provided. The requirement to obtain consumer's express consent is accordingly only relevant for services, such as digital services, which are provided against the payment of the price. It is therefore necessary to amend Article 7(3) and Article 8(8) to the effect that the requirement for traders to obtain the consumer's prior consent only applies to service contracts that place the consumer under an obligation to pay.
- (27) Article 16(m) of Directive 2011/83/EU provides for an exception from the right of withdrawal in respect of digital content that is not supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses the right of withdrawal. Article 14(4)(b) provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment is accordingly only relevant for digital content, which is provided against the payment of the price. It is therefore necessary to amend Article 16(m) to the effect that the requirement for traders to obtain the consumer's prior consent and acknowledgment only applies to contracts that place the consumer under an obligation to pay.
- (28) Article 7(4) of Directive 2005/29/EC contains information requirements for the "invitation to purchase" a product at a specific price. These information requirements apply already at the advertising stage, whilst Directive 2011/83/EU imposes the same and other, more detailed information requirements at the later pre-contractual stage (i.e. just before the consumer enters into a contract). Consequently, traders may be required to provide the same information in advertising (e.g. an online ad on a media website) and at the pre-contractual stage (e.g. on the pages of their online web-shops).

- (29) The information requirements under Article 7(4) of Directive 2005/29/EC include informing the consumer about the trader's complaint handling policy. The Fitness Check findings show that this information is most relevant at the pre-contractual stage, which is governed by Directive 2011/83/EU. The requirement to provide this information in invitations to purchase at the advertising stage under Directive 2005/29/EC should therefore be deleted.
- (30) Article 6(1)(h) of Directive 2011/83/EU requires traders to provide consumers with pre-contractual information about the right of withdrawal, including the model withdrawal form set out in Annex I(B) of the Directive. Article 8(4) of Directive 2011/83/EU provides for simpler pre-contractual information requirements if the contract is concluded through a means of distance communication which allows limited space or time to display the information, such as over the telephone or by SMS. The mandatory pre-contractual information requirements to be provided on that particular means of distance communication include information regarding the right of withdrawal as referred to in point (h) of Article 6(1). Accordingly, they include also the provision of the model withdrawal form set out in Annex I(B) of the Directive. However, the provision of the withdrawal form is impossible when contract is concluded over the telephone and it may not be technically feasible in a user-friendly way on other means of distance communication covered by Article 8(4). It is therefore necessary to exclude the provision of the model withdrawal form from the information that traders have to provide on the particular means of distance communication used for the conclusion of the contract under Article 8(4).
- (31) Article 16(a) of Directive 2011/83/EU provides for an exception from the right of withdrawal regarding service contracts that have been fully performed if the performance has begun with the consumer's prior express consent and with the acknowledgement that he will lose the right of withdrawal once the contract has been fully performed by the trader. In contrast, Article 7(3) and 8(7) of Directive 2011/83/EU, which deal with the trader's obligations in situations where the performance of the contract is begun before the expiry of the right of withdrawal period, only require traders to obtain consumer's prior express consent but not acknowledgment that the right of withdrawal will be lost when the performance is completed. To ensure consistency between the above-mentioned legal provisions, it is necessary to remove, in Article 16(a), the reference to acknowledgment that the right of withdrawal will be lost once the contract has been fully performed.
- (32) Directive 2011/83/EU provides fully harmonised rules regarding the right of withdrawal from distance and off-premises contracts. In this context, two concrete obligations have been shown to constitute disproportionate burdens on traders and should be deleted.
- (33) The first relates to the consumer right to withdraw from sales contracts concluded at a distance or off-premises even after using goods more than necessary to establish their nature, characteristics and functioning. Recital 47 of Directive 2011/83/EU stresses that during the 14-day right of withdrawal period, consumers should handle and inspect the goods only to the extent necessary to establish their nature, characteristics and functioning. This should allow the consumer to inspect the goods as he or she would be able to do in a physical shop. Nonetheless, according to Article 14(2) of Directive 2011/83/EU, a consumer is still able to withdraw from the online/off-premises purchase even if he or she has used the good more than allowed; in such a case, the consumer would be liable for any diminished value of the good.

- (34) The obligation for traders to accept the return of such goods creates difficulties for traders who are required to assess the "diminished value" of the returned goods and to resell them as second-hand goods or to discard them. It distorts the balance between a high level of consumer protection and the competitiveness of enterprises pursued by Directive 2011/83/EU. Moreover, the return of used goods which cannot be re-sold but need to be discarded runs counter to the promotion of sustainable consumption. The right for consumers to return goods in such situations should therefore be deleted.
- (35) The second obligation concerns Article 13 of Directive 2011/83/EU, 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 traders to reimburse consumers before having received back the returned goods and having had the possibility to inspect them. It distorts the balance between a high level of consumer protection and the competitiveness of enterprises pursued by Directive 2011/83/EU. The obligation for traders to reimburse the consumer on the mere basis of the proof that the goods have been sent back to the trader should therefore be deleted.
- (36) Article 14(4) of Directive 2011/83/EU stipulates the conditions under which, in the event of exercising the right of withdrawal, the consumer does not bear the cost for the performance of services, supply of public utilities and supply of digital content which is not supplied on a tangible medium. When any of these conditions is met, the consumer does not have to pay the price of the service, public utilities or digital content received before the exercise of the right of withdrawal. As regards digital content, one of these non-cumulative conditions is a failure to provide the contract confirmation including confirmation of the consumer's prior express consent to begin the performance of the contract before the expiry of the right of withdrawal period and acknowledgement that the right of withdrawal is lost as a result. This condition is not relevant in the context of the exercise of the right of withdrawal the consequences of which is regulated in Article 14 since the consumer has been duly informed and accepted the loss of this right. It should therefore be deleted from Article 14(4)(b) to ensure also consistency with Article 16(m) which defines an exception from the right of withdrawal in case of digital content.
- (37) Article 6(1)(c) of Directive 2011/83/EU requires the provision of the "trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently".
- (38) Considering technological developments, it is necessary to remove the fax number from the list of the means of communication since it is rarely used and largely obsolete. Furthermore, traders should be able to provide, instead of an email address, other means of online communication with consumers, for example, online forms and chats, provided that such alternative means enable the consumer to retain the content of the communication on a durable medium in a similar way as email.
- (39) A number of additional amendments should be introduced in the instruments amended by this Directive to clarify the application of specific rules.
- (40) Some Member States consider it necessary to restrict certain forms and aspects of off-premises sales within the meaning of Directive 2011/83/EU on grounds of public policy or the respect for consumers' private life protected by Article 7 of the Charter of Fundamental Rights of the EU. It should therefore be clarified that Directive 2005/29/EC is without prejudice to arrangements which Member States make to

protect the legitimate interests of consumers with regard to unsolicited visits at their private homes or workplace by a trader for direct marketing purposes, such as unsolicited doorstep-selling, or commercial excursions organized by a trader with the aim or effect of promoting or selling products to consumers, which are justified on grounds of public policy or the protection of private life, even if those national restrictions may also aim at the protection of consumers' economic interests. In order to ensure full transparency of such measures Member States should be required to notify them to the Commission so that the Commission can make this information available to all interested parties.

- (41) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents²⁸, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2005/29/EC

Directive 2005/29/EC is amended as follows:

- 1) Article 3 is amended as follows:

(a) Paragraph 5 is replaced by the following:

This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to unsolicited visits by a trader for direct marketing purposes or commercial excursions organized by a trader with the aim or effect of promoting or selling products to consumers, where such restrictions are justified on grounds of public policy or the protection of the respect for private life.

(b) Paragraph 6 is replaced by the following:

Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5. The Commission shall make this information easily accessible to consumers and traders.

- 2) Point (d) of Article 7(4) is replaced by the following:

(d) the arrangements for payment, delivery and performance, if they depart from the requirements of professional diligence;

- 3) The following Article 12a is inserted:

'Article 12a

Redress

1. In addition to the requirement to ensure means to enforce compliance in Article 11, Member States shall ensure that contractual and non-contractual remedies are

²⁸ OJ C 369, 17.12.2011, p. 14.

available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair commercial practices in accordance with their national law.

2. Contractual remedies shall include at least the possibility of contract termination by the consumer.

3. Non-contractual remedies shall include at least the possibility of compensation for damages suffered by the consumer.

4) Article 13 is replaced by the following:

‘Article 13

Penalties

1. Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the competent authorities or courts shall give due regard to the gravity of the infringement, such as:

- a) the duration of the infringement;
- b) the number of consumers affected, including those in other Member State(s);
- c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- d) the intentional or negligent character of the infringement;
- e) any relevant previous infringements by the trader;
- f) the financial benefits gained, or losses avoided, through the infringement.

3. Where the penalty to be imposed is a [pecuniary] fine, the infringing trader’s turnover and size as well as any fines imposed for the same or similar infringements in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension as defined in Regulation (EU) No 2017/2934 include the possibility to impose [pecuniary] fines, the maximum amount of which shall be at least 4% of the trader’s annual turnover of the Member State or Member States concerned.

5. When deciding about the allocation of revenues from pecuniary fines Member States shall take into account the general interest of consumers.

6. Member States shall notify their rules on penalties to the Commission by [date] and shall notify it without delay of any subsequent amendment affecting them.’

Article 2

Amendments to Directive 2011/83/EU

Directive 2011/83/EU is amended as follows:

1) Article 2 is amended as follows:

a) The following point (4a) is inserted:

'(4a) 'personal data' means personal data as defined by Article 4(1) of Regulation (EU) 2016/679;'

b) Point (6) is replaced by the following:

'(6) 'service contract' means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof. For the purposes of this Directive reference to services also includes 'digital services' and reference to "service contract" also includes "digital service contract";

c) Point (11) is replaced by the following:

'(11) 'digital content' means data which is produced and supplied in digital form, such as video files, audio files, applications, digital games and any other software';

d) The following points are added:

'(16) 'contract for the supply of digital content which is not supplied on tangible medium' means a contract under which a trader supplies or undertakes to supply specific digital content to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;

(17) '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, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.

(18) 'digital service contract' means a contract under which a trader supplies or undertakes to supply a digital service to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital service, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;

(19) 'online marketplace' means a service provider which allows consumers to conclude online contracts with traders and consumers on the online marketplace's online interface as defined in Regulation (EU) 2018/302'

2) Article 5 is amended as follows:

a) In paragraph 1, point (g) and (h) are replaced by the following:

'(g) where applicable, the functionality, including applicable technical protection measures, of digital content and digital services.

(h) where applicable, any relevant interoperability of digital content and digital services with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.'

3) In paragraph 1 of Article 6, points (c), (r) and (s) are replaced by the following:

'(c) the geographical address at which the trader is established and the trader's telephone number, e-mail address or other means of online communication enabling the consumer to receive the content of the correspondence on a durable medium to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting.

(r) where applicable, the functionality, including applicable technical protection measures, of digital content and digital services.

(s) where applicable, any relevant interoperability of digital content and digital services with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.'

4) The following Article 6a is inserted:

'Article 6a

Additional information requirements for contracts concluded on online marketplaces

Before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the online marketplace shall in addition provide the following information:

- (a) criteria used by the online marketplace for determining the ranking of offers presented to the consumer as result of his search query;
- (b) whether the third party offering the product is a trader or not, on the basis of the declaration of that third party;
- (c) whether consumer rights stemming from EU consumer law apply or not to the contract concluded; and
- (d) 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.'

5) Paragraph 3 in Article 7 is replaced by the following:

'3. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer makes such an express request on a durable medium.'

6) Article 8 is amended as follows

a) Paragraph 4 is replaced by the following:

‘4. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to in points (a), (b), (e), (h) and (o) of Article 6(1), except the model withdrawal form set out in Annex I(B). The other information referred to in Article 6(1) shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.’

b) Paragraph 8 is replaced by the following:

‘8. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make an express request.’

7) Article 13 is amended as follows:

a) Paragraph 3 is replaced by the following:

‘3. Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back.’

b) The following paragraphs are added:

‘4. In respect of personal data of the consumer, the trader shall comply with the obligations and can exercise the rights applicable under Regulation (EU) 2016/679.

5. In respect of any digital content to the extent that it does not constitute personal data, which was uploaded or created by the consumer when using the digital content or digital service supplied by the trader the trader shall comply with the obligations and can exercise the rights provided under [Digital Content Directive] in the event of termination of the contract.’

8) Article 14 is amended as follows:

a) Paragraph 2 is replaced by the following:

‘After the termination of the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.’

b) In Paragraph 4(b), point (iii) is deleted and point (ii) is amended as follows:

‘(ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent’

9) Article 16 is amended as follows:

a) Point (a) is replaced by the following:

‘(a) service contracts after the service has been fully performed if the performance has begun with the consumer’s prior express consent’

b) Point (m) is replaced by the following:

'(m) contracts for the supply of digital content which is not supplied on tangible medium if the performance has begun, and if the contract places the consumer under an obligation to pay, if the consumer has provided prior express consent to begin the performance during the right of withdrawal period and acknowledged that he thereby loses his right of withdrawal.'

c) The following point is added:

'(n) the supply of goods that the consumer has handled, during the right of withdrawal period, other than what is necessary to establish the nature, characteristics and functioning of the goods.'

10) Article 24 is replaced by the following:

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that these are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the competent authorities or courts shall give due regard to the gravity of the infringement, such as:
 - a) the duration of the infringement;
 - b) the number of consumers affected, including those in other Member State(s);
 - c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
 - d) the intentional or negligent character of the infringement;
 - e) any relevant previous infringements by the trader;
 - f) the financial benefits gained, or losses avoided, through the infringement.
3. Where the penalty to be imposed is a [pecuniary] fine, the infringing trader's turnover and size as well as any fines imposed for the same or similar infringements in other Member States shall also be taken into account in the determination of its amount.
4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension as defined in Regulation (EU) No 2017/2934 include the possibility to impose [pecuniary] fines, the maximum amount of which shall be at least 4% of the trader's annual turnover of the Member State or Member States concerned.
5. When deciding about the allocation of revenues from pecuniary fines Member States shall take into account the general interest of consumers.
6. Member States shall notify their rules on penalties to the Commission by [date] and shall notify it without delay of any subsequent amendment affecting them.'

Article 3

Amendments to Directive 93/13/EC

Directive 93/13/EEC is amended as follows:

Article 8a is inserted as follows:

1. Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.
2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the competent authorities or courts shall give due regard to the gravity of the infringement, such as:
 - a) the duration of the infringement;
 - b) the number of consumers affected, including those in other Member State(s);
 - c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
 - d) the intentional or negligent character of the infringement;
 - e) any relevant previous infringements by the trader;
 - f) the financial benefits gained, or losses avoided, through the infringement.
3. Where the penalty to be imposed is a [pecuniary] fine, the infringing trader's turnover and size as well as any fines imposed for the same or similar infringements in other Member States shall also be taken into account in the determination of its amount.
4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension as defined in Regulation (EU) No 2017/2934 include the possibility to impose [pecuniary] fines, the maximum amount of which shall be at least 4% of the trader's annual turnover of the Member State or Member States concerned.
5. When deciding about the allocation of revenues from pecuniary fines Member States shall take into account the general interest of consumers.
6. Member States shall notify their rules on penalties to the Commission by [date] and shall notify it without delay of any subsequent amendment affecting them.'

Article 4

Amendments to Directive 98/6/EC

Directive 98/6/EC is amended as follows:

Article 8 is amended as follows:

1. Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to

ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

2. Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the competent authorities or courts shall give due regard to the gravity of the infringement, such as:

- a) the duration of the infringement;
- b) the number of consumers affected, including those in other Member State(s);
- c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- d) the intentional or negligent character of the infringement;
- e) any relevant previous infringements by the trader;
- f) the financial benefits gained, or losses avoided, through the infringement.

3. Where the penalty to be imposed is a [pecuniary] fine, the infringing trader's turnover and size as well as any fines imposed for the same or similar infringements in other Member States shall also be taken into account in the determination of its amount.

4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension as defined in Regulation (EU) No 2017/2934 include the possibility to impose [pecuniary] fines, the maximum amount of which shall be at least 4% of the trader's annual turnover of the Member State or Member States concerned.

5. When deciding about the allocation of revenues from pecuniary fines Member States shall take into account the general interest of consumers.

6. Member States shall notify their rules on penalties to the Commission by [date] and shall notify it without delay of any subsequent amendment affecting them.'

Article 5

1. Member States shall adopt and publish, by [18 months after adoption] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from [6 months after transposition deadline].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 6

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 7

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President