Public consultation for the Fitness Check of EU consumer and marketing law

Complementary Policy Paper of ETNO and GSMA

Introduction

GSMA and ETNO welcome the opportunity to present telecoms' point of view on the public consultation. Anticipating the various parallel ongoing legislation and review processes, the Fitness Check of EU Consumer and Marketing Law provides a unique window of opportunity to establish more efficient and consistent consumer protection standards across service markets. This particularly refers to the alignment of horizontal law with rules applied to telecoms' services for end-users.

While overall horizontal laws prove to provide effective consumer protection standards, market developments challenge the current patchwork of the Consumer Acquis: The convergence of services which were in the past different (e.g. services that allow communication), bundling of different services in integrated offerings (e.g. social networks with communication, telecoms bundles) and very short innovation cycles demand a re-think. Consumers can no longer rely on consistent protection standards across service markets, and service providers have to manage the overlapping and fragmented rules across sectors and borders. More strictly regulated telecoms have to compete with less regulated providers of substitutable services. Apart from this, horizontal law does not sufficiently cover certain consumer issues, such as applying similar protection standards to any commercial service, irrespective of whether consumers pay with money or with their personal data. More recently emerged issues which may become detrimental for businesses or consumers, including a lack of law enforcement and the need to have harmonised requirements for both B2B and B2C regulation, have to be considered in a comprehensive assessment.

To appropriately address these challenges and reflect the increased competition in service markets, the regulatory fragmentation across services needs to be significantly reduced. This should be achieved through lifting specific service regulation as much as possible, and relying on horizontal protection standards. Only selected adjustments in horizontal laws are required, to consistently address identified challenges. Not more prescription but a more principle-based approach, complemented by co- and self-regulation, ensures the required flexibility for dynamically evolving services.

Based on this general position, the following explanation provides ETNO and GSMA members' detailed views on the European Commission's specific questions, as included in the consultation questionnaire.

1. In your view, to what extent are the following EU consumer and marketing rules beneficial to consumers?

Effective consumer protection is essential, but must also be proportionate and not place overly burdensome requirements on industry which could result in higher costs and less innovation. Considering this, horizontal laws prove to ensure overall an efficient consumer protection. However, this efficiency is challenged by high fragmentation of rules and more recent developments that require a few adjustments. A slightly updated horizontal framework should widely replace sector-specific regulation and cover all digital services equally.

Telecoms are subject to both horizontally applicable consumer protection rules and sector-specific consumer protection rules. These sector specific rules are generally more onerous than the horizontal requirements. Currently, the sector specific requirements do not apply to communications services offered by players that provide their services via the internet, even when these are perceived by consumers as substitutes to those offered by telecoms operators. The impact for the consumer is that they cannot rely on consistent protection standards when using similar services. The impact for telecoms operators is that they cannot compete on a level playing field.

Beyond this legal fragmentation, consumer protection rules are not applied to all commercial services in a comparable way. While e.g. pre- contractual transparency obligations apply to commercial services that charge money, most consumer protection principles are not applied if the service is based on another kind of counter-performance. E.g. collection and monetisation of personal data as counter-performance is a major loophole for consumer protection standards. A reasonable translation of protection standards to all commercial services is required.

Right to be protected against misleading or aggressive commercial practices?

While ETNO and GSMA fully agree that consumers have to be protected against malpractice, standard advertisement that addresses mass markets must not be confused with individually agreed terms of contract. Accordingly, the current rules should continuously ensure flexibility to allow standard advertisements. Individually agreed contracts may differ from generally advertised service characteristics (e.g. for geographic reasons).

Right to get adequate information about the goods and services offered, i.e. the main characteristics, the total price, the delivery time, etc.?

Information is essential for consumers in order for them to make an informed choice between different commercial offerings. Therefore, reasonable requirements need to be harmonised and applicable irrespective of the kind of provider or remuneration. Contracts where the consideration is personal data used for other commercial purposes than solely necessary for service delivery should not be considered as “free”. In such cases, the supplier should be required to inform the consumer about the nature of the counter-performance and the resulting consumer rights. Any applicable rule should be proportionate and with clear consumer benefits, e.g. limiting possible data retrieval obligations to those data that have been directly provided by the consumer. Currently, there are additional information requirements applied to telecoms which are fragmented across member states.

Right to get information also about the unit price of goods (i.e. for one kilogramme, one litre etc.)?

Websites and other services enabling price comparison are helpful for the consumer. However, mandating in detail how this has to be done can be problematic, especially as services and products are increasingly bundled/ integrated, which prevents, for example, a reasonable comparison based solely on unit prices. Also, products and services may differ significantly in detail. In such cases the comparison of unit prices would be misleading for consumers.

Right to cancel a contract concluded at a distance within 14 days from the delivery goods or conclusion of a service contract (the 'right of withdrawal')?

Consumers need a reasonable timeframe to assess services or products purchased at a distance. The current rule of 14 days has proven to be a sufficiently long period for consumers. Beyond this safeguard, some larger providers have even voluntarily extended the timeframe. Any regulatory extension should be avoided, since it increases uncertainty for many businesses about late cancellation of a concluded contract. In a competitive market, longer timeframes should be based on commercial considerations.

Right to get information about the functionality and interoperability of digital content?

ETNO and GSMA assume that this questionnaire refers to the current definition of digital content, based on the Consumer Rights Directive. Transparency and contractual information on functionality and interoperability are important for consumers. Generally, consumers should be enabled to assess if a service or product is appropriate for individual requirements. Proper upfront information is the most efficient way to avoid subsequent disputes on contract fulfilment. But information requirements must not lead to an obligation to ensure a specific interoperability or functionality.

Right to cancel the contract concluded at a distance for the downloading (or streaming) of digital content before its performance begins (the 'right of withdrawal')?

Generally, this practice is beneficial. However, in cases where consumers wish to swiftly or directly download the content, a submission of contractual information to the consumer is not always possible and would delay the possibility for consumers to download. Consideration must be given to situations where content is supplied together with tangible goods and other services and where the consumer has started to use the other goods or services.

Right to be protected against unfair clauses in the "small print" (the 'right to fair standard contract terms')?

Consumers should be protected against unfair contract terms. Current rules have proved to be effective and disputes over possibly unfair contract terms are regularly raised in court cases and, consequently, market players have to regularly adjust their contracts. Additional measures, such as additional monitoring and application of remedies through National Regulatory Authorities with regard to telecoms' services are not required. However, it has to be noted that this right proves to have little relevance for consumers in daily purchasing of services and products. Most consumer complaints do not refer to unfair contract terms but to other issues.

Right to have a defective good repaired or replaced for free or to obtain a price reduction or refund during the legal guarantee period (in most EU countries 2 years from delivery; longer in some EU countries)?

Clearly, consumers need to have the right to get what was paid for and providers have to perform their contractual obligations. However, it needs to be up to the provider's decision if a service/ good is repaired or replaced (e.g. depending on the size of the defect and the value of the service/good). In this context it also need to be considered that such costly obligations for suppliers lead to higher prices, which is detrimental for consumers.

Right of consumer organisations and public bodies to take legal actions which can stop infringements of consumers' rights (the right to seek injunctions)?

Enforcement of consumer protection rules is of high importance for consumers and is key to ensuring that all providers comply equally with obligations, irrespective of their size and whether they are located outside the EU and target EU-markets. Consumers and traders require clear responsibilities of enforcement bodies. An overlap of competencies needs to be avoided, such as in cases where public and authorised private bodies are in charge of monitoring and enforcing. This refers to e.g. National Regulatory Authorities and Consumer Protection Agencies which may become active in parallel on the same file.

Other?

A fully harmonised cross-border and cross-sector consumer protection law is required, to establish consistent protection standards that consumers can rely on (see introductory remark).

Consumers benefit greatly from many established goodwill practices. These voluntary measures to increase customers' satisfaction and to avoid legal disputes should be taken into account when assessing benefits

2. How effective are the legal actions ("injunctions") taken by consumer organisations and public bodies to stop infringements of consumers' rights in the following economic sectors?

Online provision of goods, services and digital content?

In general, the current application of injunctions has proved to be an effective tool to enforce current consumer protection law. These measures are applicable in a flexible and swift way and, thus, can prove to be more efficient and appropriate than ex ante measures such as those applied to highly regulated telecoms services. Irrespectively of this general finding, an application of injunctions does not replace the need to update consumer rules as described above, competencies of bodies to stop infringements should be clarified, and all players in the market should be equally strictly monitored.

Communications and internet access services?

Telecoms' ECS (electronic communication services) and IAS (internet access services) fall under horizontal injunctions instruments as well as strict ex ante consumer protection rules. Horizontal injunction rules are intensively applied against telecoms, if a potential infringement is identified. The application is particularly frequent since telecoms' ECS and IAS fall under stricter ex-ante rules such as more contractual information requirements. Accordingly, telecoms are an easier target for demanding injunctions, even if unjustified. Beyond this, National Regulatory Authorities are empowered to closely monitor telecoms and apply additional remedies in case of infringements.

Additional to injunctions that ensure consumer protection, telecoms fall under strict ex ante control and detailed monitoring through NRAs, even if markets for IAS and ECS are highly competitive. Providers have a strong incentive to retain customers by treating them fairly and not imposing unfair conditions. NRAs' close monitoring and application of remedies is based on legacy definitions and categorisation of market players which does not reflect market realities any more. Accordingly, communication services provided by other players than telecoms only fall under horizontal injunction rules. This leads to an unlevel playing field with regard to injunctions and consumers cannot rely on similar standards across digital services.

How important are the following problems for protecting the rights of consumers?

Consumers don't know/ don't understand their rights?

In principle, current horizontal provisions effectively balance consumers' demand for easy-to-understand information (main characteristics before contract conclusion) as well as the need for more detailed information (in contract terms). However, the fragmentation of rules across Europe and between sectors leads to a lack of consumers' trust in cross border trade and service usage. With regard to commercial contracts that are based on other remunerations than money, usually consumers do not benefit from any transparency standards such as information on services' main characteristics and contractual rights e.g. redress rights. In these cases consumers are not enabled to make an informed choice between different commercial services.

Traders don't know/ don't understand consumer protection rules?

Obviously, it is key that traders understand applicable rules. Regarding current horizontal rules, although there is room for improvement, overall they are understandable for traders. Contrary to this, telecoms have to comply with additional sector-specific prescriptive law and a higher cross-border fragmentation. The resulting inconsistency and complexity create significant challenges and

leads to additional costs. Also with regard to horizontal consumer law, which is most often already based on full harmonisation, there is potential for further cross-border harmonisation.

Traders don't comply with consumer protection rules?

Traders usually comply with obligations. Enforcement can be more challenging where traders have not notified their services or target the EU market from outside the EU and, thus, do not have a legal entity within the EU territory which can be easily addressed by EU law enforcement. Pending court cases may provide some clarification on this problem.

Consumer law is too complex?

Current horizontal rules overall do not appear to be overly complex. However, telecoms have to follow not only horizontal but additionally sector-specific consumer protection rules (cross-sector fragmentation). On top, due to minimum harmonisation of sector-specific rules, member states add further obligations, which results in considerable cross-border fragmentation. Consequently, telecoms are faced with very complex and overly strict obligations: Transparency obligations, cost control tools, duration and termination of contracts, enforcement and dispute resolution, are only some examples of areas in which different standards apply to telecoms compared to horizontal law. See previous response.

There are significant differences between national consumer protection rules across EU countries?

As stated in the introductory remark, digital services markets are characterised by fragmentation between sectors (e.g. telecoms' services falling under specific additional rules) and across member states. Since telecom-specific regulation is based on minimum harmonisation, cross-border fragmentation is even higher than in horizontal law which is based on full harmonisation. The high fragmentation of consumer protection rules, particularly with regard to telecoms-rules and horizontal law, also leads to inconsistency in enforcement of protection standards. This impairs consumers' trust in usage of digital services, particularly when using similar services that fall under different rules.

National administrative authorities lack legal powers to enforce consumer rights?

Authorities have sufficient powers, if they are provided with necessary transparency on traders' business activities. This may require that any provider has to notify within the EU if an EU market is targeted.

National authorities responsible for enforcing consumer rights are not active enough?

Authorities and empowered private bodies should enforce horizontal rules equally across all sectors.

Court proceedings are complex / long / costly?

In principle, there is no need to reform civil court proceedings, considering that provisions such as industry's voluntary measures or alternative dispute resolutions are complementary and provide effective solutions for consumers and court proceedings are rarely used.

Administrative enforcement proceedings are complex / long / costly?

Not considered as relevant problem in horizontal law application.

Injunctions proceedings are complex / long?

Not considered as relevant problem in horizontal law application.

Injunctions proceedings are costly?

Injunction proceedings can be costly in certain circumstances e.g. where operators are required to block websites which infringe third party content.

There are significant differences between national rules on injunctions proceedings across EU countries?

In principle, more harmonised approach is welcomed to ensure that consumer protection rules are equally well respected and enforced across members. The Regulation of Consumer Protection Cooperation may contribute to a more consistent and effective enforcement across member states.

Other?

As stated in the introductory remark: The high fragmentation of consumer protection rules, particularly with regard to telecoms-rules and horizontal law leads to inconsistencies in the enforcement of protection standards. This impairs consumers' trust in the usage of digital services, particularly when using similar services that fall under different rules.

3. How effective for protecting the rights of consumer are self- and co-regulation initiatives by businesses at national or EU level, under which businesses establish standards as to how they deal with consumers (eg. industry trust marks)?

There are a number of self and co-regulation initiatives in place, some of which we have listed below.

Protection of children:

GSMA with various commitments in the area of protection of minors (Mobile Alliance against Child Sexual Abuse and the Safer Mobile Framework

ICT Coalition for Children Online: Many GSMA and ETNO members have committed jointly with other ICT companies to comply with agreed principles that support minors' safer use of the internet. The ICT Coalition also includes stakeholder events, research activities and regular assessments of members' compliance (www.ictcoalition.eu).

Others:

Self-regulation on premium rate services, such as the PhonePayPlus Code of Practice in the UK:http://www.phonepayplus.org.uk/

Codes of Conduct on mobile number portability, Premium SMS and Premium Rate Voice Services of the Association of Mobile Network Operators in Czech Republic: http://www.apms.cz/pro-spotrebitele/kodexy-sluzeb.

The Privacy Code of Conduct for mHealth apps:https://ec.europa.eu/digital-single-market/en/news/meeting-privacy-code-conduct-mhealth-apps

GSMA privacy guidelines for app developers: http://www.gsma.com/publicpolicy/privacy-design-guidelines-for-mobile-application-development

Various codes of practice in relation to advertising e.g. in UK on Business Broadband Speeds, Residential Broadband Speeds, Sales and marketing of subscriptions across mobile networks, handling complaints and resolving disputes, open internet code of practice, or in Spain the initiative "Auto-control"

In Spain, operators have committed to the Telesales Code of Conduct (16/7/12) which includes some good practices in telesales operations (for example, establishing a timeframe limits to make calls).

Apart from that, the self-regulatory initiatives "Autocontrol" focuses on advertising and "Confianza On Line" aims at on-line shopping security.

In Italy, operators have committed to the Telemarketing Code of Conduct regulating direct marketing activities, direct sales and distance contracts and the Tele-selling Code of Conduct containing transparency, accuracy and completeness requirements to be used during the entire customer acquisition process. Codes also address premium services and protection of minors in compliance with the right of information and the freedom of expression. The Code on premium services aims at improving customer protection in terms of transparency in the provision of SMS/MMS premium services. In 2013, the transparency commitment on premium services activation via wap and web has been adopted.

In Germany, operators and other players have committed on how to concretely provide clear and comprehensible information on data protection notices (one pager): http://sriw.de/index.php/english1

In France, operators have committed to a Responsible Purchasing Policy: http://www.orange.com/en/Responsibility/Trust/Responsible-purchasing

In Portugal, the Code of Conduct for the provision of content service (on mobile) defines rules on age control and access to adult content and pornography on the mobile, and some basic principles as basis for the relationship with content providers. Besides this, telecoms have agreed a protocol with consumers' rights associations to simplify exchange on complaints management processes.

In Czech Republic, Codes of Conduct address MNP, Premium SMS and Premium Rate Voice Services: see http://www.apms.cz/pro-spotrebitele/kodexy-sluzeb.

4. What is your opinion regarding the following statements?

Businesses can trade across the EU easily thanks to the harmonised EU consumer and marketing rules?

The current full harmonisation of horizontal consumer protection rules are one key element to facilitate cross-border service provisioning and service consumption. However, member states still have considerable flexibility in applying these rules, e.g. when transposing directives, regulating areas that are left to member states legislation. Telecoms cannot benefit from the higher level of harmonisation applied to horizontal rules since sector-specific rules for telecoms are based on minimum harmonisation. Cross-border service provisioning is more difficult.

Businesses are well protected against misleading marketing practices of other businesses?

Current horizontal rules are in principle an effective means to tackle many possible unfair commercial practices with regard to B2C as well as B2B. Beyond these rules, telecoms fall under stricter rules since NRAs have additional possibilities to monitor and intervene if a telecoms operator potentially applies unfair commercial practices in B2B relations.

However, DG JUST should also take into account problems which are currently not adequately addressed through horizontal law. As highlighted within EC's communication on online platforms nine out of ten responses to the questionnaire on the role of online platforms see specific B2B related problems which are today not or not appropriately tackled. Also ETNO and GSMA have identified potential problems, as described in their responses to the European Commission's consultation on Online Platforms. To address this gap, better law enforcement and a more flexible application of the Unfair Commercial Practices Directive are important steps. Thus, EC's

considerations as reflected in the Guidance on the implementation and application of the Unfair Commercial Practices Directive, chapter "5.2. Online sector", provide some important proposals.

However, these considerations are neither binding for member states, nor do they tackle the variety of the problems as described in EC's communication on online platforms and B2B relations. In principle, competition law could complement horizontal rules on unfair commercial practices. However, the application of competition law proves to be too slow and static, not reflecting the dynamics in digital service markets. Reforms are urgently required.

ETNO and GSMA welcome EC's announcement to perform the targeted fact finding exercise, seriously considering industries' concerns. Based on a comprehensive assessment, appropriate means to tackle identified problems in B2B and B2C relations should be defined. Any required legal adjustments in digital services markets should only focus the identified problem and avoid imposing burdens for other services.

Businesses are well protected against unfair comparative advertising of other businesses?

ETNO and GSMA have not identified problems with regard to unfair comparative advertisement which cannot be effectively solved by existing legal instruments.

5. In your view, what are the benefits for businesses from complying with EU consumer and marketing law?

GSMA and ETNO members respect applicable legal requirements and ensure compliance. The question of whether legal compliance is beneficial for providers appears to be misleading and does not justify whether a provider complies with the law or not. Accordingly, effective enforcement has to ensure that all market players comply with obligations. Other considerations such as providing incentives for better compliance are helpful but cannot replace authorities' responsibility to effectively enforce law.

Irrespectively from necessary enforcement, ETNO and GSMA members believe that consumers value a reliable and compliant service provider. However, this is only the case if the consumer is aware of a provider's reliability and compliance. Therefore, receiving proper information from the provider is key, e.g. about contractual obligations

It has to be noted that average consumers usually do not know if a provider is compliant with legal obligations or not, since this requires detailed legal knowledge. Even when it comes to basic assessment of contractual compliance, if the commercial service is based on other remunerations than money (e.g. monetisation of personal data) consumers are most often not even informed about their basic contractual rights or service characteristics. Therefore, non-compliance of some market players does usually not appear a disadvantage. On the contrary, non-compliant providers may have less compliance costs and consumers may even show a higher degree of trust or satisfaction since e.g. consumers are not properly informed about negative contractual aspects (e.g. service restrictions, costs, etc).

An updated horizontal framework needs to ensure consistent, transparent and easy to understand rules with regard to any commercial digital service. Obligations such as those applied to telecoms should not be overly prescriptive. Principle-based rules should apply instead, ensuring that also future services are adequately covered. This is the basis for consumers' trust, fair competition and a continuously dynamic market for digital services.

6. **What is your most accurate estimate of the direct costs of compliance with consumer and marketing rules for the companies you represent, e.g. costs of providing legal guarantee for goods, complying with consumer information requirements?**

Most relevant direct costs for telecoms providers only with regard to horizontal law obligations include inter alia the following. (These direct costs only refer to regularly occurring costs, and they do not include the one off investments to comply with the various consumer protection obligation in horizontal legislation):

- Technical adjustments in online shops: e.g. in the scope of the Consumer Rights Directive obligations, new procedural requirements with regard to providing info when concluding a contract.
- Further usage of products after the customer has exercised their right of withdrawal: If such products have been used by the consumer they cannot be sold as being new anymore. The claim for compensation through the consumer is practically not feasible due to strict court decisions. Additionally, the legitimacy of any claim is rejected by courts if there are minor mistakes in the contractual terms and conditions
- Consumer complaints about lack of contractual fulfilment: The obligation that only the traders are obliged to prove the fulfilment of contract (reversal of burden of proof, today for 6 months). Traders usually have to bear all costs, even if there is no lack of contract fulfilment. Usually, a formal assessment or going to court is economically not reasonable for traders. These costs will even increase if the period for reversal of burden of proof is extended, as currently discussed in the draft directive on the supply of digital content. Apart from this, dispute resolution and compensation processes impose further costs.
- Consumers' choice on retroactive contract fulfilment: Consumers currently have the right to choose whether they want to receive a new product or if the received product has to be repaired. There is only one restriction of this right in cases of non-proportionately high costs. However, reparation as well as delivery of a new product equally serve contractual fulfilment.
- Efforts to update and ensure new information requirements for distance selling, including also costs such as legal advisory or mailing costs.
- Requirements relating to duration of contracts and contract termination fees.
- Dispute resolution and compensation process.
- Price comparison requirements.

Additionally, more prescriptive and broader telecoms-specific laws impose direct costs for telecoms (as e.g. described in ETNO's and GSMA's response to the Telecoms Framework Review Consultation in 2015). These costs also refer to Regulatory Authorities frequent requests: Telecoms operators are regularly required to provide very detailed and complex information about their products or services, commercial practices, business data etc. for assessing and monitoring consumer protection.

Indirect costs for telecoms resulting from regulatory asymmetries also have to be considered, since they have a significantly higher negative impact on telecoms. Due to the highly fragmented rules applicable to telecom operators (as described above: cross-sector and cross-border), business flexibility is more restricted and innovation speed slowed down (longer time-to-market times). The resulting competitive disadvantages are particularly costly in service markets which are characterised by high dynamics and fierce competition with providers that fall under much lighter rules.

7. What is your most accurate estimate of the average cost (in EUR) of an enforcement action to bring a trader or traders into compliance with the EU consumer and marketing rules for your authority?

It is not possible to provide a valid estimation for this very general case. The variety of possibly required actions and related costs is extremely broad and can range from a few to many millions Euros. Apart from that and as described above, the indirect costs for telecoms due to legal fragmentation are considered to be much higher than direct costs.

8. How positive / negative is the impact of EU consumer and marketing law on the following aspects?

Amount & relevance of information available to consumers to compare and make informed purchasing choices?

Information and transparency are key for consumers to make an informed choice and to control contractual fulfilment, costs etc. In general, the current level of horizontal information requirements is sufficient and should not be further extended. Contrary to "the more, the better" too extensive information requirements are of little value for average consumers and distract from key elements of contracts. More important are easy-to-understand information, that are illustrated in a transparent way. Such obligations should apply to any commercial contract, irrespective if the remuneration is based on money or other forms of remuneration such as commercial processing of personal data. The enforcement of the latter is lacking and a legal clarification appears necessary. Considering that horizontal rules generally appear to be sufficient, the more extensive transparency obligations that apply to telecoms (as included in the Universal Services Directive, the obligation to publish comparable information and to include a long catalogue of details within contracts) are not required and, thus, should be lifted. If some selected transparency rules in the mentioned sector-specific regulation is still considered as indispensable, the respective rule should be transferred to horizontal law and apply to all service providers equally.

A level playing field amongst EU-based businesses?

Horizontal consumer protection law provides overall an effective protection standard for consumers. However, the Consumer Protection Acquis lacks consistency: Consumers are faced with additional and overlapping sector-specific protection rules and EU market players do not compete on a level playing field. This applies even if the service is perceived by consumers as substitute (convergence of services – e.g. service for inter-personal communication such as messaging or voice calls). Fragmentation of rules is also highly problematic with regard to offerings that bundle/ integrate various services. Different rules apply to different elements within the same integrated offering. A fragmentation of different rules is highly confusing for consumers and to the detriment of fair competition. Apart from this cross-sector fragmentation, EU-based telecom-specific regulation is based on minimum harmonisation. This implies that telecoms have to deal with considerable cross-border fragmentation of rules if performing cross-border business activities. Horizontal regulation is already mostly based on full harmonisation and enables all respective market players to keep costs through fragmentation relatively low. These market developments require a cross-sector harmonisation of rules, through reducing sector-specific obligations.

Protection of consumers against unfair commercial practices?

The protection standards as included in the Unfair Commercial Practices Directive are important EU level rules to protect consumers with regard to unfair commercial practices. However, better law enforcement and a more flexible application of the Unfair Commercial Practices Directive are

required, as explained above. EC's Guidance on the implementation and application provide some welcome guidance.

Protection of businesses against misleading marketing and unfair comparative advertising?

While in principle rules appear to be sufficient to protect businesses, specific more recently emerged problems have to be more effectively addressed. For some of these problems, EC's Guidance on the Unfair Commercial Practices Directive may provide proportionate solutions

Availability and choice of products?

Consumers generally benefit from a greatly increased variety of offerings in digital services markets. This includes for example digital content and communication services, where the consumer can choose between many different providers and offerings. However, some service providers have reached dominant market positions for the detriment of effective competition through other players. This includes inter alia negative network effects and other lock-in effects (e.g. lock-in of personal data) that lead to new switching barriers. In such markets, new and innovative market players may find it difficult to attract customers. Consumers' choice can de facto become limited.

Lower prices of products?

In principle, monetary prices of products and services in digital service markets have decreased due to competition and short innovation cycles. However, this must not distract from the fact that data-based business models increasingly replace money-based business models. Instead of charging money, service providers process personal data for commercial purposes and monetise this data on another market side (e.g. personalised advertisement, commercial data analysis etc.). Usually consumers are not aware of this price and the commercial nature of a service which appears to be "for free". Transparency and information requirements (including the indication of data as counter-performance) that are applied to commercial contracts based on monetary payment do not apply to these services.

Higher quality and longer durability of products?

No relevance identified.

More customers and revenues for EU-based businesses?

Contrary to the little cross-border harmonisation of rules applicable to telecoms' services, most horizontal consumer protection regulation is already based on full harmonisation. A further increase of cross-border harmonisation appears to be helpful for pan-European service provisioning. However, this benefit applies irrespectively of the question whether a service provider is based in the EU or is targeting the EU-markets from outside of the EU. It has to be noted that a further harmonisation of rules is only for the benefit of service providers, if the level of harmonised rules are proportionate and provide effective protection standards. See response to next question.

Increase of national e-commerce (i.e. within the trader's EU country)

Full harmonisation of proportionate rules facilitates cross-border service provisioning. However, telecoms fall additionally under highly fragmented rules and, thus, do not benefit from this full harmonisation (see previous response).

Increase of e-commerce across EU Member States

See response to previous question.

Competitiveness of EU businesses vis-à-vis non-EU businesses

Any provider that targets EU markets would benefit from EU-wide harmonisation of rules, if this harmonisation comes at proportionate costs for industry (see response to line 8). Considering that telecoms do not benefit from fully harmonised horizontal rules, telecoms are disadvantaged when competing with non-EU based companies that only fall under horizontal rules. In addition and as described above, the lack of law enforcement with regard to some non-EU based companies appears as a disadvantage for strictly regulated telecoms.

9. How effective are the following consumer redress/enforcement mechanisms in protecting consumer rights in case of breach of EU consumer and marketing rules?

An individual consumer gets redress through direct negotiations with the trader?

Most consumer complaints received by telecoms' customers are solved through direct agreements between telecoms' customer care and the customer, often based on goodwill. This happens on a daily basis as an integral part of customer care activities. Direct negotiations allow flexibility to find individual solutions, ensure or re-establish customer satisfaction, at relatively low costs and in the shortest time. In this way, the majority of complaints are solved effectively.

An individual consumer gets redress through an alternative dispute resolution mechanism?

Alternative dispute resolutions can be an efficient alternative to direct negotiations, e.g. if a customer does not want to negotiate with the provider. Prerequisite of these mechanisms is that they do not replace court decisions, if required, and that they come at proportionate costs.

An individual consumer gets redress through a court action?

Telecoms usually avoid court decision for the above mentioned reasons (see line 1). However, in selected cases, a court decision is required to establish legal clarity (e.g. in cases of regular non-justified claims coming from the same customer or disputes over misleading advertisement cases).

An individual consumer gets redress through an administrative enforcement decision?

Same applies as described in line 1 and 3. However, decisions by courts or authorities are necessary and required with regard to undertakings which show less willingness to negotiate individually with customers or to participate in alternative dispute resolutions, in order to find satisfying solutions for customers' justified complaints. Particularly in cases where providers target many different markets with the same offering, the risk to not comply with all different national rules appears to be higher. In these cases, better enforcement is key to ensure consumers' protection.

An administrative authority issues an injunction which stops an infringement of consumer rights?

Injunctions are an effective and necessary instrument in some cases (previous response).

A court issues an injunction which stops an infringement of consumer rights?

Injunctions are an effective and necessary instrument in some cases (previous response).

How effective are the injunction actions sought against the following illegal practices?

Injunction can be considered as an effective instrument to tackle any of these listed problems. However, as described in previous sections, injunctions are a last resort. Besides general regulation, co- and self-regulation appear to be more effective to address general problems in the market.

Injunctions are not suited to enforce compliance within the whole market but address individual cases. A court decision in an injunction proceeding normally focuses only on a specific aspect. Other courts or authorities could make different decisions in similar cases. However, this is not certain and depends on the individual circumstances. Therefore, injunction actions tend not to provide legal certainty. Injunctions have only an indirect, thus limited effect on other market players' behaviour (through deterrence).

10. How strongly do you agree or disagree with the following statements about the interplay between the Injunctions Directive and the provisions on enforcement of consumer rights included in other Directives covered by this questionnaire?

There is a need for clarification of the interplay between the Injunctions Directive and other provisions **on enforcement of consumer rights?**

Clarification and regulatory coherence is key to ensure legal certainty and to avoid regulatory overlaps. This goes beyond horizontal rules and should include sector-specific law such as applied to telecoms. There is a strong need to review all existing sector specific rules: Rules that are no longer needed have to be deleted. Selected sector specific rules that are deemed to be indispensable have to be shifted to the horizontal framework. Self- and co-regulation can accompany horizontal regulation, complementing injunction.

There is a need for ensuring coherence between the Injunctions Directive and other provisions on enforcement of consumer rights?

See previous response.

11. How strongly do you agree or disagree with the following statements about the interplay between EU consumer and marketing rules and the EU sector-specific consumer rights in the area of electronic communications services?

EU consumer and marketing rules provide adequate complementary protection regarding issues, which are not expressly regulated by the sector-specific EU rules?

Horizontal consumer regulation provide a sufficient protection of consumers, also with regard to telecoms' services. They should not be considered as "adequate **complementary**" protection", but should be the only set of rules applicable. Consumers have a broad choice between different services that allow interpersonal communications, offered by telecoms providers as well as others. However, even if other providers' services are substitutes from the consumers' point of view, only telecoms are more strictly regulated. This more burdensome telecoms-specific regulation implies more costs and significantly limits business opportunities (e.g. slowing down innovation processes, limiting flexibility). Consumers' benefits from additional specific rules is questionable: Overall, horizontal rules have proved to sufficiently ensure effective protection standards. Since this includes services that are substitutes of telecoms' services, more and stricter rules applicable only to telecoms is not proportionate. On the contrary, fragmentation of rules across the digital market confuses consumers.

Consumers are aware about the complementary application of EU consumer and marketing rules in the specific sector?

Usually, consumers are not aware of the fragmented protection levels. This is demonstrated e.g. in the ComRes Consumer Survey from 2015, which shows that consumers do not know which services fall under which rules with regard to e.g. data protection. Consequently, providers of services that

are more strictly regulated do not benefit from a more consumer-friendly image. If a commercial service is based on other remuneration than money, e.g. collection and monetisation of personal data, transparency rules are not applied and, thus, consumers are not aware of their rights, the service characteristics or the commercial nature of the service.

Traders in the relevant sector are aware of the complementary application of these EU rules and comply with them?

Telecoms providers are strictly regulated by national regulatory authorities. Awareness of regulation is high.

The competent public enforcement authorities in the relevant sector are aware of the complementary application of these EU rules and enforce them where appropriate?

National Regulatory Authorities are highly aware of the sector-specific regulations and are obliged to enforce respective rules.

The co-operation between the various public enforcement authorities in charge of consumer protection should be strengthened?

A better cooperation between authorities is considered to be key to ensure harmonised and effective enforcement of horizontal rules. The current draft Regulation of Consumer Protection Cooperation may serve this objective.

12. How strongly do you agree or disagree with each of the following statements about the potential areas to improve EU consumer and marketing rules for the benefit of consumers?

The marketing/pre-contractual information requirements currently included in the Unfair Commercial Practices Directive, Price Indication Directive and Consumer Rights Directive should be regrouped and streamlined?

Streamlining and alignment of requirements applicable in digital service markets is urgently required. This should go beyond the mentioned horizontal directive and has to include sector-specific rules. The Universal Service Directive (USD) and the Open Internet Regulation include very detailed and more exhaustive contractual information requirements and the obligations to publish comparable information. The Universal Service Directive also includes strict obligations in relation to modification of contracts. In many cases, telecoms have to comply with both – horizontal and sector-specific rules – which is burdensome and confuses consumers. The need for more aligned rules also refers to paying with different kind of remuneration. Currently there is a loophole, and consumers paying e.g. with their personal data, are usually not provided with the pre-contractual information or usual contractual rights. Any commercial contract should inform consumers in a comparable way to enable consumers' informed choice. In case of paying with personal data, a reasonable translation of information requirements is required.

The information given to consumers at the advertising stage should focus on the essentials whilst more detailed information should be required only at the moment before the contract is concluded?

Advertisement of products and services for mass markets has to be general and focus on the essentials of an offering. This is necessary to reach a broad audience. Apart from that, advertisement has to be catchy and very easy-to-remember. More individual as well as detailed information can only be provided when consumers initiate contracts.

Online platform providers should inform consumers about the criteria used for ranking the information presented to consumers?

While ETNO and GSMA do not support a specific regulation of online platforms, online platforms should also have to comply with information requirements as applicable to any service. Beyond compliance with current rules, the specific character of some online platforms as gatekeepers for users, may require additional rules to be included in horizontal service regulation. This includes transparency on the criteria for ranking and additional rules that ensure non-discrimination. The latter should be considered as a general principle in horizontal service regulation.

The presentation of pre-contractual information to consumers should be simplified by applying a uniform model, e.g. using icons?

Information for consumers should be easy-to-understand and allow comparison of products and services. Additionally to pre-contractual and contractual information, consumers have the possibility to compare different digital services through e.g. third parties' comparison websites. These means are sufficient to enable consumers' informed choice. Additional obligations, such as publication requirements as applied to telecoms, are not necessary and thus not proportionate. A completely unified information model such as based on icons would be too narrow to reflect the broad variety of services and bundled services available in the market. Providers need some flexibility to decide about essential information for consumers, which provide the key facts of the service/ product and the contract in an easy-to-understand way.

The obligation to display also the price per unit (eg, 1 Kg, 1 l) of the goods should apply to all businesses irrespective of their size?

Generally, consumers can easily compare prices. Detailed information, such as provided by telecoms, allow consumers to effectively make an informed choice. If there may be a severe issue around this in some market segments, providers should discuss a more harmonised approach and possibly apply self-regulation. In this context, it has to be considered that digital services are often bundled/ integrated in one offering, which makes the displaying of a common "unit" very challenging and confusing for consumers.

Consumer protection against unfair commercial practices should be strengthened by introducing a right to individual remedies, e.g. compensation and/or invalidity of the contract when the consumer has been misled into signing a disadvantageous contract?

As described above, telecoms seek to negotiate with consumers in order to find satisfactory solutions. In case of court decisions on individual complaints, courts can already today levy individual remedies. Accordingly, there is no need to impose proposed new rule.

Consumer protection against unfair contract terms should be strengthened by introducing a "black list" of terms that are always prohibited?

A black list may improve legal certainty with regard to some terms but could not list all possible cases and would quickly become outdated due to market dynamics. Accordingly, a future-proof guidance should be provided by court decisions.

The presentation of key standard Terms and Conditions to consumers should be improved by applying a uniform model, e.g. using icons?

See previous response on usage of e.g. icons.

Consumer protection against unfair contract terms should be strengthened by incorporating key Court of Justice case law on the ex officio duties of judges to assess the presence of unfair terms?

In several member states (e.g. Germany), courts already have to include decisions of the European Court of Justice. Where there is a discrepancy between national and EU level decisions, adequate measures should be considered.

The legal guarantee period for goods should depend on their characteristics? (If you agree with this statement please indicate the relevant characteristics in the box below, e.g. the category of the good (such as small/large household appliances, ICT products, cars etc.), price, expected/ advertised lifespan)

The legal guarantee period for goods is already 24 months, which takes into account reasonable wear and tear. Considering the high dynamic in digital markets and short innovation cycles, this timeframe appears already long and any further extension needs to be avoided. On the contrary, a reduction could be considered. This should also ensure that redress rights for tangible goods and digital goods/ services are consistent

The period during which the defect is presumed to have existed already at the time of delivery of the good (reversal of the burden of proof) should be extended. It is 6 months under current EU law but longer in a few EU countries?

Today's provision of 6 months give consumers plenty of time for assessing if a service or product is defective. An extension, such as currently considered in the draft directive on the supply of digital content, is not proportionate. This is particularly the case in digital markets with short innovation cycles. Providers would be burdened with increased risks that some consumers try to claim a defect, even if not justified, and providers have to bear the related costs (see response to burden of prove above).

The notion of "vulnerable consumers" should be reviewed/ updated. Under current EU law vulnerable consumers are those that are particularly vulnerable to unfair commercial practices because of their mental or physical infirmity, age or credulity?

The current definition of an average consumer is proportionate and reasonable.

There should be additional requirements for the protection of "vulnerable consumers" as regards standard contract terms?

As explained above, there is no need for new standard contract terms, but for a new horizontal approach in the digital market to ensure consistency for all consumers. If particularly vulnerable consumers require specific rules, these should be imposed on all providers equally. In this context co- and self-regulation should be considered.

The notion of "average consumer" should be reviewed/ updated. According to the case law of the EU Court of Justice, the average consumer is defined as reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors?

See response above.

Further criteria should be defined to allow for a clearer distinction between consumers and traders in the collaborative economy?

The nature of trading has changed significantly with the emergence of marketplaces and user generated content. Consumer law must adapt to the situation in which consumers purchase goods, content and services from other consumers, to ensure they are adequately protected.

EU injunctions proceedings should be made more effective, e.g. by allowing their use for more types of infringements and by reducing their costs and length?

Injunction proceedings are already sufficiently fast and, as described in EC's Guidance on the implementation and application of the Unfair Commercial Practices Directives, injunction can already today apply in many different situations, to enforce rights of consumers and businesses. EC should facilitate the broader, effective and more harmonised application of these instruments across member states, based on the Guidance's findings.

EU consumer and marketing rules should be further harmonised to make it easier for traders to offer their products/services cross-border and for consumers to rely on the same level of protection across the EU?

From telecoms' point of view, consumers' benefits through further harmonisation of already fully harmonised horizontal rules appears to be very limited. More severe is the cross-sector fragmentation, due to more strict and exhaustive sector specific rules applied to telcos. Apart from that, telco specific rules are based on minimum harmonisation and more fragmented across borders than horizontal rules. The reduction of these fragmentations would significantly more increase consumers' benefits. From an industry point of view, further harmonisation of rules must not lead to a general tightening of rules, but needs to ensure effective and proportionate protection standards that consumers can rely on across markets.

EU consumer and marketing rules should be simplified by bringing them into a single horizontal EU instrument?

A single instrument would facilitate the establishment of consistent protection standards that consumers can rely on. Beyond current horizontal rules, a single instrument should also broadly replace current sector-specific rules. Current fragmentation across different directives could be reduced and future review processes could focus on one single and consistent instrument.

Consumer protection should be strengthened by making sure that non-compliant businesses face truly dissuasive sanctions amounting to a significant % of their yearly turnover?

There is no indication that providers with a higher turnover comply less with consumer protection rules. On the contrary, usually, larger providers are more focussed by authorities and consumer protection organisations and thus have a higher incentive to ensure compliance. It also has to be noted that the turnover of a provider does not necessarily correlate with the size of a large providers' business in one specific market (e.g. if entering new service markets). The proposed dissuasive sanctions would impose very high risks on large providers' newly started or small business activities.

13. To what extent do you agree or disagree with each of the following statements about potential areas to improve the protection of businesses, especially SMEs and in particular micro enterprises?

Businesses protection against unfair commercial practices should be strengthened by introducing a "black list" of B2B practices that are always prohibited?

As stated in the previous section, a black list cannot be comprehensive enough and would be too static to reflect all future services and practices.

Business protection against unfair commercial practices should be extended to practices happening not just at the marketing stage but also after the signature of the contract?

The question is very broad, referring to a range of different practices and possibly required measures. In principle, ETNO and GSMA members believe that some practices after contract conclusion should be addressed by adequate measures. EC's communication on the role of platforms and related B2B problems provide a good overview on identified problems. These problems are not only related to micro or small business, but can equally appear in the relations with large providers. To tackle identified issues, proportionate measures are required. In this context, any rule should be light-touch and swiftly applicable to reflect the dynamics of digital services markets. This includes possible problems before or during contract conclusion (see also response to "Businesses are well protected against misleading marketing practices of other businesses").

Business protection against unfair commercial practices should be strengthened by introducing a right to individual remedies, e.g. compensation and/or invalidity of the contract when the business has been misled into signing a disadvantageous contract?

Some national legislations (e.g. in Germany) already allow individual remedies and the need for an EU regulation on this topic is questionable considering the range of established and effective remedies. Any EU-wide harmonisation of such rules must be proportionate.

Business protection against unfair contract terms should be strengthened by extending totally or partially the scope of application of the Unfair Contract Terms Directive to B2B contracts?

Generally, consumers are more vulnerable than business. Accordingly, protection standards for businesses must differ from consumer rules and thus, the scope of the Unfair Contract Terms Directive should not simply be extended. As elaborated above, there are different possible means on how to tackle identified B2B related problems.

Business protection against unfair commercial practices should be strengthened by introducing an enforcement co-operation mechanism for cross-border B2B infringements?

Consistency of law enforcement across member states is key, with regard to B2C and B2B.

The scope of application of the Injunctions Directive should be enlarged to cover the protection of collective interests of businesses?

The proposed enlargement is not required. GSMA and ETNO members have not identified any need to better protect "collective" business interests and thus, the introduction of such a right does not appear appropriate.