# ETNO and GSMA joint position paper on the proposal for a Directive on Better Enforcement and Modernisation of EU consumer Protection Rules

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## I. Executive Summary

ETNO and the GSMA welcome the objectives of the proposals on "A New Deal for Consumers", which aim at updating consumer protection standards and improving enforcement. To effectively reach these, objectives several crucial adjustments are required, addressing only clearly identified problems in a targeted way and based on the principle of proportionality. More efforts should be focused on enforcing existing rules, rather than creating new ones which might be rendered ineffective. While the level of legal harmonisation should increase, Member States need to keep some flexibility to specify EU level provisions.

- Misuse of unsolicited visits needs to be tackled in a more targeted way and consistently across Member States. The proposal to broadly allow Member States to apply any measure, including even bans and other drastic restrictions upon doorstep-selling, are not proportionate and will lead to legal fragmentation.
- Criteria to define penalties should not all be weighted in the same way and require some clarifications. Applying maximum penalties of at least 4% of turnover should be avoided, taking into account that other proposed provisions introduced in this Article are sufficient to calculate a proportionate fine according to the harm caused. .
- The development of new business models online urgently requires that consumer protection rules apply to all commercially provided services, irrespective of the kind of remuneration they are provided against. Consistency with existing and future legislation should also be ensured.
- Proposed transparency obligations for online intermediaries are a reasonable and proportionate step. They require better alignment with the draft Regulation on Online Platforms.
- We welcome the required correction in the scope of withdrawal rights concerning refunding which is important for traders, without detrimental effects on consumers.
- To allow all actors to ensure proper compliance with the new rules, the transposition period should be extended to at least 18 months.

## II. Proposed amendments in the Unfair Commercial Practices Directive (UCPD)

ETNO and the GSMA **welcome the objective of ensuring better law enforcement**, irrespective of the size or the location of an undertaking.

This should include that Member States **provide sufficient resources for public enforcement** to adequately apply existing instruments **before adding new ones**.

ETNO and the GSMA fully support **harmonisation of consumer law**, to ensure consistency across Member States. On the one hand, it **prevents** Member States from applying **additional rules**, but on the other hand still **leaves some flexibility for detailing** EU-level provisions. Overly prescriptive rules should be avoided, precisely to allow for differences due to established traditions within Member States.

Any new rules should be **evidence-based** and **proportionate**, addressing clearly identified problems in a targeted way instead of paving the way for drastic, national regulatory intervention such as a ban of specific sales channels.

## a. Art. 1, (1): Unsolicited visits (doorstep-selling)

We acknowledge that **some undertakings potentially misuse** unsolicited visits at the doorstep, applying illegal sales practices. We fully support that such **misuse should be efficiently tackled**.

However, the **broad majority of undertakings** uses doorstep-selling (unsolicited visits) **in a lawful manner and to the benefit of the consumer**. With regard to telecoms' services, for example, consumers benefit from being actively and conveniently offered attractive tariffs. This is an important way to stimulate retail competition among service providers. A positive and usually welcome example for doorstep selling is that we inform consumers of offerings regarding newly available bandwidth in areas where high-speed internet has recently been rolled out (e.g. areas of housing development).

Doorstep-selling **already falls under several stricter consumer protection rules**, e.g. right to withdrawal, which is otherwise only granted in the scope of distance sales. Therefore, first of all there is a need to **better enforce rules that are already in force** through the Unfair Commercial Practices Directive. These include the **Member States' duty** to **provide sufficient resources** for law enforcement and **apply available instruments**. **New legal instruments and other measures** should **specifically target identified misuse of unsolicited visits**, but not the sales channel as a whole.

The current proposal gives Member States **full flexibility to apply any restriction** to doorstep selling, including bans of the wholesale channel. In practice, this means that instead of establishing a joint approach to tackle identified issues more effectively, the **draft unintentionally undermines full harmonisation** of a digital single market.

ETNO and the GSMA are **concerned** about the statement in recital 44, whereby no case-by-case assessment should be required any more. Member States are **not even required to specify concerns and justify any restrictive measure**, but it is sufficient to refer to concern regarding privacy or security. Granting such a disproportionate flexibility to Member States risks leading to **excessive regulatory interventions** with **significant detrimental effects for undertakings** and their **employees** in several national markets.

## b. Art. 1, (4): Consumer redress

It is important to **clarify in which cases consumer redress** such as compensation and contract termination rights is supposed to apply. Moreover, it remains unclear **which redress mechanism** shall apply **for which situation**. Both need **to be clarified**.

## c. Art. 1, (5): Penalties in case of infringements

**Assessment of gravity of breach (UCPD Art. 13(2), (b)):**

ETNO and the GSMA agree that a common list of reasonable criteria is required to **ensure harmonised and proportionate application of penalties** across the EU.

While all of the listed criteria may be considered relevant depending on the kind of infringement and situation, they **should not all be weighted similarly**. For example, intentional or negligent infringements are more relevant when it comes to applying deterrent penalties (see next section on max. penalties).

When taking into account the "number of affected consumers", authorities should **also take into account the relative number of affected customers** of the respective undertaking. Otherwise, undertakings with many customers will always face higher penalties, even if only a relatively small share of their customers are affected because of noncompliance.

The proposed new obligation to consider also consumers affected in other Member States does not consider that **consumer protection rules differ between Member States**. An infringement in one Member State may be not regarded as infringement in another Member State.

This also means that a **court decision in one Member States may significantly differ from a court decision in another Member State**, even if both decisions seem to refer to a similar topic.

Competent authorities or national courts **should not be obliged to assess the legal situation in other Member States**, as they usually do not have the required expertise to carry out such evaluation.

**Maximum amount of penalties of at least 4% turnover (UCPD Art. 13(4)):**

Art. 13(4) **should be removed**. ETNO and GSMA strongly think that this disposition is disproportionate and unnecessary, taking into account that proposed provisions introduced in Art. 13(2) are sufficient to calculate a proportionate fine according to the specific circumstances of the infringement and the harm caused to consumers.

In ETNO and GSMA' view that the proposed provision is **overly broad** and it does not sufficiently clarify in which cases such maximum penalties shall apply. Consequently, they will be **applied very differently** across Member States and may even **address infringements which do not require such drastic penalties**. The **proposed limitation** that this provision shall only apply to an infringement that happens simultaneously **in several Member States** (as specified in the footnote 9) is **reasonable**, but should be **highlighted also in the recital** to avoid misunderstandings.

Moreover, the **justification** for the proposed new rule is **not convincing**:

(1) An increase of deterrence has **no effect on compliance for the vast majority of undertakings**, who already strive for legal compliance.
(2) The introduction of these fines will **not remove burden from small undertakings**, which are also threatened by maximum penalties that have to be at least 4% of turnover.

In this context, it also has to be considered that such maximum penalties **establish new high references for authorities when defining lower penalties** (increase of benchmark).

The proposal risks having a very **negative effect on innovative offerings, particularly by larger undertakings**. An innovative service that may only generate little revenues becomes a significant risk for the undertaking if not compliant with consumer law. Even services that generate little revenues may result in very high penalties. This is particularly relevant with regard to telecoms companies that have to comply with a lot of additional sector-specific consumer law, as it increases the risk of unintentional non-compliance.

**In case the provision is kept, the following three amendments are crucial:**

(1) **Clarify** in the recital and article that provisions shall apply **only to "geographically" widespread** infringements.
(2) To ensure proportionality and avoid unintended side effects, **limit provision to infringements that are intentional or have a negligent character** (in line with Art. 13(2), d)).

(3) A maximum penalty should **not be higher than 4% of national turnover** (deletion of "at least") and proposal should be complemented by introducing a cap per infringement in a given Member State (maximum amount in EUR).

## III. Proposed amendments in Consumer Rights Directive (CRD)

**ETNO and the GSMA welcome the attempt to close gaps** in consumer protection law linked to data-based business models or online platforms, including online intermediaries, which have emerged in dynamic digital markets. Equally, we **welcome simplification** to reduce unnecessary burdens for undertakings.

### a. Art. 2, (1), Recital 26: Data as a kind of remuneration

We support that consumer protection rules **apply to all commercially provided services, irrespectively of the kind of remuneration they are provided against**. This **first of all refers to data as remuneration**, which has become a predominant business model online.

Taking into consideration the differences between money and data, a **reasonable translation** of consumer protection rules is required. Most important is the application of **pre- and contractual information to enable consumers' informed choice**. However, **new rights of withdrawal are not required**, given that data retrieval and portability rights are sufficiently ensured through the General Data Protection Regulation and the upcoming Digital Content Directive. **Consistency with both laws has to be ensured**.

In principle, **we welcome** the proposed amendments, but some **significant shortcomings require adjustments** in order to properly introduce the concept in the CRD:

(1) **Include** in the CRD **any contract** that is based on data as a kind of remuneration, and **refrain from limiting this to digital services and content** (Art. 2(b), 6), Art. 2(d), 16) and 18)).
(2) **Ensure that new consumer protection standards apply in all Member States** (Art. 2(d), 16) and 18). A solution would be to clarify that delivery of any service or content against collection of consumers' data as defined in Art. 2(d), 16) and 18) constitutes a contract. The current proposal only applies where national jurisdiction stipulates that "data as remuneration" constitutes a contract. As a consequence, the new consumer protection standards in case of data as remuneration **would only apply in some Member States**, to the **detriment of consumers and a digital single market**.
(3) The **definition of "data as remuneration" needs to be consistent, between Member States as well as with other relevant directives.** The upcoming Digital Content Directive and the European Electronic Communications Code (Recital 16) already include definitions of data to be considered as remuneration. Therefore, **Member States must not be free to decide** whether the CRD applies in case of collecting cookies, IP-addresses, exposure to advertisement or even in other situations (Rec. 26). The aforementioned directives provide no such flexibility for Member States. Fragmentation has to be avoided.

### b. Art. 2, (4) Transparency of Online intermediaries

We **welcome better transparency of online intermediaries**, where new issues for consumers have been identified. Online intermediaries are often important gatekeepers in the digital market and consumers strongly use their services on a daily basis. Therefore, **consumer trust has to be ensured**, which requires updated and proportionate protection standards.

In order to develop a consistent **definition of online intermediaries** throughout the whole EU legislation**,** this proposal and the **draft regulation of online platforms' relations to business customers** need to be **fully aligned,** especially as they deal with online intermediaries in a complementary manner.

To be consistent with the aforementioned draft regulation (Art. 5), **online search engines should also be included under the requirement to inform about ranking criteria, as far as it does not put business secrets at risk**. Ranking criteria are clearly at least equally relevant for consumers with regard to online search engines. Particularly, ranking criteria that favour or discriminate specific providers need to be flagged out.

The proposal to **better inform about 'who is the trader' and whether consumer rules** apply is **reasonable** and to the benefit of consumers. Consumer-friendly online intermediaries already provide such information in a transparent way.

### c. Art. 2, (7), a: Reimbursement in case of contract withdrawal

ETNO and the GSMA **welcome the proposed flexibility** for the trader to only reimburse a customer after the trader has had the chance to assess whether the good has been overly used. Indeed, this provision targets **consumers who misuse** their right of withdrawal only, allowing undertakings to get payment for the goods that have been inappropriately used. Undertakings will no longer face the **problem that a consumer rejects to pay after the undertaking has refunded.**

### d. Art. 2, 10): Penalties for consumers in case of legal breaches

**See comments above**, on "Penalties in case of infringements" in the scope of the UCPD.

## IV. Proposed amendments in the Unfair Contract Terms Directive and Price Indication Directive

**See comments above**, on "Penalties in case of infringements" in the scope of the UCPD.

## V. Transposition, Art. 5

To allow all stakeholders to properly ensure compliance with all of the provisions, a longer transposition period than only **6-month** is required. This should also take into account that provisions not only impact the industry but also courts and authorities. Therefore, at least a **18 month** transposition period would be appropriate.