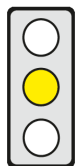


KEY ISSUES

Objective of the Regulation: Cooperation between national consumer protection authorities in combating cross-border infringements of EU consumer protection laws shall be improved.

Affected parties: Consumer protection authorities, cross-border traders, consumers, designated consumer interest groups, particularly consumer organisations.



Pro: (1) The expansion of official cooperation and powers in the case of cross-border infringements of the law, improves consumer protection and strengthens the internal market.

(2) Coordinated procedures led by the Commission may relieve national authorities.

Contra: (1) Burdensome duties of cooperation should only apply in the case of infringements which could noticeably damage the internal market.

(2) Opt-out rules are required which allow the national authorities, to take effective measures for their sovereign territory where a coordinated procedure involves unreasonable delay.

CONTENT

Title

Proposal COM(2016) 283 of 25 May 2016 for a **Regulation** of the European Parliament and of the Council on **cooperation between national authorities responsible for the enforcement of consumer protection laws**

Brief Summary

► Context and objectives

- According to the Commission, consumer protection laws are frequently flouted in cross-border EU trade. This is due to shortcomings in the CPC Regulation ["Consumer Protection Cooperation", (EC) No. 2006/2004] on cooperation between national authorities in relation to consumer protection. (p. 5)
- The Commission wants to replace the CPC Regulation with a new Regulation. This will allow better detection and enforcement of cross-border infringements of the law (p. 5), ensure that the same infringements are treated in the same way EU wide, create legal certainty, close loopholes and avoid distortions of competition. (p. 3 and 6)

► Scope and Definitions

- The Regulation applies to a range of listed EU Regulations and Directives containing consumer protection provisions (hereinafter: "EU consumer protection laws") and regulates cooperation between national consumer protection authorities in the case of cross-border infringements (Art. 3 and 5).
- "Infringements" may be ongoing or ceased acts or omissions (Art. 3 (b)).
- The Regulation provides for cooperation in the event of the following infringements (Art. 2 (1) and (2)):
 - "Intra-Union infringements": These are infringements (Art. 3 (b)),
 - which, in at least one other EU Member State other than that in which the infringement originated or in which another link to the trader exists - e.g. an establishment or assets -
 - at least potentially harm the "collective interests" of consumers..
 - "Collective interests" are the interests of "a number of" consumers; they are particularly affected by potential harm to a "significant number" of consumers "in a similar situation" (Art. 3 (i)).
 - "Widespread infringements": These are infringements (Art. 3 (c)) which either
 - have the same characteristics as "intra-union infringements" but damage the "collective interests" of consumers in at least two other Member States, or
 - take place in at least two Member States and have common features, e.g. identical conduct or interests or they occurred concurrently; this covers parallel infringements by branch offices.
 - "Widespread infringements with a Union dimension": These are infringements which (Art. 21 (1)) may harm consumers in at least three quarters of the Member States accounting together for at least three quarters of the EU population.

► Minimum powers of national authorities

- Particularly in order to combat "intra-union infringements" and "widespread infringements" within the framework of the procedures under this Regulation (Art. 8 (1) and (2)), the national authorities may
 - where there is a risk of serious irreparable harm, order interim measures such as the blocking of websites or accounts, or shut down websites and accounts other than through such measures,
 - otherwise bring about the cessation of infringements,
 - impose sanctions such as fines and penalty payments for infringements or failure to comply with decisions up to five years after the infringement has ceased,
 - order the trader to compensate consumers or to pay restitution of profits obtained as a result of infringements,

- require any natural or legal person, including internet service providers, domain registrars, banks and authorities to provide access to all necessary information and evidential material, in order to identify e.g. financial and data flows, bank account information or the identity of persons,
- to conduct test purchases - possibly under cover - as well as on-site searches and seizures.
- The EU countries decide whether the authorities are permitted to exercise these powers directly under their own authority or whether they have to apply to the competent courts (Art. 9, Recital 7).
- EU countries can oblige their own authorities - e.g. criminal prosecution authorities - to assist competent authorities and to take measures at their request (Art. 6 (1) - (3)).
- ▶ **"Mutual Assistance Mechanism"**
 - The existing "mutual assistance mechanism" between the national authorities covers mutual information and enforcement obligations (Art. 11-15). It applies in the case of "intra-Union infringements" (Art. 11 (1)) but the authorities can also use it for "widespread infringements" (Art. 17 (2), Art. 22 (2)).
 - In the case of "requests for information", the "requested authority" must supply, and if necessary acquire, all the necessary information which may assist in establishing or bringing about the cessation of an infringement (Art. 11).
 - In the case of "requests for enforcement measures", the "requested authority" must, in principle, take all measures in accordance with its powers, which are necessary to bring about the cessation of the infringement (Art. 12 (1) and (2)).
 - In future, the Commission will systematically monitor the "mutual assistance mechanism", issue guidance and issue an opinion in case of dispute (Art. 15 (4) - (6)). In addition, it will now be authorised to set time limits for the handling of requests by the authorities (Art. 11 (4) and (5)).
 - The "requested authority" may refuse a request under strict conditions (Art. 15 (1) and (2)).
 - The "requested authority" can delegate the performance of mutual assistance obligations to a "designated body" appointed by the Member State where this body can carry out the requested activity "as efficiently and as effectively" as the requested authority. The latter must consult the "applicant authority" in this regard which must give its agreement. (Art. 13 (4))
 - "Designated bodies" are organisations with a legitimate interest in the prohibition of infringements (Art. 6 (4)), e.g. consumer organisations.
- ▶ **"Coordinated action" in the case of "widespread infringements without a Union dimension"**
 - Where there is a reasonable suspicion of a "widespread infringement" which does not reach the threshold required for an "EU dimension", the national authorities must work together, led by a mutually appointed coordinator and, in particular, coordinate their investigation and enforcement measures (Art. 16, Art. 30). The coordinator is a national authority or, "only where necessary" (p. 14) the Commission (Art. 16 (3) and (4)).
 - The national authorities concerned
 - must ensure that investigations and interim measures are carried out simultaneously (Art. 17 (1)),
 - may set out the outcome of the coordinated investigation and case assessment in a "common position", notify the trader concerned of this and hear his point of view (Art. 17 (3), (4) and Art. 31),
 - may invite the trader to make commitments to cease the infringement and compensate consumers, or assess the trader's own proposals (Art. 18 (1) and (2)).
 - Where the trader fails to cease the infringement voluntarily, the authorities can either take enforcement measures simultaneously or agree on the appointment of one national authority to enforce the measures on behalf of the consumers in all the affected Member States (Art. 18 (3) and (4)).
 - National authorities can instruct "designated bodies" to take enforcement measures if the other authorities agree (Art. 18 (5)).
- ▶ **"Common actions" in the case of "widespread infringements with a Union dimension"**
 - Where there is a reasonable suspicion of a "widespread infringement with a Union dimension", the Commission will launch a common action (Art. 21 (1)).
 - By contrast with "coordinated action"
 - common actions are launched, closed and coordinated by the Commission which can request all the necessary information from the national authorities (Art. 21 and 26),
 - the national authorities can only refuse to take part if judicial proceedings are already under way in their Member State or final judgement or a final administrative decision has already been passed in respect of the same infringement and against the same trader (Art. 21 (3)),
 - national authorities must set out the result of the investigation in a "common position" and, if the trader fails to cooperate, can take direct enforcement measures (Art. 23 and 25).
- ▶ **Miscellaneous provisions**
 - Under the "surveillance mechanism" (currently the "CPC system of alerts")
 - national authorities and the Commission must inform each other of any "reasonable suspicion" of an infringement that may affect "consumers' interests" in other EU countries ("Alert mechanism", Art. 34),
 - "designated bodies", European Consumer Centres and consumer interest groups appointed by the Member States or the Commission - e.g. consumer organisations - will also be able to report infringements via "external alert" in the future (Art. 35 (1) - (3)).

- In the case of indications of widespread infringements, national authorities can conduct “concerted investigations of consumer markets” (“sweeps”), coordinated by the Commission (Art. 32).
- Evidence obtained by a national authority by use of its powers under the Regulation may be exchanged and also used in proceedings in other Member States relating to cross-border infringements (Art. 42 (1) and (2)).
- The Commission can adopt implementing acts in particular to regulate the details relating to the “implementation and exercise” of the minimum powers (Art. 10), for deploying designated bodies as part of the “mutual assistance mechanism” (Art. 13 (6)) and on standard forms and time limits (e.g. Art. 11 (5), 12 (5), Art. 20 and 27).

Main Changes to the Status Quo

- ▶ In future authorities will also be able to take action against infringements which have already ceased.
- ▶ The minimum powers of the national authorities will be more clearly worded, considerably widened and adapted to the requirements of the digital age. New: e.g. powers to block traders’ websites or accounts or to carry out test purchases, also under cover. In addition, the authorities can now impose fines and penalty payments, order the payment of compensation and confiscate the infringer’s profit.
- ▶ The authorities’ obligations to cooperate on cross-border breaches of consumer law will be much stricter. In the case of “widespread infringements”, they will in future have to carefully coordinate their measures. New in this regard: “common action”.
- ▶ The Regulation significantly widens the powers of the Commission in relation to cross-border consumer protection. Thus, in future, it will systematically monitor mutual assistance and take on the role of mandatory coordinator in the case of “widespread infringements with a Union dimension”.

Statement on Subsidiarity by the Commission

The Member States cannot effectively coordinate the activities of the national consumer protection authorities in the case of cross-border infringements because their powers are restricted to domestic matters (p. 6).

Policy Context

In 2015, the Commission announced, in its Digital Single Market Strategy [COM(2015) 192 and COM(2015) 550], the revision of the CPC Regulation due to its enforcement deficits.

Legislative Procedure

25 May 2016	Adoption by the Commission
9 June 2016	1st Reading in European Parliament
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Justice and Consumers (leading)
Committees of the European Parliament:	Internal Market (leading), Rapporteur Olga Sehnalová (S&D Group, CZ); Legal Affairs; Industry; Budgets; Culture and Education
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Legal Affairs and Consumer Protection (leading); Economic Affairs; Digital Agenda; EU Affairs
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Consumer protection law can be enforced, as in Germany, under civil law – i.e. by private individuals – and/or, as in most other Member States, under public law – i.e. by the government. This Regulation strengthens public enforcement of consumer protection in the case of cross-border infringements which affect multiple – particularly large numbers of – consumers. This is appropriate: Although consumer protection in relation to individual claims is particularly suitable for enforcement under civil law, its limitations are apparent when it comes to cross-border infringements which affect many consumers but only cause them minor loss. A lack of incentive to bring individual claims where legal costs are high ensures, in such cases, that infringements are worthwhile for traders. An EU-wide expansion of the enforcement of rights by individuals could also remedy the situation but would be politically impracticable. **The EU-wide expansion of official cooperation and powers in the case of cross-border infringements of the law however facilitates the enforcement of consumer protection, prevents future infringements and thereby strengthens the internal market.**

Impact on Efficiency and Individual Freedom of Choice

Coordinated procedures led by the Commission may relieve national authorities. Care should be taken, however, to ensure that their deployment remains proportionate in terms of cost-benefit considerations.

Legal Assessment

Legislative Competency

The planned expansion of official powers and duties facilitates the prosecution of cross-border infringements of consumer law in the EU and thus reduces obstacles in the internal market. The Regulation is thus correctly based on the power to approximate laws in the internal market (Art. 114 TFEU).

Subsidiarity

Unproblematic. Since the powers of national authorities end at national borders, standard obligations to cooperate on cross-border infringements can only be sensibly regulated at EU level.

Proportionality with respect to Member States

Since consumer law in most EU countries is principally enforced by authorities rather than individuals, greater cooperation between authorities and additional powers, such as the imposition of sanctions, is appropriate. **Burdensome duties of cooperation should however only apply in the case of infringements which could noticeably damage the internal market**, e.g. due to the threat of substantial loss, **or if the affected EU countries agree on cooperation.** It is disproportionate for authorities to be generally subject to these duties for every "widespread infringement" whose definition is likely to be met frequently in cross-border online trade and is therefore too wide.

The duties are also not necessarily effective because complex procedures could jeopardise speedy national measures to the detriment of the efficient national protection of consumers. **Opt-out rules are therefore required which allow the national authorities to take effective measures for their sovereign territory where a coordinated procedure involves unreasonable delay** - e.g. due to a failure to agree on a common position. Such differences of opinion are possible, especially where national consumer protection laws differ from one another as a result of implementation. **It is also necessary to clarify the extent to which enforcement under private law without consulting other EU countries remains possible in parallel to coordinated proceedings** by authorities.

Delegating official tasks to designated bodies should not be subject to the consent of other authorities or be permitted to be regulated in more detail by the Commission by way of implementing acts. The efficient application of the Regulation can be achieved by a cross-procedural requirement that designated bodies must act just as efficiently as authorities. Otherwise it is a matter for the EU countries how they organise the enforcement of EU law.

Compatibility with EU Law in other respects

In exercising their powers, authorities must respect the fundamental rights of the affected person. Their interventions must be necessary and reasonable for achieving the aims of the Regulation (Art. 52 EU Charter of Fundamental Rights). **The minimum powers** also allow severe intervention in fundamental rights such as blocking websites and accounts. They **should be linked** – e.g. by way of rule examples – **to requirements which accommodate the aforesaid rights and principles under the EU Charter of Fundamental Rights.**

Impact on German Law

In Germany, where the prosecution of infringements of consumer law is primarily carried out under private law, the official structures must be expanded and/or created in parallel to the established civil law structures. This applies, in any case, where powers cannot be delegated to designated bodies because no civil law basis exists or can reasonably be created, such as for the now possible imposition of official penalty payments. These powers must either be exercised by the authorities that are currently responsible for it - e.g. the Federal Ministry of Justice and Consumer Protection or respectively the Federal Financial Supervisory Authority; alternatively other authorities could be appointed and if necessary tasks assigned to enforcement authorities such as the Federal Cartel Office. The EC Consumer Protection Enforcement Act and the rules on European mutual assistance contained in administrative procedural laws must be adapted. The relevant procedural law - e.g. Code of Civil Procedure (ZPO) - must be amended so that the authorities can effectively use their new powers, evidence and investigation results in accordance with it.

Conclusion

The expansion of official cooperation and powers in the case of cross-border infringements of the law, facilitates the enforcement of consumer protection and strengthens the internal market. Coordinated procedures led by the Commission may relieve national authorities. Burdensome duties of cooperation should however only apply in the case of infringements which could noticeably damage the internal market or if the affected EU countries agree on cooperation. Opt-out rules are required which allow the national authorities, to take effective measures for their sovereign territory where a coordinated procedure involves unreasonable delay. It is also necessary to clarify the extent to which enforcement under private law without consultation with other EU countries remains possible in parallel to coordinated proceedings. The minimum powers should be linked to conditions which accommodate the rights and principles of the EU Charter of Fundamental Rights.