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Enhancing Consumer Protection with Co-Regulation

1 Abstract

SCOPE Europe and SRIW (“**we**”) appreciate that the proposed amendments below on the Directive on better enforcement and modernisation of EU consumer protection (“**Directive**”) refer to a co-regulatory framework. SCOPE Europe and its primary SRIW (see also section 4 “About SCOPE Europe”) gathered experience and expertise in the field of co-regulation for several years and, based on that, we encourage the adoption and implementation of co-regulatory frameworks, such as Codes of Conduct. In principle, SCOPE Europe and SRIW therefore endorse the proposed amendments.

We would also like to use the opportunity to specifically comment on the proposed amendments and provide additional policy recommendations on the implementation of co-regulatory measures.

2 Background: Better enforcement and modernisation of EU consumer protection rules

On 11 April 2018, the European Commission published the proposal¹ for a Directive on better enforcement and modernisation of EU consumer protection, which is part of the “new deal for consumers” package. The proposal amends four existing Directives of EU consumer legislation² and covers various topics such as increasing transparency on online marketplaces, extending protection of consumers in digital services and harmonising penalties for infringements. The Directive resulted from an evaluation of EU consumer and marketing laws by the European Commission, which identified enforcement as one of the key obstacles in Europe’s current consumer protection legislation due to a lack of effective enforcement of penalties. Accordingly, the European Commission “considers that one of the reasons for non-compliance with the consumer Directives is that penalties are not sufficient to deter infringements”³.

¹ COM/2018/0185 final - 2018/090 (COD).

² The Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive (CRD), the Unfair Contract Terms Directive (UCTD) and the Price Indication Directive (PID).

³ EPRS Briefing “Modernisation of EU consumer protection rules”;

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623547/EPRS_BRI\(2018\)623547_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623547/EPRS_BRI(2018)623547_EN.pdf)

In this context, co-regulatory initiatives such as approved Codes of Conduct can be an effective, modern and transparent mechanism to foster the enforcement of consumer protection rules while strengthening both the rights of consumers and the practical implementation by involved stakeholders. As such mechanisms were introduced in the draft report by the European Parliament, we want to take to opportunity to comment on the respective amendments.

3 Amendments proposed by European Parliament

(Text proposed by the Commission) [...] Member States shall ensure that, when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

[...]

(g) any other aggravating or mitigating factor applicable to the circumstances of the case:

(Amendment) ***(i) whether the firm had qualified under approved certifications or adhered to approved codes of conduct.***

as proposed in:

- **Amendment 250 Proposal for a Directive Article 1 – paragraph 1 – point 5**
Directive 2005/29/EC Article 13 – paragraph 2 – point g
- **Amendment 427 Proposal for a Directive Article 2 – paragraph 1 – point 10**
Directive 2011/83/EU Article 24 – paragraph 2 – point g
- **Amendment 457 Proposal for a Directive Article 3 – paragraph 1 – subparagraph 1**
Directive 1993/13/EEC Article 8 b – paragraph 2 – point g
- **Amendment 473 Proposal for a Directive Article 4 – paragraph 1 – subparagraph 1**
Directive 1998/06/EC Article 8 – paragraph 2 – point g

3.1 Opinion on proposed amendments

We appreciate the amendments proposed and recommend the adoption. From our perspective and according to our experience, a reasonable implementation of a co-regulatory framework facilitates balancing of different interests where due to highly distinguished practical scenarios mere (abstract) legal regulations become complex and often nearly impossible. The introduction of approved Codes

of Conduct as criterion for courts and authorities when imposing penalties, as introduced in the amendments by the European Parliament, is a strong reference to such a co-regulatory framework.

(1) First, we appreciate that the amendments use the term “approved” certifications and Codes of Conduct, which strongly indicates that the Directive is aiming for a co-regulatory approach instead of simple self-regulation. Please note our general remarks on how such an approval can positively affect the adoption of Codes of Conduct by stakeholders (see section 3.2.3). According to our experience, a purely self-regulatory framework requires very specific circumstances to lead to adequate outcomes for all stakeholders. Therefore, and provided the context of consumer protection, more successful initiatives are expected in a co-regulatory framework, with clear legal requirements, combined with positive incentives for organisations to develop and adhere to a Code of Conduct (e.g. legal certainty, liability reductions, less administrative burden, etc.).

(2) Second, we would like to point out, that, though we endorse the amendments as proposed, we strongly recommend clarifications in future negotiations. The Directive stresses that, according to the European Commissions’ findings, one of the weaknesses of the current regulatory framework seems a lack of appropriate penalties. Given that background, the current phrasing is unclear and may be understood that adherence to either a certification or Code of Conduct shall even be regarded negatively by increasing the penalties. As a result, the benefits of a co-regulatory framework would be lost and likely discourage stakeholders to make themselves subject to either a certification or Code of Conduct.

We therefore recommend future adjustments clarifying that adherence to a certification or Code of Conduct shall principally be regarded positively, whilst acknowledging that, in cases of intentional or excessive infringements as well as fraudulent behaviour, it can and shall be regarded negatively.

3.2 Further policy recommendations

As mentioned above, the adoption of the outlined amendments is generally recommended. To benefit from the full potential of co-regulatory measures and to further optimise the enforcement and modernisation of European consumer protection rules, the following additional recommendations can be considered:

3.2.1 Characteristics of co-regulation

In comparison to initiatives which are only industry-driven, a co-regulatory approach is characterised by a distinct legal framework providing both overall goals and general requirements which organisations shall adhere to. By setting up the legal framework accordingly, it is still the legislator defining

the overall safeguards prerogative whilst leaving the exact implementation up to the market. For instance, regulatory authorities could define transparency requirements or consumer cooperation obligations as general objectives of a Code of Conduct regime, the actual development and design of a respective Code could be driven by private organisations. Such sector-specific provisions of a Code ease the actual application of a respective regulation, as for those being affected by such regulation co-regulatory measures provide guidance for implementation whilst enhancing legal certainty. A similar approach is introduced in the General Data Protection Regulation (GDPR), which defines high-level goals which have to be reached when handling personal data. Regarding the exact implementation, the GDPR stays rather vague and introduces Codes of Conduct as a tool for stakeholders to define the exact implementation in practice. The same mechanism could enhance the enforcement of European consumers protection rules.

3.2.2 Benefits of co-regulation for consumers

The implementation of a co-regulatory framework would benefit multiple stakeholders.

Any concretisation of a respective sector or business by co-regulatory measures, e.g. a Code of Conduct, enhances trust by clarifying obligations and legal requirements for such sectors or businesses and thereby increases transparency and legal certainty in the respective field. Enhanced transparency can finally result in informed decisions by consumers, as consumers may recognise adherence to a Code of Conduct as relevant criterion for their purchases.

If a co-regulatory framework includes the oversight of a (private) body that is monitoring organisations adherent to this framework, further benefits are expected. On the one hand, such bodies may provide consumers with independent but effective, cost-free, fast and unbureaucratic complaint mechanisms. On the other hand, efficient and trusted complaint mechanisms hosted and processed directly by those bodies will effectively protect consumer interest whilst unburdening courts and authorities. For the avoidance of doubt: such bodies would not replace any competencies of courts or authorities, but they would act as a compulsory entity supervising compliance with the law within the respective sector, complementing the regulatory oversight by courts or authorities. Where such a mechanism is reflected or even required in a co-regulatory framework, the legislator should provide additional incentives for those adhering to such a robust but still voluntary co-regulatory measure (section 3.2.4).

3.2.3 Trusted development and approval of Codes of Conduct

Ideally, co-regulatory frameworks include provisions for both the development and approval process of co-regulatory measures, e.g. Codes of Conduct or certifications. Those provisions should reflect individual circumstances of the regulated sector.



Trust and applicability are strengthened if most relevant stakeholders participate in the development of co-regulatory measures. The essential involvement of such stakeholders can be safeguarded by a formalised procedure for development and approval of co-regulatory measures. An official approval by authorities is the most robust option to ensure an appropriate application of legislative requirements within a co-regulatory measure, e.g. a Code of Conduct. For European-wide legal frameworks, though, this will require a significant harmonisation within all Member States, like GDPR provided for data protection. In other areas, where such a harmonisation is lacking, other approaches could be implemented, capable to address diverse requirements within different Member States but still trusted to reach benefits of a co-regulatory framework. For instance, it could be legally required to include different interests and perspectives during the drafting of a Code of Conduct, e.g. by stipulating a public consultation. The accreditation of (private) bodies, supervising respective stakeholder adherence to a co-regulatory measure, could complement the credibility, especially, if the co-regulatory framework provides such bodies with possibilities to take appropriate actions against organisations infringing the co-regulatory measure.⁴

3.2.4 Implementation of incentives for the adoption of Codes of Conduct

A formalised approval of Codes of Conduct as outlined above (section 3.2.3), including a (private) monitoring, could ease wide adoption by the market. Formalised development and approval safeguard credibility and quality and thereby justifies further incentives for those developing and adhering to approved Codes of Conduct.

Co-regulatory measures as a mere differentiator in the market for customers is, from a business perspective, not always sufficiently cost-efficient to broadly adopt such measures, as customers may not consider such differentiator adequately within their decisions of purchase. This applies specifically to tensed markets, like those for consumers. Therefore, it is always recommended to complement co-regulatory frameworks with incentives for those voluntarily adhering to such a framework.

In the context of the Directive, it is recommended to clarify that adherence to approved Codes of Conduct would generally be regarded as mitigating and positive factor when deciding on whether to impose a penalty (see also section 3.1(2)). This explanation would additionally give incentives to organisations to draft, prepare and develop such Codes of Conduct as co-regulatory scheme and therefore to commit themselves to robust consumer protection rules.

⁴ The General Data Protection Regulations introduces a similar concept of Codes of Conduct and Monitoring of approved Codes of Conduct in Art 40, 41 GDPR.

Depending on the substantive provisions of the Directive, multiple and different incentives could be incorporated as well. Those may be related to liability, burden of proof, administrative burdens, periods, etc.

4 About SCOPE Europe

SCOPE Europe b.v.b.a/s.p.r.l. (Self and Co-Regulation for an Optimized Policy Environment in Europe) is a Brussels-based entity supporting self- and co-regulative initiatives of the digital economy, founded as a subsidiary of the non-profit association Selbstregulierung Informationswirtschaft e.V. (SRIW). SRIW is a Monitoring Body for Codes of Conduct in Germany since 2011 and fosters data and consumer protection through self- and co-regulation, serving as a platform for the development, implementation, enforcement and evaluation of various Codes of Conduct related to this purpose. SCOPE Europe/SRIW therefore have generated deep knowledge and gathered experience in levelling industry and consumer needs and interests to credible but also rigorous provisions and controls related to data and consumer protection. SCOPE Europe gained experience throughout multiple Code of Conduct initiatives, projects and discussions with different stakeholders of different kinds (e.g. consumer and data subject' interest groups, industry, data protection authorities, legislators as well as legal experts of literature and practice). The remarks above are made based on this experience.