Responses to the EU Consumer Fitness check Consultation:

Page 32: How important are the following problems for protecting the rights of consumers?

Court proceedings are complex / long / costly

“Very Important”

Administrative enforcement proceedings are complex / long / costly

Injunctions proceedings are complex / long

“Rather important”

Injunctions proceedings are costly

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

Other (please specify in the box below)

“Very important”

A problem which has not been identified above and in the consultation documents is a failure to modernise the consumer law acquis by recognising, in relation to all economic sectors mentioned here, the effectiveness of the ombudsman model for consumer redress. Ombudsmen systems are multi-functional whereas court systems are one-dimensional; ombudsmen advise consumers, they resolve consumer disputes independently and impartially, they aggregate market data from their caseload and they feed back the results to regulators. Unlike consumer associations, whatever their merits, they are independent and impartial. Ombudsmen apply the law but do not exclude access to judicial process for consumers, (or the threat of it against intransigent traders), and they do not pre-empt the role of court in determining consumer rights. But they can deliver effective results in terms of much more flexible measures of consumer benefit than courts can. Additionally, they provide the all important function of market surveillance to ensure that similar infringements (by for example rogue traders, or systemic sectoral misleading or aggressive practices) are prevented or forestalled. An axiomatic resort to courts to resolve all consumer disputes leads to the concern whether the existing consumer law (e.g. injunctions)
needs strengthening by creating new judicial procedures and remedies. This encourages unnecessarily one-sided court-centric regulation, and misses the opportunity which this REFIT exercise provides in redesigning consumer protection to reflect the digital age by using aggregated data of past market failures to prevent future ones via the ombudsman/regulator model.

Page 34: How effective for protecting the rights of consumers 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 (e.g. industry trust marks)?

very effective tick
rather effective
rather not effective
not at all effective
no opinion / don't know

Please provide information on any successful self- and co-regulation initiative and describe what makes it successful (optional) – 1500 characters

Many self- and co-regulatory schemes exist in the EU. To take one well-known example in the UK, the Financial Ombudsman Service (FOS), provides a tried and tested easy-to-use service for anyone complaining about a UK financial service or product marketed to a person in the UK or elsewhere in the EU. It has accumulated a well-documented track record and its success is verifiable through published annual reports.

In Germany, the Ombudmen of the Insurance sector (the general one and the one for private health insurance, both based in Berlin) are illustrations of particularly efficient means of self-regulatory initiatives providing Ombuds-Solutions coming relatively close to the ideal. Also the Wettbewerbszentrale and the Handelskammern in Germany, of which all businesses are members by law, provide examples of well-functioning semi-public bodies active in self-regulatory respects.

In Italy the Arbitro Bancario Finanziario (ABF) is a public ADR scheme established in 2009 by law and is effectively the sectoral Ombudsman. Decisions are made by independent panels of individuals, according to law. These are not arbitration or mediation, and do not preclude the possibility of submitting a dispute to the civil courts. However, they are regarded as authoritative and impartial, and notice of an intermediary’s refusal to comply with a decision is published on ABF’s website (black list). This reputational sanction, and the supervisory involvement of Banca d’Italia, produces a high compliance rate by intermediaries.

Space prohibits citing many other examples. Self-regulatory solutions are effective specifically where competitive markets exist, which drives commercial advantage through observance of self-regulation and reputational forces.

I. Page 36: In your view, what are the benefits for businesses from complying with EU consumer and marketing law?

Consumers whose rights are respected come back tick
Consumers whose rights are respected bring/attract other consumers (by word of mouth, online endorsements) tick
On the contrary, consumers whose rights are not respected discourage other consumers (damage to reputation) tick
Compliant and hence trusted businesses can sell at higher prices tick
There are no benefits
No opinion / don't know
In addition to the first four benefits, there are 3 additional benefits to a business:

- market reputation gained by a business from compliance adds commercial value and a competitive edge to products and services sold;
- compliance is also a risk regulating mechanism which lowers management costs, and increases shareholder value, by systematically controlling the risk of legal liability; and
- compliance reduces public costs of enforcement which in turn feeds back to the benefits for the business if a responsive regulation approach is followed which is strongly suggested.

**Page 40: 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: **Very Effective**
- An individual consumer gets redress through an alternative dispute resolution mechanism: **Very effective**
- An individual consumer gets redress through a court action: **Rather ineffective**
- An individual consumer gets redress through an administrative enforcement decision: **Very effective**
- An administrative authority issues an injunction which stops an infringement of consumer rights: **Rather effective**
- A court issues an injunction which stops an
Infringement of consumer rights

Other (please specify in the box below)

Please explain your reply (optional)

In terms of effective protection of consumer rights the most effective mechanism is one omitted from the question, namely statutory or private ombudsmen schemes.

Sectoral Ombudsman Schemes represent the best form of ADR body because they comprise multiple functions: the consumer advisory function, thereby singling out cases with no merits, the dispute resolution function, (whose speed and minimal cost greatly outweigh the comparable outcomes from mass judicial process) and the third function which is of collecting and publishing market data, and feeding the aggregated data back towards those institutions which can intervene in an effective way to eradicate systemic misbehaviour, thus incorporating what we call virtuous feedback loops into the centre of the dispute resolution process. The architecture and functionality of ombudsman systems throughout the EU have been extensively researched and reported on by Professor Hodges and others\(^1\)\(^2\).

Page 53: 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?

**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** (page 54 of the Questionnaire)

Tend to disagree

This is a valid aspiration. But the only effective way to achieve this goal would be through guaranteeing a pan-EU network of effective consumer Ombudsmen, since processes and remedies are ineffective so far. If this issue is taken further, the Better Regulation Scrutiny Board and Impact Assessment should include a requirement to demonstrate evidence of how such individual rights would effectively be delivered in Member States, since many of them would simply be unable to achieve this at present.

**Consumer protection should be strengthened by making sure that non-compliant businesses face truly dissuasive sanctions amounting to a significant % of their yearly turnover** (page 57 of the Questionnaire)

Strongly disagree

An enforcement policy based on criminalizing non-compliant businesses (as opposed to criminal behaviour or rogue trading) is out of place in this REFIT assessment of consumer law. “Truly dissuasive sanctions” against non-compliant businesses would require that such fines had direct, consistent and systemic effects in deterring repeated infringements, and curing market failures. A wealth of research has shown that these effects do not occur and that imposition of such fines would be wholly disproportionate


\(^2\) See Hodges, Creutzfeldt, Steffek and Verhage: 'ADR and Justice in Consumer Disputes in the EU', Foundation for Law, Justice and Society Policy Brief, 2016 [fljs.org/content/adr-and-justice-consumer-disputes-eu](fljs.org/content/adr-and-justice-consumer-disputes-eu)
to the objectives of improving consumer protection. And further, that a methodology to calibrate such a punitive approach has not been developed and applied so far, because two theoretical assumptions informing the concept of punitive deterrence are false:

1) commercial firms make decisions solely on the basis of rational assessments of costs and benefits, valuing every decision with complete foresight and calculation;
2) every firm can be considered to be a single entity with its own animus and can completely control the activities of every employee.

Instead, the adoption of an entirely different model of regulatory enforcement is recommended, which does achieve such effects, such as combining sectoral ombudsmen (as explained above) with regulators who exercise oversight responsibly (paradigm of „Ethical Regulation“, see Christopher Hodges, “Law and Corporate Behaviour, Integrating Theories of Regulation, Enforcement, Compliance and Ethics, Hart 2015, pages 693 s. and 695 – 706; UK Government Department for Business Innovation and Skills, Better Regulation Delivery Office: ‘Ethical Business Regulation: Understanding the Evidence’, February 2016).

EJF is convinced that a dynamic solution adapted to the requirements of our time like the Ombuds-Solutions is the way in which future developments should proceed.