

EU Consumer Rights Enforcement— Penalties Ahead

IN SHORT

The Situation: The recent [EU Commission proposal for a tightening of consumer protection regulations](#) envisages, in one of its pillars, to step up government enforcement of EU consumer rules, including by introducing a harmonized ceiling of fines of 4 percent of the infringing company's turnover in the EU Member State(s) concerned.

The Plan: To increase deterrence through stronger rules on penalties, the EU Member States will be required to provide for sanctions for "widespread infringements" and "widespread infringements with a Union dimension." The strengthened rules on penalties will apply widely at the EU level and will be inserted in four directives pertaining to consumer protection.

Looking Ahead: The proposed step-up in enforcement brings consumer rights enforcement in line with the penalty frameworks for EU competition and data protection law. This requires multinational corporations to set in place an enhanced compliance framework at a EU level and dedicated crisis management plans.

The [REFIT Fitness Check of EU Consumer and Marketing Law](#), carried out on behalf of the EU Commission, and the [evaluation of the Consumer Rights Directive](#) by the EU Commission, both published in May 2017, found a need for more effective and dissuasive penalties for widespread cross-border infringements.

Despite the recent adoption of Regulation (EU) 2017/2394 (on widespread infringements harming consumers in several Member States and widespread infringements with a Union dimension), the available penalties for infringements of consumer law vary significantly among Member States and are often set at a low level.



The draft legislation provides guidelines to all EU authorities or courts for the decision-making process of whether to impose a penalty, as well as its level.



Proposal on Penalties in the Proposal for a Directive

The penalties provision will apply widely to the full spectrum of consumer-related directives, stepping up the remedies available to Member State authorities and courts against, e.g., breaches by companies of consumer information and the right of withdrawal (see Directive 2011/83/EU, aimed at ensuring a high level of consumer protection); commercial practices likely to deceive the average consumer (see Directive 2005/29/EC, protecting consumer against unfair commercial practices); contracts with consumers whose terms would not be drafted in plain and intelligible language (see Directive 93/13/EEC, providing rights to consumers); and the absence of indication of the selling price and the price per unit of measurement of products offered to consumers (see Directive 98/6/EC, protecting consumers in the indication of product prices).

That being said, the scope according to the proposal would be limited to these consumer regulations on the European level and would not include any and all (additional) national regulations.

Standard for Penalties

The draft legislation provides guidelines to all EU authorities or courts for the decision-making process of whether to impose a penalty, as well as its level.

Penalties will be imposed according to the following criteria: (i) the nature, gravity, and duration or temporal effects of the infringement; (ii) the number of consumers affected, including those in other Member State(s); (iii) any action taken by the company to mitigate or remedy the damage suffered by consumers; (iv) where appropriate, the intentional or negligent character of the infringement; (v) any previous infringements by the company; (vi) the financial benefits gained or losses avoided by the company due to the infringement; and (vii) any other aggravating or mitigating factor applicable to the circumstances of the case.

Based on such criteria, EU authorities or courts will apply the most appropriate penalties available in their national laws (e.g., fines, publication measures, prohibition under penalty, product recall, etc.).

Guidance for Fines. Where the penalty to be imposed is a fine, EU authorities or courts will take into account the infringing company's annual turnover and net profits as well as any fines imposed for the

same or other infringements under this Directive in other Member States.

High Ceiling for Widespread Infringements. With respect to widespread infringements and widespread infringements with a Union dimension, the maximum amount of fines will be at least 4 percent of the company's annual turnover in the Member State(s) concerned.

Assessment

Identification of EU-wide infringement will be determined based on the concept of "widespread infringements" and "widespread infringements with a Union dimension," as set forth in Regulation (EU) 2017/2394. To qualify as such, account will be given to the impact of the infringement on the collective interests of consumers residing in at least two additional Member States other than the EU Member State in which the infringement took place and the infringing company is established or owns assets. Similarly, the same infringements, occurring at the same time and committed by the same company in at least three EU Member States, will also be considered as "widespread infringements."

A "widespread infringement" that harms the collective interests of consumers in at least two-thirds of the EU Member States, accounting, together, for at least two-thirds of the population of the Union, will qualify as "widespread infringement with a Union dimension."

While "widespread infringements with a Union dimension" are inherently more harmful than "widespread infringements," the proposal does not *per se* state that it will be punished more severely. The EU Member States are free to implement specific thresholds in their national laws.

The next *Commentary* in this series will discuss the proposed framework for class actions in the European Union that is part of the proposal package.

THREE KEY TAKEAWAYS

1. The legislative plan is to have the rules on penalties be implemented in all EU Member States, within 18 months of the adoption of the Directive.
2. This proposal will likely increase activity among national administrative authorities throughout the European Union.
3. Compliance with the various EU consumer protection regulations remains as vital as ever, and companies will have to consider broadening their compliance systems.

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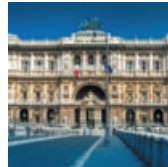
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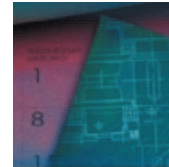
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