



Federation of the European
Sporting Goods Industry

FEDERATION OF THE EUROPEAN
SPORTING GOODS INDUSTRY

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FESI POSITION PAPER NEW DEAL FOR CONSUMERS (*Consumer Law*)

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The Federation of the European Sporting Goods Industry (FESI) welcomes the publication by the Commission of its *New Deal for Consumers*. Although we believe that the current legislative framework strikes a right balance between the respective needs of economic operators and consumers, the Commission's proposal suggests some much welcome improvements.

Please find below FESI position on some of the key aspects of the Directive 2018/0090 on better enforcement of EU consumer protection rules.

MORE TRANSPARENCY FOR CONSUMERS

1) Online transparency

FESI strongly supports the proposed requirements for online marketplaces to clearly inform consumers about:

- Whether the contract is concluded with a trader or an individual,
- Whether consumer protection legislation applies, and
- Which trader is responsible for ensuring consumer rights related to the contract.

Consumers on online marketplaces often have little visibility on whom they are dealing with when they buy online: the nature of their contracting party (i.e. private individual or professional), whether they are the marketplace operator or a third-party seller, when it comes to branded products, their link – if any – to the brand (e.g. authorized distributor, brand owner, absence of relationship with the brand) and the legal regime governing the transaction.

FESI would thus recommend keeping unchanged the requirements on transparency in online marketplaces proposed in the draft Directive.

2) Online Platforms offering order fulfillment services

The sporting goods industry is of the opinion that EU-policy makers could go one step further in ensuring that consumers purchasing products online would be adequately protected in any given situation.

Some online platforms offer order fulfillment services, which allow non-European companies or SMEs an easy way to sell their products directly to European consumers. A company just has to send its products to the warehouse of an online platform, and the online platform does the rest (payment, packaging, shipping, after sale services etc.).

Online platforms with fulfillment services on the one hand assume no responsibility as a normal retailer but on the other hand simultaneous act as normal retailer in other aspects, especially in relation to the customer, i.e. they take back products from consumers (14-days right of withdrawal), handle the payment-process and other after sale services.

Problems may arise when there is no importer or authorised representative of the third country company appointed in the EU, which can be held accountable and fulfill the legal responsibilities in respect of the product marketed. If or to what extent the products are safe and comply with European standards and regulations, is not always checked by the OP, who often see themselves as just a parcel service provider and assume none of the responsibilities which a conventional retailer/distributor would typically assume. Since order fulfillment services are a relatively new business model, there is currently a grey area in this regard. Several aspects are affected: consumer protection (safe products / product design and labelling regulation / consumer rights in respect of defective products), tax fraud (a lot of the distributors don't pay sales tax / VAT) and anti-competitive behaviour.

FESI believes that online platforms which offer order fulfillment services going beyond simple parcel delivery should be treated as distributors and be the one held responsible for compliance with product rules applicable to the products they distribute.

This position is in line with the EU Commission's Blue Guide on EU Product Rules 2016 which states (C272/36) that "*where fulfillment service providers provide services as described above which go beyond those of parcel service providers, they should be considered as distributors and should fulfill the corresponding legal responsibilities*".

PENALTIES

1) List of common criteria

FESI supports the proposal by the Commission to include a list of common, non-exhaustive criteria for assessing the gravity of a potential infringement. The harmonization of these criteria at EU-level will provide additional predictability to both economic operators and authorities.

When adopting sanctions, FESI has always stressed the importance of making the distinction between rogue traders who deliberately breach EU law for their own benefit and well intentioned companies who violate EU law inadvertently. We are thus pleased to see this aspect reflected in the list.

In addition, taking into account fines imposed in other Member States for the same infringement is also important to avoid duplicative penalties for the same violation. Cooperation between national authorities in this regard should be reinforced.

While the article is correctly drafted, FESI would nonetheless support the development of guidelines to ensure a uniform interpretation of the list of common criteria in all Member States. Enforcement of the harmonized penalties is carried out by national or even local/regional enforcement authorities, leading to at least some inevitable divergence in enforcement practices throughout the EU. Introducing methods to ensure more aligned enforcement, e.g. through the introduction of public uniform enforcement guidelines and/or an EU consultation mechanism for Member State market surveillance authorities, may effectively tackle this challenge.

2) Threshold for maximum turnover-based fines

FESI remains concerned by the Commission's proposal to link fines to a trader's turnover. From our perspective, penalties should be proportionate to the level of infringement – especially since harsh fines have no deterrent effect on companies who are well intentioned, but violate EU consumer laws inadvertently.

While serious and deliberate violations of consumer rights by rogue traders should be penalized appropriately, the application of penalties should recognise where violations are minor and committed inadvertently by traders who usually take a good faith approach to compliance and are cooperative.

For traders who take a good faith approach to compliance, the best method of ensuring that they continue to take such an approach is stimulating self-regulation. This can be done by better educating traders as to the requirements of EU consumer law and issuing appropriate guidance. E.g., traders might be encouraged to become member of associations (existing in most Member States already) that issue trust marks which traders can only receive after finishing a certification process.

This is all the more important that the efficiency of fines based on overall turnover has not been clearly demonstrated. While fines can indeed be used as a deterrence tool, there is no one-size fits all solution. FESI remains concerned that this approach would thus unfairly penalised economic operators acting in good faith.

For these reasons, we would support the removal of the reference to the threshold for maximum turnover-based fines – until a proper and rigorous assessment is conducted to explore more efficient alternative options that would not unnecessarily harm businesses which did not breach EU law on purpose.

REMOVING BURDEN FOR BUSINESSES

1) Right of withdrawal

An appropriate balance must be found between the respective (financial and administrative) burdens imposed on producers/suppliers and the rights and interests of consumers. Compliance with the 14-days right of withdrawal has been challenging for some companies as they often cannot inspect the returned goods within such a short timeframe – especially SMEs who usually have limited time and resources available. As a result, consumers are often likely to be reimbursed without properly checking to what extent the good has been used – and potentially damaged.

In that context, the sporting goods industry appreciates the proposals brought forward by the Commission to grant economic operators the possibility to:

- Refuse goods if a consumer has used it instead of only trying it out the same way they could have done in a brick and mortar shop, and
- Wait until they have received the returned good before reimbursing the consumer.

Unfortunately, the proposal fails to address the difficulties personal protective equipment (PPE) manufacturers face with the current application of the right of withdrawal. As an example, most helmets are designed to absorb shock by partial destruction of the shell and liner. This damage may not be visible. Therefore, if subjected to a severe blow, the helmet should be destroyed and replaced even if it appears undamaged. When a helmet (or similar PPE) is returned to one of FESI's members within 14 days, there is no possibility to be sure that it has not been subject to a severe blow. For safety reasons the product cannot be resold.

FESI would thus suggest keeping the wording proposed by the Commission on the right of withdrawal and include the possibility to exempt certain categories of products from the scope of this rule. A list of products could be drafted by means of a delegated act – with the support of relevant economic operators and consumer organizations – to ensure that PPE where producers cannot be fully confident for safety reasons that they can be resold will be excluded from this rule.

2) Means of communication

Allowing traders to use new means of online communication is a good idea. An e-mail remains the most efficient way of communication, and is nowadays widely used by consumers but this should

not prevent economic operators for using other innovative communication channels when engaging with their consumers.

Companies should, ultimately, be free to provide whatever contact information they choose to consumers, provided that by using that contact information, consumers can easily reach the correct person to deal with their complaint in accordance with the applicable EU consumer law provisions.

For these reasons, the sporting goods industry supports the proposed article as drafted by the Commission.

IPR

From FESI perspective, the new deal for consumers should also address issues related to the fight against counterfeiting. According to a recent studyⁱ, as much as 27 percent of online shoppers have been duped into buying imposter goods. Online marketplaces play a key role in the dissemination of counterfeit products: according to the same study, 39% of people that unintentionally purchased fake products online found them via online marketplaces.

In that context, FESI calls for the inclusion of an obligation for any online marketplace operator who has come to learn (through a notification from a right holder, or on its own) that a product on its platform is a counterfeit, to inform consumers which have previously bought the corresponding product, that this product is a counterfeit and that its use could cause harm.

In such a case, only the online marketplace operator has the necessary information (e.g. information about the product, transaction history, contact details, etc.) to alert those of its users who have bought the product, and prevent damage.

Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1,800 sporting goods manufacturers (85% of the European market) through its 12 National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 650,000 EU citizens and has an annual turnover of some 66 billion euro.

ⁱ "Global Online Shopping Survey 2017 – Consumer Goods" by brand protection firm MarkMonitor