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EXECUTIVE SUMMARY OF THE FITNESS CHECK

of EU consumer law on digital fairness

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1. Context and objectives

As a result of the development of EU consumer law over the last 50 years, EU consumers are among the most protected in the world, online and offline. EU consumer protection laws aim to empower consumers to play an active role and fully benefit from the Digital Single Market. However, there are increasing concerns that new technologies and data-driven practices are being used to undermine consumer choice and to influence consumers to take decisions that go against their interests. This could reduce consumer trust and limit the effectiveness of the current rules in the digital environment.

In response to the emerging concerns about the lack of digital fairness for consumers, the Commission announced in the New Consumer Agenda of 13 November 2020 that it would analyse whether additional legislation or other action was needed in the medium-term to ensure equal fairness online and offline. In May 2022 the Commission launched a Fitness Check of EU consumer law on digital fairness in order to determine whether the existing key cross-cutting consumer law instruments remain adequate for ensuring a high level of consumer protection in the digital environment (digital fairness) or whether any changes are necessary. This Fitness Check covers three Directives, which form the core of the framework of consumer protection that applies to most traders and consumer-facing sectors in the EU:

- Unfair Commercial Practices Directive 2005/29/EC (UCPD);
- Consumer Rights Directive 2011/83/EU (CRD);
- Unfair Contract Terms Directive 93/13/EEC (UCTD).

2. Key findings

The conclusions of the Fitness Check should be read in the context of the limitations and uncertainties of the evidence base, taking into account the analytical challenges related to the fast-evolving nature of digital markets and new technologies. Data and stakeholder feedback gathered for the purpose of this Fitness Check clearly point to a strong link between the application of the Directives and consumer protection in the digital environment. However, there are challenges associated with isolating and attributing various effects directly to the Directives and with disentangling the online and offline impacts.

The key findings are summarised in the table below for each evaluation criterion:

Evaluation criterion	**Summary assessment**	**Key findings**
Effectiveness	Limited	- Consumer complaints and detriment remain high; problems are amplified by the increased scale, speed and potency of digital solutions for targeting consumers - Legal uncertainty regarding the application of the laws and gaps of protection in certain areas - Risk of regulatory fragmentation due to diverging interpretations and national laws in certain areas - Insufficient public and private enforcement
Coherence	Positive with limitations	- Internal coherence: consistent and mutually reinforcing - External coherence: generally complementary to other EU legislation but it is important to ensure coherent

		interpretation of key concepts when applying the different regulatory frameworks
Efficiency	Positive with limitations	- Costs and benefits are balanced at societal level (to the extent that they are quantifiable and attributable) - Compliance costs for businesses are generally not considered to be high - Significant benefits for consumers, traders and authorities (e.g. consumer protection and trust in digital markets, more regulatory certainty through harmonisation and enabling cross-border enforcement cooperation) - Specific areas with potential for simplification (e.g. information obligations, right of withdrawal)
EU added value	Positive	- EU legal framework achieves moderately or significantly better outcomes than could have been achieved by Member States
Relevance	Positive with limitations	- Objectives remain highly relevant - Benefits of a technology-neutral safety-net framework - Different technological and market developments will have an impact on fitness for purpose and are expected to do so at a faster pace in the future (e.g. growing use of AI, automation, personalisation) - Application of other EU legislation will impact relevance

The Fitness Check confirms that the **technology-neutral** nature of cross-cutting EU consumer law, with its combination of **principle-based** rules and **more prescriptive obligations and prohibitions**, is a necessary component of the regulatory framework for the Digital Single Market. The core objectives of the Directives remain just as valid today. The Directives have provided the necessary **minimum of regulatory certainty and consumer trust** to support the development of a diverse market of consumer-facing digital products and services in the EU. At the same time, the Fitness Check shows that the Directives have only partially achieved the objectives of providing a high level of consumer protection and a better functioning of the internal market through the harmonisation of rules in the digital environment.

The Fitness Check indicates the prevalence of **multifaceted problems** that consumers encounter in the digital environment, **including deceptive or addictive interface designs and functionalities, personalised practices targeting vulnerabilities, difficulties with the cancellation and renewal of digital subscriptions, forced acceptance of unfair contract terms and challenges associated with social media commerce, such as influencer marketing**. There is a continuation of the same problems of **power imbalance between consumers and traders** that triggered EU action in the past, now amplified by the increased scale, speed and potency of digital solutions for targeting consumers. Consumers do not behave the same way online as they do offline. In the online context, they are less likely to pay attention, to read contract terms carefully or to process all of the information they are shown at each step of their transactional decisions. Traders are able to use more effective online commercial persuasion tactics than ever before. Technological developments and insights from tracking consumer behaviour are making consumer-facing digital products, services and business models increasingly complex, for both market participants and authorities.

A conservative estimate **quantifies EU consumer detriment resulting from problems experienced in the digital environment at EUR 7.9 billion per year**, with the highest levels of detriment among younger age groups. At the same time, to the extent that the costs can be quantified and attributed, the regulatory burden on businesses is modest and the Directives do not contain any reporting obligations. The overall estimated adjustment and administrative costs associated with compliance with the Directives across the EU amount to approximately EUR 511-737.3 million per year. Only 10-18% of traders, including SMEs, report high costs relating to the different compliance activities, whereas the majority face low costs or no costs at all.

Importantly, the effectiveness of the three Directives is diminished by **ineffective enforcement** mechanisms, despite the new possibilities of collective redress and the continued improvement of the cross-border coordination of public enforcement within the Consumer Protection Cooperation (CPC) Network. In parallel to this Fitness Check, the Commission is reflecting on the possible need to reform the CPC Regulation in order to strengthen it. The **lack of sufficient national and Court of Justice of the European Union case law** applying the Directives in the digital environment leaves EU consumer law largely underused when it comes to meeting its intended objectives. Authorities, consumer organisations and other plaintiffs would have to take considerable risks and face a difficult burden of proof in order to test the application of these laws. Similarly, law-abiding traders do not have sufficient certainty that the measures they are taking are enough to ensure compliance and they **lack incentives to go the extra mile** in a competitive environment that does not reward 'digital fairness by design'. While the Commission's interpretative **guidelines** are perceived very positively by authorities and market participants alike, they are not binding and cannot create sufficient incentives to ensure effective implementation.

There is **insufficient legal certainty** about the application of the existing general principle-based rules to complex online practices. Moreover, in the absence of EU action, there is a risk of **regulatory fragmentation** in specific areas due to diverging national laws and interpretations. Several Member States have adopted or are considering adopting new consumer protection laws in specific areas, such as influencer marketing and digital subscriptions. Despite the benefits of a principle-based approach, the broadly worded legal provisions in the Directives **are not specific enough to allow them to be applied effectively** to commercial practices and system architectures in the digital environment. Traders are unable to translate these general principles into concrete development decisions in design interfaces, software, hardware, infrastructure etc.

The evaluation period (2017-2023) saw a comprehensive overhaul of the regulatory framework for digital markets and technologies, with the introduction of landmark legislation such as the Digital Services Act, the Digital Markets Act and the Artificial Intelligence Act, which will undoubtedly have implications for consumer protection. However, the new digital rulebook was **not intended to address all problematic commercial practices** and focuses on specific types of traders (e.g. online platforms), business models and technologies (e.g. AI systems). There has also been an **increase in the complexity** of applying consumer protection rules in the digital area in conjunction with other digital legislation. At present, the level of consumer protection may vary depending on the Member State in which consumers reside, the trader's location, business model or the categories of personal data or underlying technologies that are used in their products or services.

3. Lessons learned - areas for improvement

To achieve digital fairness, the Fitness Check points to the need to do more to address the remaining consumer protection challenges in the digital environment. Despite providing a high level of protection and a baseline for regulatory certainty, the existing EU legal framework cannot be considered sufficiently effective in tackling current and emerging consumer harms. Without prejudice to the format and content of future Commission action, the lessons learned from this Fitness Check point to the following **areas for improvement**, which could be **further analysed**:

1. **addressing the most harmful problematic practices** (such as dark patterns) so as to increase consumer trust in digital technologies, reduce consumer detriment and enable consumers to make more meaningful and informed choices in the digital environment;
2. **reducing legal uncertainty** for market participants about the application of EU consumer law to practices in the digital environment, **preventing regulatory fragmentation** between Member States and **promoting fair growth and competitiveness** in the digital economy;
3. **ensuring the consistent application** of EU consumer law and other EU legislation that regulates aspects of B2C digital markets, new technologies and the use of consumer data for commercial purposes;
4. **facilitating more effective enforcement and compliance** with EU consumer law, in particular in technologically complex cases, and reflecting on how to address current challenges for the cross-border enforcement of consumer protection;
5. **simplifying the existing rules in the areas identified**, without compromising the objective of a high level of consumer protection.