

Cullen International, together with the Universities of Leuven and Namur, held on March 15, 2016 a seminar on '*the protection of digital consumers*'.

The seminar discussed the current sector specific and horizontal rules that protect digital consumers in an attempt to assess if these rules are suited to the Internet eco- system or if reforms are needed.

Around 80 people from industry, EU institutions, member states' permanent representations in Brussels, national regulatory bodies and academia participated.

The slides can be found [here](#).

Some of the key points made by the speakers are highlighted in this summary.

Overview of the current rules

Michèle Ledger (Cullen International) gave an overview of the current rules, highlighting sector specific rights, horizontal rights, and showing some inconsistent rights such as the right to data portability in the General Data Protection Regulation ([Tracker](#)) and the right to retrieve in the new Commission proposal on contracts for the supply of digital content ([Tracker](#)). She also referred to the different rules on contract duration.

Ms Ledger also raised the question of whether there is a no man's land on the enforcement/application of rules vis-à-vis information society service providers, especially when compared to the role of regulators in the electronic communications sector.

Hervé Jacquemin (University of Namur) proposed the idea to develop a code of consumer rights at the EU level, which would have the advantages of introducing a single set of definitions and a consistent scope of application, while ensuring that rules would be applicable to digital and non-digital consumers alike with a consistent set of penalties.

Despite moving towards maximum harmonisation directives, the enforcement of rules varies considerably in the Member States, which is creating difficulties he said and proposed that civil penalties should be included in the directives.

He also offered the following methodology to ensure a complete level of consumer protection at the EU level and a move towards more comprehensive horizontal rules.

Horizontal	Sector specific	TO DO
V	V	Check whether protection measure in sector specific could be deleted
X	V	Check whether protection measure in sector specific could be moved to horizontal (with broad scope)
V	X	Check whether additional protection is needed in sector specific

Policy panel

Vesa Terava (European Commission, DG Connect) discussed how consumer protection would be addressed in the review of the EU electronic communications regulatory framework ([Tracker](#)). The legislative proposals are expected to be published after the summer break, possibly in September.

He said the Commission was examining which consumer protection issues may continue to need sector-specific legislation and which could fall under general 'horizontal' consumer protection rules applicable to all sectors.

Mr Terava mentioned the recently adopted EU rules on net neutrality (which will enter into force from April 30, 2016 – [Tracker](#)) as an example of where sector-specific rules are still required.

Some consumer rights provided for under the universal service obligation may also continue to need sector-specific legislation, he said, without giving examples.

Filipe Prista (ANACOM - Portuguese telecommunications regulator) described how ANACOM, in addition to being the telecommunications regulator, has the role of "*central supervisory authority for e-commerce in Portugal*".

Mr Prista emphasised the importance of an "*adequate and clear*" distribution of consumer protection competences.

In Portugal, the primary role for enforcement is distributed among different existing authorities (for example, the Copyright Inspectorate and the Directorate-General for Consumers). However, ANACOM plays a central, coordinating role at national and international level and is the 'fall back' authority when no other authority is competent.

Furthermore, it is essential that the enforcement authorities have good working relationships with the online intermediaries and deal with them via the same procedures, he said.

Mr Prista spoke about how the rules on liability of intermediaries are being enforced in Portugal to prevent access to illegal content online.

The e-Commerce Directive ([Tracker](#)) establishes the principle that intermediaries should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner. At the same time, when intermediaries become aware of illegal content, they are required to expeditiously take effective action to remove it or to disable access to it.

Three types of intermediaries are defined:

- 'mere conduit' (telecoms operators and ISPs); caching
- operators; and
- hosting operators.

Mr Prista said that Portugal has added a fourth category of intermediary in its national law: content aggregation services, such as search engines.

He said ANACOM has created a database where all intermediaries can register. While intermediaries do not have a legal obligation to do so, the number of intermediaries registering is increasing every year, he added.

Antonio Mancini (AGCM - Italian competition and consumer protection authority) explained how AGCM is responsible both for the enforcement of competition and consumer protection law in Italy. AGCM has the same strong enforcement powers for consumer protection as for competition law, including the possibility to open own-initiative investigations, to impose interim measures to stop harmful practices, and to impose large fines (up to €5m for each infringement).

AGCM has "*full and exclusive competence*" for unfair commercial practices in all regulated sectors, such as telecommunications. However, AGCM is obliged, before closing an investigation, to ask for the (non-binding) opinion of the sector regulator.

Mr Mancini outlined some of the recent actions taken by AGCM in the area of digital consumers, including:

- unsolicited activation of premium services on mobile phones (Telecom Italia, Vodafone, Wind, H3G);
- legal warranties (Apple);
- responsibility for checking and blocking fake online reviews (TripAdvisor);
- in-app purchases in games marketed as 'free' (Apple and Google – this was a [joint action at EU level](#) through the Consumer Protection Cooperation (CPC) network, which brings together national authorities for the enforcement of EU consumer protection laws); and
- airline tickets sold online.

Regarding the EU consumer protection rules, Mr Mancini argued in favour of full harmonisation in order to avoid national fragmentation, which would not be in line with the Digital Single Market initiative.

Mr Mancini also noted that, whereas cooperation between national competition authorities in the European Competition Network (ECN) involves one authority per member state, in the CPC network there is sometimes more than one consumer protection authority per member state.

One of the 16 actions in the European Commission's Digital Single Market strategy ([Tracker](#)) is to review in 2016 the Regulation establishing the CPC network “*in order to develop more efficient cooperation mechanisms*” between national consumer protection authorities.

Stakeholder's panel

Guillermo Beltrà (BEUC - European consumer organisation) said that consumers of telecommunications services may be dissatisfied because:

- there is not enough enforcement of the rules;
- some rules are out of date (e.g. with the bundling of services consumers face new problems to switch to another operator).

Mr Beltrà noted that the EU framework is construed on a sector by sector basis. He agreed that there could be horizontal rules for comparable services but the main issue is how to enforce such rules.

He added that enforcement authorities are not always well equipped to deal with digital services. Further, in the context of enforcement he said there should be more joint action by regulators. In this regard, he welcomed the Commission intention to review the functioning of the CPC.

Enrique Medina (Telefónica) said that in the telecoms sector products and services evolve but are always subject to rules. However, this is not the case of online services, which are also being used by telecoms clients, he added.

Mr Medina mentioned some examples of online services' terms and conditions that show that they are not subject to regulation and oversight. He added that new online services competing with traditional telecommunications services enjoy a competitive advantage.

He concluded that there is a big gap in terms of regulatory obligations between telecommunications services and online services that has to be addressed.

Lisa Felton (Vodafone) agreed with Mr Medina that there is a gap on digital content, platforms, etc. and added that “*consumers are starting to feel that gap.*”

She said that the current problems in the market (e.g. small number of cross-border sales, lack of consumers' trust) do not necessarily require sectoral legislation.

Ms Felton noted that there is a temptation by EU regulators to keep adding burdens (e.g. new Commission proposal on contracts for the supply of digital content). She said that this is creating new problems and inconsistencies among the applicable laws.

Ms Felton pointed out that good regulation makes differentiation possible. On the contrary, overregulation does not leave room for differentiation among products and services.

Cornelia Kutterer (Microsoft) said that the telecoms sector makes a fundamental error when focusing on the level playing field issue. The focus should instead be on how the consumer can best be protected, she added.

She noted that maximum harmonisation rules on consumer protection have not been successful because of Rome I Regulation ([Tracker](#)). This regulation guarantees that the applicable law in contracts with consumers is the law of the country where he habitually resides.

Ms Kutterer added that consumer rules have so far failed to bring legal certainty for businesses. She criticised that the outcome of the REFIT exercise will come after measures affecting consumers are being proposed.

She however acknowledged that some current horizontal instruments such as the Unfair Commercial Practices Directive ([Tracker](#)) are working well.

Ms Kutterer concluded that maximum harmonisation does not make sense if the enforcement of the rules is different.