



Organisation for Economic Co-operation and Development

DSTI/CP(2018)7/FINAL

Unclassified

English - Or. English

22 May 2018

**DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INNOVATION
COMMITTEE ON CONSUMER POLICY**

Cancels & replaces the same document of 17 May 2018

**Conclusion of the Review of the 2003 Recommendation on Protecting Consumers
from Fraudulent and Deceptive Commercial Practices across Borders**

JT03432189

Foreword

This report summarises the results of a review by the Committee on Consumer Policy (CCP) of the 2003 *Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders*. It has been prepared on the basis of the responses to a questionnaire [Annex A] to CCP delegates, along with the input from an informal working group for the review. The conclusion of the review is that the 2003 Recommendation does not need modifications at this stage. Rather, there should be a renewed focus on fuller implementation of the existing text.

The report was drafted by Akira Yoshida of the OECD Secretariat. It was approved and declassified by the Committee on Consumer Policy on 19 April 2018.

1. Background

To develop a common framework for closer, faster, and more efficient co-operation among consumer protection enforcement agencies in combating fraudulent and deceptive commercial practices across borders, the OECD Council adopted, in June 2003, its Recommendation of the Council concerning Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders (“2003 Recommendation”). Recognising that most laws and enforcement systems existing at the time of the adoption were not necessarily adequate to address cross-border fraud cases, the 2003 Recommendation recommends that Adherents (currently all OECD Members) develop a framework for closer, faster and more efficient co-operation amongst their consumer protection enforcement agencies that include where appropriate:

- establishing a domestic system for combating cross-border fraudulent and deceptive commercial practices against consumers,
- enhancing notification, information sharing, and investigative assistance,
- improving the ability to protect foreign consumers from domestic businesses engaged in fraudulent and deceptive commercial practices,
- improving the authority to protect domestic consumers from foreign businesses engaged in fraudulent and deceptive commercial practices,
- considering how to ensure effective redress for victimised consumers, and
- co-operating with relevant private sector entities.

The 2003 Recommendation anticipated the growth of cross-border trade and e-commerce and its impact on consumer protection policy. Indeed, since the adoption of the 2003 Recommendation, the Internet and digital technologies have dramatically evolved and brought significant changes to cross-border markets. According to a recent survey, for instance, the size of cross-border business-to-consumer e-commerce has greatly increased and this trend is likely to further expand across the globe in the long term¹.

While consumers embrace many benefits from these developments, there are also risks and challenges faced by consumer in the digital world. The changing environment of cross-border transactions has increased the need for more effective and better co-ordinated consumer protection across borders. The report on Consumer Protection Enforcement in a Global Digital Marketplace [DSTI/CP(2017)10/FINAL] which supports this review, finds that Adherents have made significant efforts to combat cross-border fraudulent and deceptive commercial practices through, for instance, enacting legislation

¹ For instance, a recent study predicts that the volume of cross-border B2C E-commerce will grow by 27.3% from 2014 to 2020 in all of the regions across the globe: available at http://unctad.org/meetings/en/Presentation/dtl_eweek2016_AlibabaResearch_en.pdf. Additional research on the development of cross-border e-commerce is available here: https://www.paypalobjects.com/webstatic/mktg/2014design/paypalcorporate/PayPal_ModernSpice_Routes_Report_Final.pdf. However, it should be noted that data on cross-border e-commerce are limited.

on information sharing and investigative assistance with foreign jurisdictions, and enforcing consumer laws in co-operation with their foreign counterparts.

The scope of the 2003 Recommendation is limited to the protection of consumers from fraudulent and deceptive commercial practices. However, it recognises that closer co-operation in this area can lay the groundwork for enhanced cross-border co-operation on wider consumer protection issues. Indeed, the 2003 Recommendation has served as a basis to develop OECD Recommendations to enhance international enforcement co-operation in related policy areas, such as spam² and for privacy³.

Of greater direct relevance, the 2016 revisions to Recommendation of the Council on Consumer Protection in E-commerce (“E-commerce Recommendation”) have effectively broadened the scope of consumer protection enforcement co-operation to cover online transactions. In fact, the revised E-commerce Recommendation includes provisions calling for governments to enhance cross-border enforcement co-operation for consumer protection through:

- facilitating communication, co-operation, and, where appropriate, the development and enforcement of joint initiatives at international level;
- improving the ability of consumer protection enforcement authorities and other relevant authorities, as appropriate, to co-operate and co-ordinate their investigations and enforcement activities;
- making use of existing international networks and entering into bilateral and/or multilateral agreements and other arrangements as appropriate to accomplish such co-operation;
- co-operating toward developing agreements or other arrangements for the mutual recognition, and enforcement of judgements.

The E-commerce Recommendation further calls for governments to:

- establish and maintain consumer protection enforcement authorities that have the authority and powers to investigate and take action to protect consumers against fraudulent, misleading or unfair commercial practices;
- work towards enabling those authorities to take action in cases involving either foreign consumers or foreign businesses.

² The 2006 *Recommendation of the Council on Cross-Border Co-operation in the Enforcement of Laws against Spam*; available at <https://legalinstruments.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=118&InstrumentPID=114&Lang=en&Book=False>

³ The 2007 *Recommendation of the Council on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy*, available at <https://legalinstruments.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=119&InstrumentPID=115&Lang=en&Book=False>

2. Key findings of the survey

In 2017, a short questionnaire was circulated to solicit views about whether there was a need to update the 2003 Recommendation [see Annex A]. As is described in more detail below, the results highlight that while continued implementation efforts are needed, the 2003 Recommendation continue to be relevant and appropriate to further the objectives set out when it was adopted.

1. Obstacles in implementing the 2003 Recommendation

Overall, respondents indicated that there is a room for better implementation of the 2003 Recommendation and countries should increase efforts to achieve the goals of the 2003 Recommendation. Although countries have made significant efforts in developing both national and international frameworks for consumer protection enforcement protection across borders, many countries have faced obstacles in implementing the 2003 Recommendation and not yet fully implemented all provisions.

In Europe, as a result of the development of the European Union (EU)'s Consumer Protection Cooperation (CPC) network, respondents from the EU member countries have not identified major difficulties in implementing the 2003 Recommendation in enforcement co-operation with other EU countries. However, they acknowledged that enforcement co-operation with non-EU members is still challenging due to the lack of EU-level international agreements with these countries. Efforts, for example, to negotiate an agreement between the United States and the EU were suspended in 2012. EU authorities face difficulty in finding their competent counterparts and seeking judicial co-operation to tackle deceptive commercial practices outside the EU. In addition, they find it difficult to effectively enforce administrative injunctions outside their jurisdictions, and to seek co-operation from foreign counterparts if their consumers are not harmed.

Outside the EU, there is a common recognition that the lack of legal authority to co-operate with foreign agencies or established requirements for such co-operation is a major obstacle in implementing the 2003 Recommendation. Israel, for instance, reported that it faces difficulty in dealing with businesses that do not have official representatives in the country. Chile noted that the lack of co-operation mechanisms made it challenging to exchange information and notify foreign authorities of investigations.

It was also pointed out that better implementation of the 2003 Recommendation could be supported by increasing resource allocations to enable consumer protection enforcement authorities to be more appropriately staffed. The increase in the volume of online transactions makes it necessary to further strengthen the cooperation between consumer protection enforcement authorities, which in turn calls for providing the agencies with better financial and human resources. In addition, respondents called for better enforcement co-operation through existing international networks, such as the International Consumer Protection Enforcement Network (ICPEN) and the International Mass Marketing Fraud Working Group (IMMFWG).

As a potential barrier to implementation of the 2003 Recommendation, the United States raised an issue related to WHOIS databases⁴ of the Internet Corporation for Assigned Names and Numbers (ICANN), which contain contact information including name, address, email, phone number, and administrative and technical contacts related to domain names. The issue relates to possible access limits to the WHOIS databases, which are a primary source of information on businesses located in a foreign jurisdiction. Such limitations could be a barrier to fostering information sharing between consumer law enforcement authorities. The CCP has discussed the importance of WHOIS access in previous work.⁵

2. Assessing the need for changes in the Recommendation

Despite facing obstacles in implementing the 2003 Recommendation, respondents agreed in general that there is no need for major changes in the text of the 2003 Recommendation. Many confirmed that the text of the Recommendation is still fit for the purpose, and if properly implemented, it can continue to help address problems that consumers face in cross-border markets. Many noted that introducing additional provisions to the 2003 Recommendation is not required, stressing the importance of better implementation of the Recommendation. It is also important to bear in mind that the scope of the cross-border enforcement co-operation of the 2003 Recommendation has already been effectively broadened in the context of online markets through the revisions of the E-commerce Recommendation, as noted above.

Although the overall sentiment expressed in the responses was that major changes are not needed at this stage, some suggestions for possible revisions were mentioned:

- redefining the term “fraudulent and deceptive commercial practices” by, for instance, explicitly referring to new forms of misleading practices such as subscription traps;
- incorporating some of the elements from the current and revised⁶ version of the EU’s CPC regulation;
- adding a provision concerning minimum requirements for bilateral or multilateral arrangements;
- additional provisions regarding public education campaigns to increase awareness about fraudulent and deceptive commercial practices;

⁴ More information about WHOIS databases may be available at: <https://whois.icann.org/en/about-whois>

⁵ OECD, "Consumer Policy Considerations on the Importance of Accurate and Available Whois Data" (2003), available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=dsti/cp\(2003\)1/final](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=dsti/cp(2003)1/final).

⁶ The newly adopted version of the CPC regulation will become effective in January 2020, which will enable competent consumer protection enforcement agencies to have the powers to request information from domain registrars and banks to identify the responsible trader. The regulation also provides for powers of the authorities to carry out mystery shopping exercises and order the immediate closing of scam websites.

- adding a provision on the need for properly resourcing law enforcement agencies, including with criminal enforcement powers, to better address cross-border cases; and
- making explicit references to established international enforcement co-operation networks, such as ICPEN and IMMFWG.

3. Conclusion for the review of the 2003 Recommendation

Based on the findings of the survey and the input from the working group, the CCP concluded in its 95th meeting in April 2018 that the 2003 Recommendation does not need modifications at this stage. The Committee agreed that the Recommendation has stood the test of time and, if properly implemented, continues to provide an effective framework to address cross-border fraudulent and deceptive commercial practices. Although some potential areas could be identified to update the 2003 Recommendation, countries do not see significant merit today in opening up the Recommendation for minor modifications now. Rather, there should be a renewed focus on fuller implementation of the existing text, consistent with the obstacles in implementing the 2003 Recommendation described above.

Annex A. Questionnaire for the Review of Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders

The report on consumer protection enforcement authorities [DSTI/CP(2017)10] highlights that a number of challenges related to cross-border co-operation are remaining in many OECD countries, especially in forms of information sharing restrictions, resource limitations of consumer protection enforcement authorities, and legislative limitations restricting effective cross-border co-operation.

In this context, this short questionnaire provides delegates with an opportunity to focus specifically on the text of the 2003 Recommendation with a view to enabling the CCP to decide whether the text remains adequate for its purposes or whether modifications are needed to better address the current challenges to effective cross-border cooperation.

In preparing responses to the questionnaire, delegates are encouraged to consider:

- **The changing circumstances faced by consumers and enforcement authorities.** For example, the evolution and expansion of e-commerce (e.g. rise of peer platform markets), and threats and risks for consumers (e.g. online identity theft). Are there good practices that consumer protection enforcement authorities have put in place that should be better reflected in the Recommendation?
- **The types of problems facing consumers for which international co-operation is needed.** The scope of the 2003 Recommendation is limited to the protection of consumers from fraudulent and deceptive commercial practices. In effect, the 2016 revisions to the E-commerce Recommendation already broadened the scope of enforcement cooperation to include e-commerce. Are there other areas that consumer protection enforcement authorities may seek for cross-border co-operation that should be brought into the scope of the Recommendation?
- **Good practices from other policy domains.** Are there any lessons learned from good practices in other policy areas (e.g. competition, tax, securities regulation or privacy enforcement) to increase cross-border co-operation, especially in notification, information sharing (including exchange of confidential information) and enforcement activities?

QUESTIONS

1. Please identify any obstacles faced in implementing the 2003 Recommendation, noting whether you believe changes to the text of the Recommendation may be needed as a result.
2. Is there a need for changes (modification, deletion, or addition) to any part of the 2003 Recommendation, including the scope and definitions and principles? Please identify areas where changes might be needed.
3. Please describe any recent or anticipated developments related to cross-border consumer protection enforcement that would further inform the review of the Guidelines.