



The Enforcement and Modernisation Directive

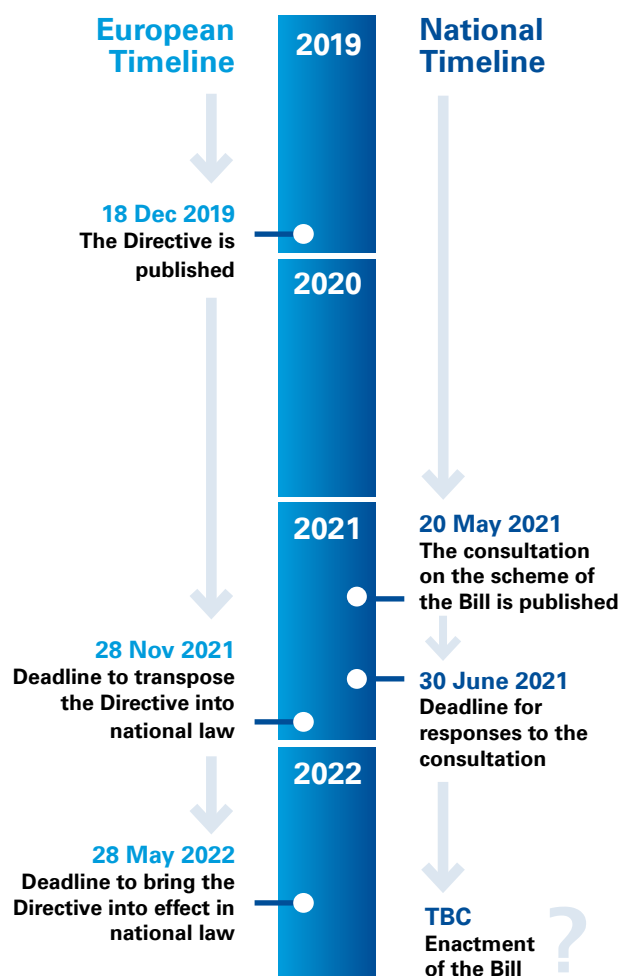
Background

Consumer protection has been at the forefront of the regulatory agenda, both at a European and national level, with an acknowledgement that the increase in digitalisation requires a review of and update to existing rules. Directive 2019/2161 on the better enforcement and modernisation of consumer protection rules ("the Directive"), has two aims:

1. To provide stronger enforcement mechanisms where breaches of consumer rules have occurred; and
2. To update and modernise existing European Union ("EU") consumer protection Directives in line with recent trends, particularly in digitalisation.

The effective transposition and implementation of the Directive is key action as part of the European Commission's ("EC's") New Consumer Agenda. For more information on the New Consumer Agenda, visit our website: <https://home.kpmg/ie/en/home/insights/2021/03/new-consumer-agenda-risk.html>. The Directive will increase the level of consumer protection across a variety of industries engaged in business-to-consumer transactions.

In Ireland, the Directive will be transposed into law by the Consumer Rights Bill ("the Bill"). Regarded as a significant reform of consumer protection laws, the Bill will amend existing rules, bringing a number of EU Directives into effect.





Upcoming Changes

A summary of the changes introduced by the Directive in relation to **enforcement mechanisms** is outlined below.

1. Penalties for non-compliance:

- **Harmonious approach** – The Directive ensures a consistent approach to penalties for non-compliance across the EU;
- **Penalties** – The penalties imposed must be effective, proportionate and act as a deterrent against non-compliance. A number of criteria should be taken into account when setting penalties, for example, the nature of the non-compliance and any mitigating action taken; and
- **Impact** – The maximum penalty has been set to at least 4% of annual turnover or a maximum penalty of at least €2 million where annual turnover is not available.

2. Aggressive / misleading marketing and selling practices:

- **Additional protection** – The Directive allows Member States to adopt additional measures to protect consumers from unfair marketing practices, such as unsolicited home visits, however these must be non-discriminatory, justified, and proportionate; and
- **Impact** – The withdrawal period is increased to 30 days (from 14 days) for contracts concluded as a result of an unsolicited home visit.

3. Consumer compensation

- **Compensation** – The Directive ensures that consumers who have been harmed by unfair commercial practices have the right to be compensated and may avail of a price reduction or termination of the contract; and
- **Criteria** – A number of criteria may be taken into account, for example, the nature of the unfair practice and the damage suffered by the consumer.

A summary of the changes introduced by the Directive in relation to **increased consumer protection and digitalisation** is outlined below.

1. Scope of consumer rights:

- **Scope** – The Directive broadens the scope of

consumer rights to include digital content / digital services where personal data is provided to the business in return for use of the digital content / digital services; and

- **Exceptions** – Exceptions are provided where the personal data is only gathered for the purposes of performing the contract and complying with legal requirements.

2. Online marketplaces:

- **Disclosures** – Consumers are often unsure who they are buying from when they shop on online marketplaces. Providers of online marketplaces must disclose whether third party suppliers are businesses or a private individuals. Consumers must be advised that consumer protection rules only apply in business-to-consumer transactions; and
- **Contractual obligations** – Providers of online marketplaces must advise consumers who is responsible for obligations related to the contract, for example, for delivery and the handling of returns i.e., is it the online marketplace / third party supplier.

3. Search results:

- **Ranking** – Websites, such as those used for price comparisons or online booking, often provide ranked search results. Many consumers will only look at the results which appear at the top of the search results provided by the website. Where search results are displayed based on a ranking, for example based on price / distance / consumer ratings, consumers must be informed of the factors which impact the ranking. Consumers must also be informed of the relative importance placed on the factors which impact the ranking; and
- **Disclosures** – Businesses must disclose where paid advertisements are included and where they are paid to provide a higher ranking to certain traders.

4. Personalised pricing:

- **Profiling** – Consumers must be informed if the contract price was personalised to them based on automated decision making, making consumers aware that the business may have increased the price of an offer due to profiling.



5. Consumer reviews:

- **Legitimacy** – Many consumers rely on reviews when deciding whether to buy a product / service. The Directive aims to ensure reviews posted on websites are genuine. The submission of a fake review / the commissioning of someone to submit fake reviews is prohibited; and
- **Disclosures** – Businesses must provide information regarding if / how they ensure reviews are only submitted by consumers who have used / purchased the product.

Focus Area

In January 2022, the EC published the results of a website sweep of online consumer reviews for 223 websites. This has highlighted a number of areas for improvement, which align to the requirements of the Directive.

A summary of the findings is outlined below:

- There was doubt as to the reliability of the reviews in almost two thirds of cases, with traders being unable to show that they were doing enough to ensure that consumers had used the product / service being reviewed;
- Approximately half the websites did not include information as to how fake reviews are prevented; and
- Approximately 80% of websites did not note that incentivised reviews are prohibited / how incentivised reviews are flagged if they are permitted.

6. Ticket resale:

- **Preventative measures** – Tickets bought on secondary markets are often more expensive than those purchased directly from the event organiser. It is prohibited to resell event tickets that were acquired through “bots”, an automated software that enables ticket resellers to bypass limits imposed by the primary ticket vendor.

7. Digital content:

- **Additional protection** – The Directive provides additional safeguards for consumers in relation to the digital content created by them, in the event of their withdrawal from a contract.

8. Price reductions:

- **Comparability** – Sometimes price reductions advertised to consumers are not genuine / transparent. Businesses will have to indicate the lowest price a reduced product has been within at least a 30-day period prior to the price reduction announcement; and
- **Exceptions** – Exceptions are provided where the goods expire rapidly, where they have been on the market for less than 30 days and where price reductions are applied progressively.

9. Dual quality goods:

- **Transparency** – Marketing goods in identical / similar packaging across Member States, where the characteristics / components of the goods vary across countries, is not allowable unless there is a legitimate / objective reason.



Next Steps

The Consumer Rights Bill will be brought into the Houses of the Oireachtas for enactment. The timeline has not yet been announced, however on 10 February 2022 as part of the Parliamentary Questions it was noted that this will happen shortly.

How can KPMG help?

KPMG's Consulting experts in the conduct and regulatory sector have unparalleled experience assisting with regulatory implementations. We have extensive experience in guiding businesses through regulatory change and designing and implementing your operating policies, procedures and systems to align to the requirements. Examples of how our team of experts can assist include:

- Assist you with a regulatory gap analysis to assess any changes which will be required as a result of the Bill;
- Advise you on the design of a framework that will meet the requirements of the changes and how those changes impact your business across people, processes and technology;
- Assist you with the testing of the changes to ensure that they are adequately designed pre-implementation;
- Assist you with the implementation and post-implementation assessment ensuring that the changes were applied correctly and in line with the new regulatory requirements; and
- Support you in training your staff following the changes through a variety of training techniques.



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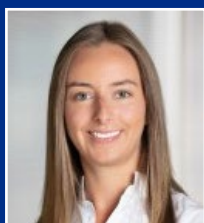
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