

Référence: 20220104952

Type: Doctrine

Intitulé: Draft Law N° 7904: Transposition of Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules

Date du document: 04/01/2022

Date d'applicabilité du document: 04/01/2022

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## Draft Law N° 7904: Transposition of Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules

by Melvin Tjon Akon<sup>1</sup>

### Introduction

A **bill** transposing Directive [2019/2161 \(BEMD\)](#)<sup>2</sup> was submitted to the Luxembourg House of Deputies (Chambre des Députés) (**Bill**) by the Ministry for Protection of Consumers (**MPC**) on 28 October 2021<sup>3</sup>. The BEMD was adopted to remedy the issues identified in the REFIT Fitness Check of EU Consumer and Marketing law<sup>4</sup>, and the evaluation of the Consumer Rights Directive: insufficient enforcement, limited awareness of consumer rights among consumers and professionals, a lack of coherence of the information obligations and a need to adapt the rules to the digital age<sup>5</sup>. To this end, the BEMD:

1. introduces common non-exhaustive and indicative criteria for the application of penalties in four consumer protection directives: the Unfair Contract Terms Directive (**UCTD**), the Price Indication Directive (**PID**), the Unfair Commercial Practices Directive (**UCPD**) and the Consumer Rights Directive (**CRD**)<sup>6</sup>; and
2. modernises consumer protection directives, in particular UCPD and CRD, in view of the continuous development of digital tools (in particular online marketplaces) and economic exchanges (in particular contracts for digital content).

The purpose of this note is to present a high-level overview of the key changes to the Luxembourg Consumer Code (**LCC**) as proposed in the Bill, focusing on a selection of noteworthy elements. The Bill contains three main sections: specification and harmonisation of penalties, specification of the administrative structure implementing consumer protection and new substantive provisions.

### I Specification and harmonisation of penalties

In order to facilitate more consistent application of penalties to infringements that are widespread or have a (intra-)Union dimension, the BEMD introduces new criteria for the imposition of these penalties in the four Directives<sup>7</sup>. These criteria cover *inter alia* the infringement (e.g. nature, gravity, duration), mitigating/remedying actions by the seller, gains and losses and penalties imposed for the same infringement in cross-border cases<sup>8</sup>. Member States must also provide the possibility to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines. The Bill introduces these elements in the relevant sections of the LCC<sup>9</sup>. The MPC also seeks to improve the protection of

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consumers and the observance of consumer law by professionals by introducing a new regulatory measure: the written warning<sup>10</sup>. The written warning would exist next to the criminal law sanctions and the enforcement powers of other authorities under the LCC<sup>11</sup>. In various places, the Bill introduces the written warning as part of a three-step enforcement process<sup>12</sup>:

1. If the MPC learns of the non-compliance of a professional with specific rules, the minister can invite the professional to provide explanations in at least 15 days.
2. If the professional has not provided explanations or if the minister concludes that the professional violates the rules in a manifest, serious and grave manner, the minister can send a registered letter to the professional noting the violation and request conformity withing a reasonable period (written warning).
3. If this notified violation continues or re-occurs, and if it harms or could harm the collective interests of consumers (in the meaning of Article [L. 311-1](#) LCC), the minister can request an injunction (*cessation*) or prohibition (*interdiction*).<sup>13</sup>

The measure is inspired by the enforcement mechanisms on data protection by the *Commission nationale pour la protection des données* (CNPD) in the [law of 1 August 2018](#) on the CNPD and the law of 27 July 1991 on electronic media<sup>14</sup>. The trigger of the written warning (manifest, serious and grave violation of the rules) tracks with Article 35(1) of the latter law. The written warning is also used in other countries. For example, the Dutch Financial Markets Authority (AFM) uses the written warning (*waarschuwingsbrief*) as one of its ‘informal enforcement instruments’<sup>15</sup>. The proposed measure could benefit from additional clarity, in particular on the consequences if the professional does not comply with the measure<sup>16</sup>.

## II Specification of administrative structure implementing consumer protection

The Bill foresees the creation of a new service within the MPC, following the evolution of consumer law and administrative sanctioning powers of the MPC<sup>17</sup>. The service will be in charge of implementing consumer law<sup>18</sup> and its general mission will be to ensure that professionals respect the rights under the LCC and other laws protecting consumer interests, where the action or omission can or may harm the collective interests of consumers residing in Luxembourg, where the professional is established in Luxembourg or where the *preuves or actifs* concerning the action or omissions are located in Luxembourg<sup>19</sup>. More specifically, the service will:

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- 1 have the competences of *Bureau de liaison unique* under Regulation (EU) [2017/2394](#) on the cooperation in consumer protection matters<sup>20</sup>,
- 2 exercise the attributions of the MPC as competent authority under Regulation (EC) [2006/2004](#) and Regulation (EC) [261/2004](#), to the extent not attributed to other entities<sup>21</sup>,
- 3 assist the MPC with the issuance of administrative sanctions under the LCC, as well as injunctions and prohibition orders to protect the collective interests of consumers<sup>22</sup>,
- 4 prepare an annual action plan for supervisory controls and organize such controls<sup>23</sup>.

The proposal has been welcomed by the Luxembourg Consumers Union (ULC), who at the same time laments that the staffing of the service is ‘kept to a strict minimum’<sup>24</sup>. There are still points open for further consideration. For example, it remains to be seen how the service will deal with consumer issues where expertise in competition law aspects is necessary (e.g. pricing and market structure)<sup>25</sup>. Another open issue is the exact scope of powers of this service, as well as the training or experience required for its members<sup>26</sup>. The exact embedding of the service within the administration of the MPC is also not well-specified and could benefit from further clarification<sup>27</sup>.

### III Improvement and modernisation of consumer rights

Finally, the Bill transposes the material provisions of the BEMD aimed at improving and modernising consumer rights across the four Directives in light of the developments in digital markets, especially online marketplaces (OMPs). The general section of consumer information (Title 1 of Book 1 LCC) is updated with various obligations, notably:

1. a detailed disclosure regime in respect of price reductions, with the key requirement that the displayed prior price is the lowest price applied during a period of time not shorter than 30 days prior to the price reduction, unless the product has been on the market for less than 30 days<sup>28</sup>,
2. new pre-contractual information obligations covering:
  - a. the seller,<sup>29</sup>
  - b. price personalisation (if applicable)<sup>30</sup>,
  - c. general information on the principal ranking parameters of the search function on the OMP (and their order of importance),
  - d. the third-party seller (on an OMP)<sup>31</sup>.

The section on unfair commercial practices (Title 2 of Book 1 LCC) is updated with *inter alia*:

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1. descriptions of information that is considered material in the context of misleading omissions, specifically:
  - a. whether the third-party seller on an OMP is a professional or not<sup>32</sup>,
  - b. general information on the principal parameters (and their order of importance) that determine the ranking of the products displayed using the OMP's search function<sup>33</sup>,
  - c. the information necessary to establish that consumers publishing product reviews on OMPs, have actually purchased the products<sup>34</sup>.
2. descriptions of commercial practices that are considered misleading in all circumstances, specifically:
  - a. reselling tickets for events if the professional has obtained them using automated means to circumvent rules applicable to the purchase of the tickets<sup>35</sup>,
  - b. stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers<sup>36</sup>,
  - c. submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products<sup>37</sup>,
  - d. providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results<sup>38</sup>.

#### **IV Gold-plating**

The Bill mostly transposes the BEMD without exercising the gold-plating options given to Member States. The only options exercised are the options provided under the BEMD's price reductions regime discussed above, except for the option covering rapidly deteriorating/expiring goods which are liable to deteriorate or expire rapidly.<sup>39</sup> The main stated reasons for not exercising the other options are equal treatment of sales modalities<sup>40</sup>, existing provisions, avoidance of diluted consumer information rights<sup>41</sup> and of precipitous rule-making in an area of overlapping rules<sup>42</sup>. While the transposition deadline of the BEMD expired on 28 November 2021 and the measures should apply from 28 May 2022, only eight countries have formally notified the European Commission of adopted transposition measures<sup>43</sup>. \*\*\*

#### **Conclusions**

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Draft Law N° 7904 is a bill of law which proposes significant changes to the Luxembourg Consumer Code that fall in two categories: (1) amendments transposing the BEMD, and (2) national provisions that modify the enforcement apparatus. The national provisions, which could benefit from further clarification, have drawn mixed views from various stakeholders (the Competition Council, the Luxembourg Consumers Union and the Chamber of Civil Servants and Public Employees), with other opinions still pending. It goes without saying that this bill is one to watch.

1 Attorney-at-law (New York State) and PhD candidate (Leiden University). This article is written on personal title. The research for this note was finalised on 27 December 2021.

2 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive [93/13/EEC](#) and Directives [98/6/EC](#), [2005/29/EC](#) and [2011/83/EU](#) of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L328/7. The Directive is also called the ‘Omnibus Directive’.

3 *Projet de Loi 7904 (Projet de loi portant modification du Code de la consommation aux fins de transposition de la directive (UE) 2019/2161 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive 93/13/CEE du Conseil et les directives 98/6/CE, 2005/29/CE et 2011/83/UE du Parlement européen et du Conseil en ce qui concerne une meilleure application et une modernisation des règles de l'Union en matière de protection des consommateurs)*, Parliamentary session 2021-2022, accessed via [www.chd.lu](http://www.chd.lu).

4 Report of the Fitness Check on Directive 2005/29/EC (and various other directives), SWD(2017) 209 final (**REFIT report**). ‘REFIT’ refers to the European Commission’s regulatory fitness and performance programme. As part of the programme, the Commission performs fitness checks in which it evaluates EU laws with a view to assess whether they deliver on their objectives at minimum cost (see European Commission, ‘REFIT – making EU law simpler, less costly and future proof’, accessed via [www.ec.europa.eu](http://www.ec.europa.eu)

5 Recital 2 BEMD; Proposal for the BEMD (COM(2018) 185 final), section 1.1; REFIT report, section 7.

6 Directives 93/13/EEC, 98/6/EC, 2005/29/EC and 2011/83/EU. Recitals 3-7 BEMD.

7 Article 9(4) of Regulation (EU) 2017/2394 (CPC) on cooperation between national authorities responsible for the enforcement of consumer protection laws. See recital 7 BEMD; Articles 1(3), 2(2), 3(6) and 4(13) BEMD.

8 See Articles 1(2), 2(2), 3(6), 4(13) BEMD.

9 Articles L. 112-9(1), L.113-1(7), L. 122-8(1), L. 211-4(2), L. 213-7(2) and L. 222-11(10) LCC. NB: the references to Articles of the LCC in this note relate to the consolidated version included in the Bill.

10 The measure is intended to raise awareness and coerce compliance, while reinforcing the other measures available to the authorities, see Bill, p 8.

11 For example, the LCC section on residential mortgage credit agreements designates the Commission de surveillance du secteur financier (CSSF) as the competent authority (Articles L. 226-1.1 and 226-4 LCC). The general rules on the allocation of supervisory powers are set out in Book 3, Section 1, Chapter 1 LCC.

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12The measure is applicable to non-compliance with the rules on unfair contract terms (Article L. 211-4 LCC), unfair commercial practices (Article L. 122-9 LCC), information obligations applicable to contracts other than distance contracts and off-premises contracts (Article L. 113-1(8) LCC), the unsolicited provision of a good or service (Article L. 213-7 LCC) and violations of certain distance contract provisions (Article L. 222-11(11) LCC). See Bill, p 8.

13Bill, p 5-8.

14Bill, p 7.

15The measure is considered informal because it lacks a statutory basis in Dutch law. see 'Handhavingsbeleid van de Autoriteit Financiële Markten en De Nederlandsche Bank', October 2020, p 6. According to the AFM, the letters are useful to produce compliant behavior in some cases. The Luxembourg Consumers Union has expressed a critical view on the measure, see *Avis de l'Union Luxembourgeoise des Consommateurs*, Document [7904/01](#), 18 November 2021, accessed via [www.chd.lu](http://www.chd.lu)

16Similarly, the Chamber of Civil Servants and Public Employees, see *Avis de la Chambre des Fonctionnaires et Employés publics*, Document [7904/03](#), 7 December 2021, accessed via [www.chd.lu](http://www.chd.lu)

17Bill, p 8.

18Article L. 311-10(1) LCC.

19Article L. 311-1 LCC.

20Articles L. 311-3 LCC and 311-10(2)(a) LCC (NB: Regulation (EC) 2006/2004 has been repealed).

21Article 311-10(2)(b) LCC. The CSSF, *Commissariat aux Assurances*, Ministry of Health and CNPD have attributions under Article L. 311-5 LCC.

22Articles L. 311-10(2)(c) and L. 311-10(2)(d) LCC.

23Bill, page 8. See also Art. L. 311-10 LCC.

24Opinion of the Luxembourg Consumer Union (n 14) p 4.

25In this respect it should be noted that in its response to the Bill, the Competition Council stated that the proliferation of supervisory authorities should be avoided and that a single authority should be tasked with the enforcement of both competition laws and consumer laws, 'similar to numerous other EU Member States' ([7904/02](#), p 4). For example, the Dutch consumer and market authority (*Autoriteit Consument en Markt*) enforces consumer laws, competition laws and a range of sector-specific regulations (e.g. electricity, telecommunications).

26Opinion of the Chamber of Civil Servants and Public Employees (n 15).

27The Chamber of Civil Servants and Public Employees (n 15) considers that the MPC itself should be in charge of implementing consumer law. The Grand-Ducal Decree of 28 May 2019 on the creation of Ministries does not provide specific rules in this regard.

28Article L. 112-2-1 LCC in the subsection on price indications (Indication des prix).

29Article L. 222-3.1(b) LCC.

30Article L. 222-3.1(t) LCC.

31Article L. 222-3(9) LCC.

32Article L. 122-3(4)(f) LCC

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33Article L. 122-3(5) LCC

34Article L. 122-3(7) LCC

35Article L. 122-4(24) LCC.

36Article L. 122-4(25) LCC.

37Article L. 122-4(26) LCC.

38Article L. 122-4(27) LCC.

39Article 2(1) BEMD. See Bill, p 10.

40Bill, p 11, in respect of the option under Article 4(8)(a) BEMD.

41Bill, p 11, in respect of the option under Article 4(12)(b) BEMD.

42Bill, p 12, in respect of the option under Article 4(5) BEMD.

43BEMD, 'National transposition'[www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)  
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