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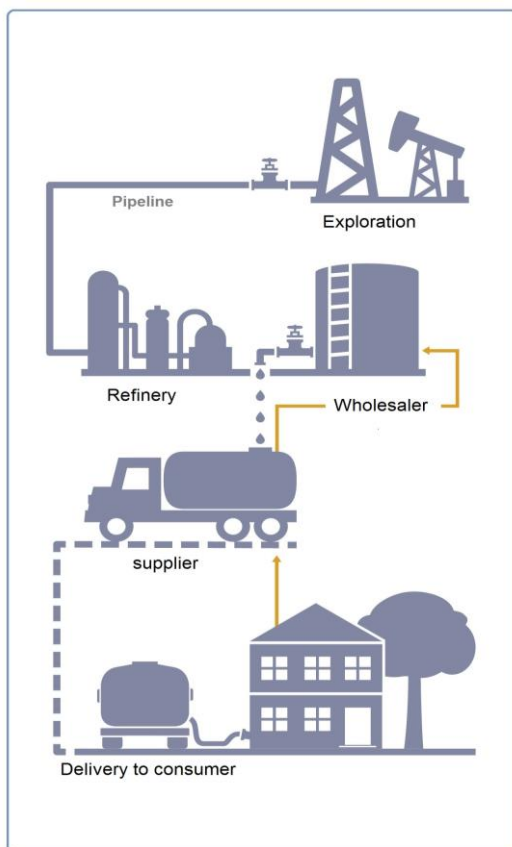
ECFD recommendations for the revision of Directive 2011/83/EU on consumer rights

In view of the ongoing revision of the Consumer Rights Directive, the European Confederation of Fuel Distributors (ECFD) would like to highlight to the European Commission several crucial points:

- The right of withdrawal granted to consumers in Germany in the case of distance selling of heating oil, and
- Several uncertainties surrounding common purchase of heating oil through online buying groups.

German interpretation of the right of withdrawal in the context of heating oil distance selling

On 17 June 2015, the German Federal Supreme Court (FSC) ruled against the exclusion of the right of withdrawal for heating oil deliveries in distance selling (article 9 of the Consumer Right Directive). The FSC ruling enables consumers to cancel their heating oil orders at any time within the delivery period and without indicating reasons. In extreme cases, the consumer may cancel the order shortly before the planned delivery date or even upon delivery¹.



A sector dominated by local SMEs

The heating oil B2C-sector mainly comprises small and medium-sized enterprises that are often run as local family businesses. Heating oil suppliers typically do not have their own heating oil storage facilities for interim storage. The focus of activity in the B2C-heating oil business is distribution logistics, i.e. the collection of heating oil from the upstream supplier (refinery or wholesaler) using a tanker vehicle and the immediate delivery of heating oil to customers (execution of customer orders).

Heating oil – a product subject to fluctuating prices

It is important to insist on the fact that between the time of the consumer's heating oil order and heating oil delivery, there may lie several days to a number of weeks (as might be the ordering party's request). Changes of the heating oil price occur within these delivery periods on a daily basis – independently from the heating oil suppliers' will.

Indeed, the price of this product depends on a range of factors, including the euro/dollar exchange rate, the price performance on oil exchanges, the performance of the global economy and the supply on international and national oil markets. Therefore no one (neither the heat-

¹ This rightly does not affect the existing statutory exclusion of the right of withdrawal on the grounds of the mixing of the good with old reserves in the customer's tank pursuant to Article 16f) CRD, which however only applies once the heating oil tank is filled.

ing oil supplier nor the consumer) is able to reliably predict or even plan for heating oil price fluctuations in the future. Reliable information on the price fluctuation is however available to all consumers through official exchange listings, regular oil price reports in the daily press, online platforms, etc.

The right of withdrawal – a disproportionate burden on heating oil suppliers

While the consumer is able to withdraw from their heating oil order without any justification required, and thereby terminate their contractual obligations towards the heating oil supplier, the heating oil supplier must fulfil all other contractual obligations (particularly towards its upstream suppliers).

Indeed, irrespective of the customer’s withdrawal, heating oil suppliers are obligated to collect their contractually ordered goods from the upstream supplier at the day price effective at the time of the order. Moreover, as interim storage is in the vast majority of case not an option for heating oil traders, they are forced to sell the goods from a cancelled order to customers at the new, cheaper day price, even though this implies selling at a loss. In contrast, in phases of increasing heating oil prices, heating oil suppliers are not able to cancel customers’ heating oil orders. They instead honour the contract and deliver the heating oil at the contractually agreed price.



Large-scaled and repeated and cancellations thus create a massive risk for the sector as this is already leading to small businesses going bankrupt. What was initially aimed at strengthening consumers’ right turns out to reduce competition in the heating oil delivery sector, to the detriment of consumers.

ECFD recommendations

Our Confederation is deeply concerned by this development severely affecting our German members. We fear that the erroneous interpretation of the German FSC will spread to other national markets



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should the European Commission not take a clear stance on the matter. It was commonly assumed until now that distance selling contract of heating oil benefited from exclusionary grounds for the right of withdrawal on the basis of Article 16 b) of the Consumer Right Directive – “*the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period*”.

- ⇒ ECFD calls for the Commission in its next revision of the Consumer Rights Directive, to clarify the scope of exemptions to the right of withdrawal provided for in article 16 b) of the Directive, clearly stating that heating oil is one of the goods benefiting from the exemption.
- ⇒ In order to prevent other detrimental interpretation from national courts pending the directive’s revision, the Commission should include a corresponding interpretation in the Guidance Document² developed by DG Justice, aiming at facilitating the effective application of the Consumer Rights Directive.

Common purchase of heating oil through online buying groups

Consumers making common orders of heating oil for a cheaper price has always been a practice well accepted by ECFD members. If this has existed for decades, the emergence of online platforms to provide this kind service is on the other hand relatively new, though emerging in all Member States.

Relative opacity of online buying groups

ECFD is concerned that some online oil buying groups are providing insufficient or incorrect information to potential customers, competing with other heating oil distributors on unfair terms. Consumers are indeed not fully aware that these platforms are a commercial service, charging the heating oil suppliers they deal with a service cost, and consumers a commission to cover administrative costs.

Moreover, some platforms advertise misleading prices to attract potential customers, calculating the possible discounts based on the official maximum price, which does not necessarily reflect the actual market price. Due to that unforeseen and misunderstood price difference between order and delivery from a consumers’ perspective, heating oil distributors regularly face refusal upon delivery from their customers, as the price to pay does not match the one initially advertised on the website. This causes not only delays in tank refilling but also unnecessary delivery trips for distributors, especially during winter time when demand reaches its peak.

Liability issue

Distributors might face challenges if tank conditions and locations are not verified (ease of access/safety of the installation), ordered volumes do not correspond with actual deliverable volumes, and in the case of problems with the solvency of clients. These kinds of problems do not occur when heating oil distributors are dealing directly with consumers.

Uncertainties arising from these challenges have to be addressed. In particular who is the liable party if the consumer does not receive its oil purchase or does not receive the requested quality.

ECFD recommendations

- ⇒ Enterprises acting as intermediaries, as is the case of online buying groups, should be held (co-)responsible for the quality of the goods and services delivered as they choose the trader.

² DG Justice Guidance Document concerning Directive 2011/83/EU on consumer rights, from June 2014 http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf



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- ⇒ Online buying groups should provide detailed information on the consumers' invoice about the compensation (commission fee) paid by the trader as this affects the final price.

Literature references

(The references are available from metze@uniti.de upon request.)

1. Working document of the EU Commission {COM(2017) 259 final}, 23.05.2017, page 40
2. EuCML Journal of European Consumer and Market Law, edition 2/2016, 14th April 2016, 'Distance Sales of Heating Oil and the Consumer's Right of Withdrawal – A Fair Balance?', pages 87-91
3. wrp Wettbewerb in Recht und Praxis, edition 6/2016, June 2016, report by the expert commission for competition issues, November 2015: 'Heizöl – Widerrufsrecht', pages 701-704
4. IW Institut der deutschen Wirtschaft Köln: 'Wirtschaftliche Folgen des neuen Widerrufsrechts im Heizölfarnabsatz', 7th July 2016, Cologne
5. energie+Mittelstand, edition 3/2015, title: 'Warum Heizöl kein Turnschuh ist', pages 12-14
6. energie+Mittelstand, edition 1/2016, title: 'Zocken auf dem Rücken von Familienunternehmen', pages 10-11
7. energie+Mittelstand, edition 3/2016, title: 'Das ist keine fair balance', pages 16-18

The ECFD represents the interests of 10,000 distributors of petroleum products, including domestic heating oil, kerosene, petrol, diesel, gasoil and liquefied petroleum gases (butane, propane, LPG). Its members are essentially family-owned SMEs who supply from the refineries, terminals and their own storage directly to their customers' tanks. Members include the Austrian Association of fuel and petroleum distributors (WKO), the Belgian Federation of Fuel Suppliers (BRAFCO), Bundesverband mittelständischer Mineralölunternehmen e.V. (UNITI), the French Fédération Française des Combustibles et Carburants (FF3C), and the UK Federation of Petroleum Suppliers (FPS).

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