EU Directive

"NEW DEAL" FOR CONSUMERS – PART 2: ENFORCEMENT OF EU CONSUMER LAW

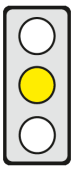
cep**PolicyBrief** No. 2018-36

Centrum für Europäische Politik

KEY ISSUES

Objective of the Directive: EU consumer law is to be "modernised" and its enforcement improved.

Affected parties: Consumers, companies.



Pro: (1) The Directive brings consumer protection into line with modern business practices and strengthens its enforcement.

(2) Improved transparency in online marketplaces will facilitate rational buying decisions.

Contra: (1) The extent to which Member States are permitted to continue to limit enforcement to private law proceedings and consequences, must be expressly regulated.

(2) The Directive should be brought into line with the GDPR and the Directive on digital content.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM (2018) 185 of 11 April 2018 for a **Directive** of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council **as regards better enforcement and modernisation of EU consumer protection rules**

Note: Unless otherwise indicated, recital numbers and page numbers refer to the proposal for a Directive COM (2018) 185.

Brief Summary

- **Context and objectives**
  - In view of the increasing risk of EU-wide violations, the Commission wants to strengthen the enforcement of, and thus improve compliance with, EU consumer law. In order to achieve this, it wants
    - to expand the possibilities for representative actions regarding violations of consumer law (see cep**PolicyBrief**) and
    - amend four EU consumer protection Directives (this cep**PolicyBrief**).
      - The Directive on unfair business-to-consumer commercial practices [2005/29/EC] (hereinafter: "UCPD") regulates when trading practices by companies are "unfair" to consumers and thus prohibited.
      - The Consumer Rights Directive [2011/83/EU] ("CRD") regulates the companies' information requirements for distance and off-premises contracts and the consumer's right to withdraw from such contracts.
      - The Directive on unfair contract terms [93/13/EEC] (hereinafter: "Unfair Terms Directive") regulates when contract terms, that have not been negotiated in detail with the consumer, are deemed to be unfair.
      - The Directive on the indication of prices [98/6/EC] (hereinafter: "Price Indication Directive") regulates how traders have to indicate the prices of the products they are offering.
  - The Commission wants to "modernise" the said Directives, improve their enforcement, strengthen transparency and consumer rights and remove some burdens for businesses [p. 2-4].

- **Extension of consumer rights regarding digital services**
  - Until now, the CRD has only applied to contracts for digital services where the consumer pays a "price" (money). In future, it will also apply – as is already the case for contracts for the supply of "digital content" such as e.g. videos provided online, by one-off action, by a company – to contracts for digital services where the consumer provides "personal data" [Art. 2 No. 11, 16 and 18 CRD, Recitals 21 and 22].
    - "Personal data" is information relating to an identified or identifiable natural person, e.g. name [Art. 4 No. 1 General Data Protection Regulation (EU) 2016/679 ("GDPR"), see cep**PolicyBrief**].
    - "Digital services" are services via which a company continuously enables a consumer [Art. 2 No. 17 (a) and (b) CRD, Recital 21],
      - to create, store or otherwise process or access data in digital form, e.g. cloud services, or
      - to share or otherwise interact with digital data such as videos or audio content that is uploaded or created by the consumer and other users, e.g. via social media.
  - The CRD does not apply where the consumer does not pay a price and the company [Art. 2 No. 16 and 18 CRD]
    - collects the data "exclusively" to provide the service or meet legal requirements, such as compulsory registration, and does not process this data "for any other purpose" [Recitals 24 & 25];
    - only collects metadata such as the IP address, browsing history or "other information" e.g. collected by cookies, unless this is "considered a contract" under national law [Recital 26].

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- **Greater transparency in online marketplaces**
  - "Online marketplaces" are service providers such as Amazon or eBay that enable consumers to conclude contracts with companies or consumers via an "online interface" – website, mobile app or other software – [Art. 2 No. 19 and 20 CRD in conjunction with Art. 2 No. 16 Regulation (EU) 2018/302].
  - Consumers will receive more clarity in online marketplaces about their contractual partner, their rights and the order in which offers resulting from a search are shown ("ranking") [Recitals 17–19].
  - Online marketplaces must therefore additionally inform consumers, prior to concluding a contract, [Art. 6a CRD]
    - about the "main parameters" for the ranking of offers, without having to disclose trade secrets,
    - whether third-party suppliers in the online marketplace are traders or non-traders according to their self-declaration,
    - whether consumer rights under EU consumer legislation apply to the contract and
    - whether the consumer has to assert these rights against the third-party provider or the online marketplace.

- **More protection for consumers against unfair commercial practices**
  - It is "clarified" that Member States are permitted to provide consumers with additional protection, over and above that of the UCPD, against misleading and aggressive advertising practices during unsolicited visits to private homes or commercial excursions where this is justified on grounds of "public policy" or the protection of the respect for private life [Art. 3 (5) UCPD].
  - The practice whereby consumers cannot easily recognise that online search results are only being displayed, or more accurately placed, because the company has paid for this "sales promotion" ("paid placement or inclusion") will in future constitute a prohibited unfair commercial practice [Annex I No. 11 UCPD].
  - In future, marketing products, e.g. foods, across the Member States, "as being identical" when they differ "significantly" from one another, will be expressly prohibited as a "misleading commercial practice" if it may influence the buying decision ("dual quality products") [Art. 6 (2) (c), Recitals 41–43 UCPD].
  - Member States must ensure – in accordance with their national law – that individual "contractual and non-contractual remedies" are also available to consumers "harmed" by unfair commercial practices, at least including
    - a contractual right to unilaterally terminate the contract ("termination") [Art. 11a (1) and (2) UCPD] and
    - a non-contractual right to compensation [Art. 11a (1) and (3) UCPD].

- **Removing burdens for companies and restrictions on consumer protection**
  - The provisions of the CRD regarding contracts made during distance selling – e.g. online – or away from business premises (off-premises contracts) will be changed in favour of companies as follows:
    - The consumer's right of withdrawal is forfeit where he handles the goods other than what is necessary in order to examine their quality and functioning; the consumer's liability for any diminished value of the goods [Art. 14 (2)] has been struck out [Art. 16 (n) CRD].
    - In the event of withdrawal, companies only have to pay the reimbursement when they have received the returned goods rather than when the consumer provides proof that the goods have been sent [Art. 13 (3) CRD].
    - Instead of providing an email address, companies can use other means of online communication such as web forms if consumers are able to store the correspondence permanently [Art. 6 (1) (c) CRD].
    - In the case of contracts concluded by distance communication such as telephone or SMS, allowing limited space or time for information, companies will no longer have to provide a model withdrawal form [Art. 8 (4) CRD].

- **Harmonised criteria for imposing sanctions for violations of consumer law**
  - The CRD, UCPD and the Price Indication Directive oblige Member States to provide for "effective, proportionate and dissuasive" penalties for violations; national law is not uniform however [Recitals 4 and 5].
  - In future, the "administrative authorities or courts" in the Member States will have to take account of certain "common non-exhaustive criteria" when deciding whether and to what extent they are going to impose penalties [Art. 13 UCPD, Art. 24 CRD, Art. 8 Price Indication Directive, Art. 8b Unfair Terms Directive, Recital 6]. These include
    - benefits gained, the nature and intentional character of the infringement, the number of consumers affected [sub-clause (2) in each case];
    - when determining fines, the company's annual turnover and net profits as well as any fines imposed in other Member States for infringements of the same Directive [sub-clause (3) in each case];
  - In the case of certain "widespread" infringements – defined in the Regulation on cooperation on consumer protection ("CPC Regulation") [(EU) 2017/2394, see cep**PolicyBrief**] – that affect consumers in several Member States, national authorities and courts must be able to impose fines of up to a maximum amount of at least 4% of the infringer's annual turnover in these states [sub-clause (4) in each case];

Main changes to the status quo

- Die CRD will in future also apply where consumers "pay" for a digital service by providing personal data.
- The consumer's right of withdrawal is forfeit where he handles the goods more than necessary for their examination.
- Online marketplaces must inform consumers more clearly about their rights, their contractual partner and the ranking.
- Consumers harmed by unfair commercial practices will have the right to individual remedies.
- Widespread infringements may in future be punished by way of fines of up to 4% of annual turnover or more.

Statement on Subsidiarity by the Commission

The EU-wide enforcement of EU consumer protection law and the protection of consumers in what is often cross-border online trade are problems with a "Union-wide character" [p. 9, Recital 46].

Policy Context

The proposal is based on reports on the Fitness check concerning consumer and marketing legislation [SWD(2017) 209] and the Assessment of the CRD [COM(2017) 259]. In 2017, the European Council called for transparency regarding platform use.

Legislative Procedure

11 April 2018	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Justice and Consumers (leading)
Committees of the European Parliament:	Internal Market and Consumer Protection (leading); Rapporteur: Daniel Dalton (ECR); Economic and Monetary Affairs; Environment; Legal Affairs
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Justice and Consumer Protection (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 114 TFEU (Internal Market);
Type of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Directive brings consumer protection into line with modern business practices and also **strengthens its enforcement.** The extension of the Consumer Rights Directive, to cover digital services that consumers pay for by providing personal data, is appropriate because the release of this data is often linked to a certain loss of privacy on the part of the consumer and is therefore not for free. Pre-contractual information requirements and a right of withdrawal from distance sales may – as with payments in money – protect consumers from wrong decisions or fraud. Improved transparency in online marketplaces will facilitate rational buying decisions because inter alia rankings that have been paid for will be revealed. There should, however, be clarification about what falls within the "main parameters" for the ranking that have to be disclosed by online marketplaces.

The fact that consumers can only test goods to the extent necessary or risk losing their right of withdrawal, prevents any misuse of the right of withdrawal by consumers and protects companies from the associated losses. It can also have the effect of reducing prices.

The blanket ban on marketing products, that are "significantly" different, "as identical" across the Member States, makes it clear that using the same marketing for products of dual quality may be prohibited. It **is** however much **too vague and** therefore **fails to remedy the existing legal uncertainty regarding marketing.** The Directive firstly fails to specify when marketing – e.g. by way of a standard brand name or presentation – Is considered to be "identical". Secondly, it is not made sufficiently clear whether, and if so when, product differences may be justified and on what grounds – e.g. differences in consumer preferences, buying power or place of production. Legal uncertainty therefore continues to exist which obstructs marketing and thus the free movement of goods within the EU internal market. The Directive should therefore provide a more detailed definition of the ban and possible exceptions or attach clear criteria to the ban.

Legal Assessment

Legislative Competency

Under the internal market competence [Art. 114 TFEU], the EU can amend existing consumer directives in order to ensure a high level of consumer protection [Art. 169 TFEU] and adopt new rules to improve their enforcement if this does in fact strengthen cross-border trade or remove competitive distortions. This seems possible but should be more clearly justified.

Subsidiarity.

Unproblematic regarding changes to the content of laws that are already harmonised. Protection from unfair practices within the meaning of the UCPD, that are occurring increasingly in a cross-border context, can be better enforced if

consumers in all member states have individual rights to cancel contracts and claim compensation in such cases. Introducing such rights only for transnational infringements would be problematic because consumers are not always aware of the cross-border element. The fact that, in future, all Member States must be in a position to impose high fines in a "coordinated" action initiated under the CPC Regulation, is also in line with the principle of subsidiarity. The EU is better able than the Member States to harmonize penalties to be imposed in coordinated procedures. It is also in a better position to specify their duty to impose effective penalties because companies are increasingly operating across borders and widely divergent national sanctions obstruct effective EU-wide enforcement of the law.

Proportionality with Respect to Member States

The blanket obligation to grant consumers individual rights to terminate the contract and claim compensation in the case of unfair commercial practices, restricts the Member States' legislative scope for discretion and may lead to conflicts with their laws of contract and tort. The intervention is limited because Member States have to implement the consumer rights "in accordance with their national law". However, in order to comply with proportionality, it should be made clear that Member States have broad regulatory discretion and can inter alia determine what damages may be compensated, link the rights to additional conditions such as a certain relevance of the breach, fault and causality and e.g. give precedence to rights under guarantee. Additional unilateral termination rights may weaken confidence in the continuance of contracts; such rights do not always seem justified, e.g. where the consumer is not personally affected by the breach.

The rules on penalties encroach upon the power of Member States to enforce consumer protection laws. Harmonised proportionality criteria do, though, allow national sanctions to converge without excessively restricting the freedom of choice of Member States provided their value can clearly be determined in the individual case.

However, **the extent to which Member States are permitted to continue to limit enforcement to private law proceedings and consequences**, such as the invalidity of clauses, **must be expressly regulated.** The Directive does not formally take away the freedom to organise enforcement under private law or by administrative measures, but it does stipulate that the criteria must be taken into account by "administrative authorities and courts". A blanket obligation to create supplementary "administrative or judicial" powers to impose sanctions which also apply to purely national violations would be disproportionate and at best only partially justified where national enforcement systems as a whole are not sufficiently effective, proportionate and dissuasive and therefore obstruct effective EU-wide enforcement.

The fact that Member States do not have to impose a penalty for every infringement should be made clearer. They should also be able to link the penalties to other requirements – e.g. severity, duration – as infringements can also be committed unintentionally and vague legal terms make them more difficult to foresee.

Compatibility with EU Law in other Respects

The fact that the Directive also specifies penalties for the infringement of provisions that are capable of interpretation, which is e.g. often the case in the law on unfair practices, may be in breach of the principle of certainty, also laid down in Art. 49 (1) CFR, which states that rules on penalties and fines must clearly define the requirements of the offence and the penalty. General clauses and vague legal terms are however permitted where the infringer can clearly identify, on the basis of relevant case law, which act or omission gives rise to which penalty (CJEU Case T-43/02, para. 80). It is however doubtful that there is a sufficient volume of case law EU-wide on all the rules that are subject to sanctions.

The Directive must be brought into line with the GDPR [(EU) 2016/679] **and the** planned **Directive on** contracts for the supply of **digital content** [COM (2015) 634, see cep**PolicyBrief**]**. There is a need for clarification regarding**, inter alia, **the interaction between data protection and the consumer's right of withdrawal if the latter provides, by way of consideration, data** which is not itself necessary for contractual performance. Until now, there has not been sufficient clarification as to whether this also constitutes consent under data protection law and whether it can be withdrawn at any time – as required by the GDPR – or whether the ability to withdraw consent can be lawfully restricted, by the consumer's contractual obligation, in line with the time limit for withdrawal under consumer law.

Impact on German law

In the German Civil Code (BGB), i.a. the rules on information requirements (Sections 312 d, Art. 246 a Introductory Act to the German Civil Code – EGBGB) and on the right of withdrawal (Section 355) will have to be amended. In German Unfair Competition Act (UWG), the new offences must be laid down, consumer rights created and the right of action extended (Section 8 (3)). In order to create non-contractual rights to claim compensation, the UWG could be designated as a "protective law" ("Schutzgesetz") within the meaning of Section 823 (2) BGB. In order to transpose the rules on penalties, the German Consumer Protection Enforcement Act and the UWG must be amended and, where applicable, supplementary sanctioning powers for administrative authorities or courts created.

Conclusion

The Directive brings consumer protection into line with modern business practices and strengthens its enforcement. Improved transparency in online marketplaces will facilitate rational buying decisions. The blanket ban on marketing products, that are "significantly" different, "as identical" across the Member States, is too vague and fails to remedy the existing legal uncertainty regarding marketing. The extent to which Member States are permitted to continue to limit enforcement to private law proceedings and consequences, must be expressly regulated. The Directive should be brought into line with the GDPR and the Directive on digital content. There is a need for clarification regarding the interaction between data protection and the consumer's right of withdrawal if the latter provides data as consideration.