

EU Consumer Protection Law Developments Impact on TMT Industry

Moderator: Lothar Determann

Speakers: Julia Kaufmann,
Magdalena Kogut-Czarkowska,
Michaela Nebel

June 15, 2020 - Webinar



Speakers



Lothar Determann



Julia Kaufmann



Magdalena
Kogut-Czarkowska



Michaela Nebel

Contents



Overview on Key Legislation



Who is protected and who must comply?



How to comply?

- a. P2B Regulation
- b. Digital Content Directive
- c. Better Enforcement Directive
- d. Representative Actions Directive



Preparation Checklist



1

Overview on Key Legislation



Overview on Key Legislation



Regulation
2019/1150 on
promoting fairness
and transparency for
business users of
online intermediation
services (“**P2B
Regulation**”)



Directive 2019/770
on certain aspects
concerning contracts
for the supply of
digital content and
digital services
 (“**Digital Content
Directive**”)



Directive 2019/2161
as regards the better
enforcement and
modernization of
Union consumer
protection rules
 (“**Better
Enforcement
Directive**”)



Proposal for a
directive on
representative
actions for the
protection of the
collective interests of
consumers
 (“**Representative
Actions Directive**”)

Who is protected and who must comply?



Who is protected and who must comply?



Generally all companies targeting consumers in the EU, regardless of the company's location (**B2C**)



Companies that provide an online intermediation service or search engine for businesses in the EU with consumers in the EU (**P2B**)



3



How to comply?



a

P2B Regulation

**Baker
McKenzie.**

Purpose and Timing



Purpose: Ensure that business users of online intermediation services/platforms and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities



Applies from
July 12, 2020



Has direct
effect in the EU

Impact on TMT Industry

- Applies to
 - Online intermediate services, and
 - Online search enginesirrespective of where they are located, if they
 - provide their services to businesses and corporate users established in the EU
 - those businesses and corporate users offer goods or services to consumers located in the EU

Key Provisions (1/2)

- Terms and conditions of providers of online intermediation services must include

grounds for decisions to suspend, terminate or restrict services

information on any additional distribution channels

main parameters determining the ranking and possibility to influence ranking

differentiated treatment of own group of company's goods or services

access to personal data and other data after expiry of contract

internal complaint-handling system

grounds for a restriction to offer same goods/services to consumers under different conditions/means

conditions to terminate the contractual relationship

Key Provisions (2/2)

- Changes to terms and conditions: Provide for 15 day minimum notice period for changes
- Termination: Provide for 30 day minimum notice period and a statement of reasons for such decision
- Ranking: Inform about main parameters determining the ranking of links (including possibility to influence ranking)
- Differentiated Treatment: Inform about differentiated treatment which they give to their own group of company's goods or services.



b

Digital Content Directive

**Baker
McKenzie.**

Purpose and Timing



Purpose: Provide clear and effective rights and ensure that both consumers and businesses can rely on uniform and effective rules across the EU



Entered into force on June 11, 2019, must be transposed into national law by July 1, 2021 and applied by January 1, 2022



Remains to be seen how it will be implemented into national law

Impact on TMT Industry

- Applies to
 - all services in connection with digital content, such as databases, cloud-computing services, social networks, platform providers (if contracting party for own services), streaming services and blogs
 - If rendered against remuneration or “against personal data”

Key Provisions (1/2)

- Scope
 - Digital content and digital services: Terms shall be of future-proof nature and cover e.g. computer programs, applications, video files, audio files, music files, digital games, e-books
 - B2C
 - Will also apply, if the consumer “pays with his/her personal data“
 - Out of scope, in particular, “goods with digital elements“

Key Provisions (2/2)

- Obligations
 - Supply without undue delay
 - Meet subjective and objective requirements for conformity
- Remedies:
 - In case of failure to supply, ask for supply and if failed, right to terminate the contract
 - In case of lack of conformity, right to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract



C

Better Enforcement Directive

**Baker
McKenzie.**

Purpose and Timing



Purpose: Better enforcement and modernization of consumer protection law EU-wide



Entered into force on January 7, 2020, must be transposed into national law by November 28, 2021 and applied by May 28, 2022



Remains to be seen how it will be implemented into national law

Impact on TMT Industry

Applies to

- Online retailers, web stores or service providers that sell services/digital services – amendments apply in particular if they deploy features like a search functionality, a ranking of products, consumer reviews of products and personalized prices
- Online marketplaces
- Website operators which supply digital content or digital services for free and consumer "pays with his/her data" (significant consumer protection rules)
- Any company using terms and conditions vis-à-vis consumers (sanctions, fines)

Key Provisions (1/2)

- Amends several existing directives:

**Council Directive
93/13/EEC (unfair
contract terms)**

**Directive 98/6/EC
(price indications)**

**Directive
2005/29/EC (unfair
commercial
practices)**

**2011/83/EU
(consumer rights)**

Key Provisions (2/2)

- GDPR-style fines: at least 4%” of the seller's/supplier's annual turnover in the concerned member state(s) for “widespread infringements or widespread infringements with a Union dimension”
- New individual remedies, such as compensation for damage, and where relevant, a price reduction or the termination of the contract
- “Paying with data”: Consumer rights of distance selling contracts apply
- More transparency, e.g. (i) main parameters determining the ranking of products, (ii) if paid advertisement or payment to achieve higher ranking was made, (iii) how it is ensured that the published consumer reviews originate from consumers who have used or purchased the product, (iv) that price was personalized based on automated decision-making

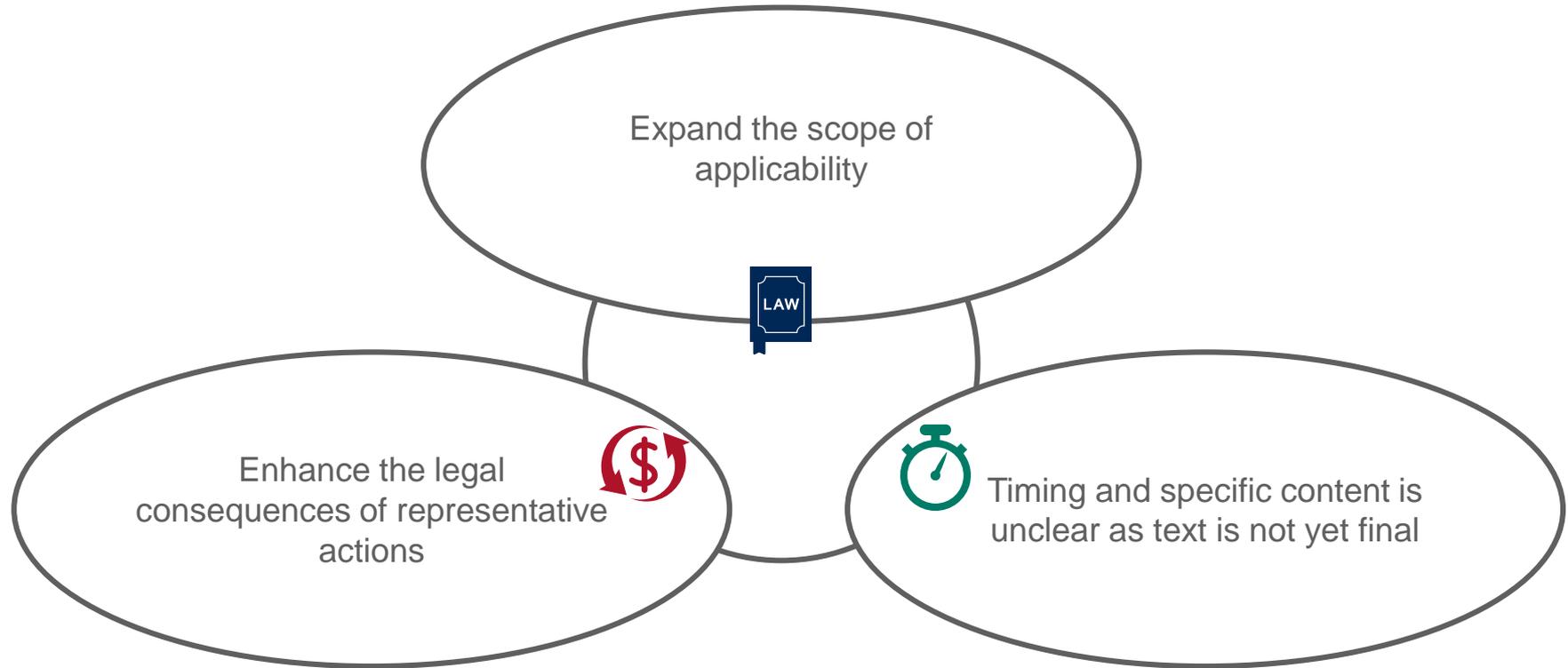
A close-up photograph of a person's hands. The left hand holds a smartphone with a pink case, and the right hand holds a silver credit card. The background is blurred, showing a person in a white shirt. A dark blue diagonal overlay covers the right side of the image, containing text and a logo.

d

Representative Actions Directive

**Baker
McKenzie.**

Purpose and Timing



Impact on TMT Industry

- Significantly increases litigation risks of companies in the TMT industry targeting consumers in the EU
 - “qualified entities” are less reluctant than consumers to enforce consumer protection law violations, and
 - the list of consumer protection laws is extended significantly

Key Provisions (1/2)

- “Qualified entities” may bring representative actions in case of violations of provisions of a number of consumer protection laws that harm or may harm the collective interests of consumers
 - Consumer protection laws include the following areas:
 - general terms and conditions,
 - distance selling and eCommerce,
 - price indication,
 - data protection, including electronic communication,
 - unfair competition

Key Provisions (2/2)

- Redress measures
 - Injunction order as an interim measure for stopping or prohibiting the practice, and
 - injunction order establishing that the practice constitutes an infringement of law
- Seek redress order, such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid
- Effects of final decisions

4

Checklist



Checklist for preparation

Steps to prepare for upcoming EU consumer protection law developments

Prepare Management for upcoming risk increase

Create project plan and project team

Review business activities, e.g. which businesses are affected, to what extent and in which countries?

Create list with implementation measures, e.g. revise T&Cs, adjust website, translate documents

Keep track of national laws transposing the directives

Implement measures

Further Resources

- A New Framework for Consumers in the EU - "The New Deal" (Part 1):
https://www.bakermckenzie.com/-/media/files/insight/publications/2020/03/client-alert_neue-rahmenbedingungen-fr-verbraucher-in-der-eu_the-new-deal_teil-1.pdf?la=en
- A New Framework for Consumers in the EU - "The New Deal" (Part 2):
https://www.bakermckenzie.com/-/media/files/insight/publications/2020/03/client_alert_neue-rahmenbedingungen-fr-verbraucherschutz-eu--teil-2_verbandsklagen.pdf?la=en
- New EU-Rules for Platform Providers:
https://f.datasrvr.com/fr1/820/36654/Client_Alert_New_EU-Rules_for_Platform_Providers.pdf?cbcachex=625496
- Omnibus Directive: Is There a New GDPR-style Legislation Waiting for Us?
<https://www.connectontech.com/2020/05/27/omnibus-directive-is-there-a-new-gdpr-style-legislation-waiting-for-us/>



Questions

Baker McKenzie.

Baker & McKenzie – Partnerschaft von Rechtsanwälten und Steuerberatern mbB is a member firm of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2020 Baker & McKenzie Partnerschaft von Rechtsanwälten und Steuerberatern mbB

[bakermckenzie.com](https://www.bakermckenzie.com)