

The "New Deal" - Consumer Protection Law Developments in the EU - Part 1

What is the current implementation status and how can companies get ready?

In April 2018, the European Commission proposed a remake of the framework conditions for consumer rights in the EU in order to improve the protection of EU consumers and strengthen the enforcement of consumer protection rules. Since then, the EU legislator has been active and issued a number of legislative acts at EU level. The core elements of the remake are the Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules ("**Better Enforcement Directive**", also called "Omnibus Directive") and the Directive on representative actions for the protection of the collective interests of consumers ("**Representative Actions Directive**").

In this Part 1 of our Client Alert we cover the main aspects of the Better Enforcement Directive, which entered into force on January 7, 2020 and must be transposed into national law by November 28, 2021. In Part 2 of our Client Alert we cover the proposal of the European Commission for the Representative Actions Directive and recent developments in this regard.

1. Main changes in EU consumer protection law

The remake provides the following main changes:

- a) **Penalties/Fines:** In case of "widespread infringements or widespread infringements with a Union dimension"¹ penalties for consumer right infringements shall include the possibility to impose fines up to a maximum amount of at least 4 % of the trader's annual turnover in the Member State, however, Member States may also set a higher maximum amount than 4 %.
- b) **More Transparency:** For example, when using an online marketplace consumers shall be informed clearly, whether they are buying goods or services from a trader or not, and when using an online search engine consumers shall be informed whether a payment has been made to achieve a higher ranking within the search results and on the main parameters determining the ranking of products as a result of a search request.



¹ In a nutshell, an infringement is "widespread" if it violates consumer protection law and has done, does or is likely to do harm to the collective interests of consumers in three member states. A "widespread infringement with a Union dimension" means a widespread infringement that has done, does or is likely to do harm to the collective interests of consumers in at least two-thirds of the member states, accounting, together, for at least two-thirds of the population of the Union.

- c) **"Paying with Data"**: The rules for distance selling contracts, in particular information obligations and the right of withdrawal, shall in the future also apply to digital content and digital services "free of charge" if the consumer does not have to pay money but provides his/her personal data in return.
- d) **Representative Actions**: Qualified institutions, such as consumer protection associations, shall be able to bring representative actions in the case of infringements of consumer protection rules which aim to protect the collective interests of consumers. Those representative actions shall include redress orders, such as injunctive relief, right to terminate a contract, compensation, repair or replacement. Further details on representative actions can be found in Part 2 of our Client Alert.

2. The Better Enforcement Directive

On January 7, 2020 the Better Enforcement Directive entered into force. It serves the purpose of a uniform enforcement of consumer protection law throughout the EU. Member States must transpose the Better Enforcement Directive into national law by November 28, 2021 and it must be applied by May 28, 2022. The Better Enforcement Directive amends four existing directives: a) Directive 93/13/EEC on unfair terms in consumer contracts², b) Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers³, c) Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market⁴, and d) Directive 2011/83/EU on consumer rights⁵.

It is currently unclear how the German legislator and the legislators of the other EU Member States will implement the Better Enforcement Directive, in particular what specific penalties will be foreseen.

a) Amendments to the Directive 93/13/EEC on unfair terms in consumer contracts

Directive 93/13/EEC was implemented into national law in Germany by the General Terms and Conditions Act ("AGBG"), respectively is now implemented by sections 305 seqq. German Civil Code. It basically stipulates transparency and fairness in contractual provisions in standard contracts ("T&C law").

Compliance with the T&C law pursuant to sections 305 seqq. German Civil Code is so far typically enforced by cease and desist actions initiated in particular by consumer protection associations.

Pursuant to the Better Enforcement Directive compliance with the T&C law shall also be ensured by GDPR-like fines. The Better Enforcement Directive requires Member States to provide for effective, proportionate and dissuasive penalties for infringements against the T&C law implemented due to Directive 93/13/EEC. In the case of a "widespread infringement" or an "infringement with a Union dimension" (see footnote 1), these sanctions must, in particular, allow fines of a maximum amount of at least 4% of the

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0013>. In Germany mainly implemented in sections 305 ff. German Civil Code.

³ <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31998L0006>. In Germany mainly implemented in the Price Indication Ordinance.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>. In Germany mainly implemented in the Act against Unfair Competition.

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083>. In Germany mainly implemented in sections 312 ff. German Civil Code concerning distance selling law.

trader's annual turnover in the Member State(s) concerned. If information on the annual turnover is not available, Member States must allow a fine with a maximum amount of at least EUR 2 Mio.

b) Amendments to the Directive 98/6/EC on consumer protection in the indication of prices

Directive 98/6/EC was implemented into German law mainly by the Price Indication Ordinance. Infringements against the Price Indication Ordinance are typically also enforced by cease and desist actions initiated by consumer protection associations.

Pursuant to the Better Enforcement Directive any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction. This prior price shall in general be the lowest price applied by the trader during a period of time no less than 30 days prior to the application of the price reduction. In order to strengthen enforceability, Member States must provide effective, proportionate and dissuasive sanctions for infringements against the provisions of the Price Indication Ordinance implemented due to the Directive 98/6/EC. A GDPR-like fine is not foreseen for such a violation.

c) Amendments to the Directive 2005/29/EC concerning unfair commercial practices in the internal market

Directive 2005/29/EC was implemented in Germany primarily by the Act against Unfair Competition.

The changes introduced by the Better Enforcement Directive to this directive include an extension of the catalogue of unfair commercial practices which are in all circumstances considered unfair. Such misleading commercial practices shall, for example, include (i) providing search results in response to a consumer's online search request without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results, or (ii) stating that reviews of a product are submitted by consumers who have used or purchased the product without taking reasonable and proportionate steps to check that the reviews originate in fact from such consumers. Furthermore, the scope of what is considered a misleading act or omission is extended. For example, in certain circumstances it may be misleading if (i) goods in one Member State are marketed as being identical to goods offered in other Member States, even though the goods differ significantly from each other, (ii) information on whether the seller of a product is a trader or not is missing in an online marketplace, (iii) the consumer has the possibility to search for products offered via a search function and information on the main parameters and their individual relevance for determining the ranking of products presented to the consumer in the list with search results is not made directly and easily accessible, or (iv) consumer product reviews are made accessible and information is withheld on whether and how to ensure that the published reviews originate in fact from consumers who have actually used or purchased the product.

Consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damages

and a right to a price reduction or termination of the contract. Furthermore, Member States must provide for effective, proportionate and dissuasive penalties, including GDPR-like fines (see 2a) in case of infringements against the provisions implemented due to Directive 2005/29/EC.

d) Amendments to the Directive 2011/83/EU on consumer rights

In Germany, Directive 2011/83/EU was mainly implemented by the provisions on consumer contracts, including the provisions on distance selling law, stipulated in sections 312 seqq. German Civil Code. Pursuant to section 312 para. 1 German Civil Code the provisions on consumer contracts and distance selling law are only applicable if they provide for a performance by the trader against payment.

The Better Enforcement Directive aims to ensure that in the future these rules shall also apply if the trader supplies to the consumer digital content, which is not supplied on a tangible medium, or a digital service and the consumer provides personal data to the trader as a form of "payment", except where the personal data provided are exclusively processed by the trader for the purpose of supplying the digital content or services or for complying with legal requirements and the trader does not process those data for any other purpose. Thus, the requirement of "performance against payment" in section 312 para. 1 German Civil Code is in case of digital content or digital service to be extended to "payment with data", i.e. the extensive information obligations and the right of withdrawal shall also apply in those cases.

Furthermore, additional information obligations in case of distance selling contracts will be imposed. For example, in the future the consumer must be informed if the price was personalized on the basis of automated decision-making; or in case of contracts concluded on online marketplaces, the provider of the online marketplace must inform about the main parameters and their individual relevance for the ranking of search results; or the provider of an online marketplace must inform whether the seller is a trader or not, and if not, consumers must be informed that consumer protection rights will not apply. In addition, details of the right of withdrawal will change, including new obligations regarding digital content and data in case of withdrawal.

In case of infringements against the national provisions implemented due to Directive 2011/83/EU, Member States must provide for effective, proportionate and dissuasive penalties, including GDPR-like fines (see 2a) above).

3. How can companies prepare?

It is still unclear how the German legislator and the legislators of the other EU Member States will transpose the Better Enforcement Directive and the Representative Actions Directive (see Part 2 of the Client Alert) into national law and what the detailed national rules will look like. However, companies can already prepare for the upcoming changes and the significantly increasing risk in case of violations of consumer protection law.

A respective project plan should take into consideration the following steps:

- I. Project-Team and Management:** Which departments must be involved and who should be part of the project team, respectively who should lead the project team? Prepare management for the upcoming changes regarding risk of enforcement.
- II. Review of business activities:** Which business activities are affected, to what extent and in which countries? For example:
 - a. What are our B2C activities?
 - b. Do we offer "free" digital content and digital service with personal data as a consideration?
 - c. Do we publish product reviews submitted by consumers?
 - d. Do we use/offer online marketplaces and online search functions?
- III. Expected company-internal implementation measures and changes**
For example:
 - a. Reassessment of risk decisions taken in the past in the context of compliance with consumer protection law
 - b. Revision of general terms and conditions
 - c. Adjustment of the Website (especially online-shop, online marketplace, online search function)
 - d. Internal guidelines and training for risk assessments
 - e. Translation work for the relevant EU countries
- IV. Monitor the developments at EU Member State level regarding national laws implementing the new directives**
- V. Specification of the project plan based on the relevant national laws and on company-specific high risk areas and priorities**
- VI. Full implementation of project plan**

For further questions don't hesitate to contact our specialists:



Julia Kaufmann, LL.M.
julia.kaufmann@bakermckenzie.com



Dr. Michaela Nebel
michaela.nebel@bakermckenzie.com



Prof. Dr. Michael Schmidl, LL.M.
michael.schmidl@bakermckenzie.com



Dr. Holger Lutz, LL.M.
holger.lutz@bakermckenzie.com



Florian Tannen
florian.tannen@bakermckenzie.com

Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB

Berlin

Friedrichstrasse 88/Unter den Linden
10117 Berlin
Tel.: +49 30 2 20 02 81 0
Fax: +49 30 2 20 02 81 199

Frankfurt am Main

Bethmannstrasse 50-54
60311 Frankfurt / Main
Tel.: +49 69 2 99 08 0
Fax: +49 69 2 99 08 108

Dusseldorf

Neuer Zollhof 2
40221 Dusseldorf
Tel.: +49 211 3 11 16 0
Fax: +49 211 3 11 16 199

Munich

Theatinerstrasse 23
80333 Munich
Tel.: +49 89 5 52 38 0
Fax: +49 89 5 52 38 199

www.bakermckenzie.com

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