

The "New Deal" - Consumer Protection Law Developments in the EU - Part 2

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 modernization 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 2 of our Client Alert we cover the [proposal of the European Commission](#) for the Representative Actions Directive on which to date the [European Parliament](#), the [Council of the European Union](#) and some national legislators have [commented](#). [On](#) June 22, 2020, the negotiators of the European Parliament and the Council of the European Union have reached a [preliminary political agreement](#) on the Representative Actions Directive which now has to be approved by the European Parliament as a whole and the Council of the European Union. The full text of the preliminary political agreement has yet to be published. Thus, this Client Alert covers the key elements of the European Commission's proposal and highlights aspects of the preliminary political approval mentioned in the European Parliament's [press release](#).

Please refer to [Part 1](#) of this Client Alert to learn more about the Better Enforcement Directive, which entered into force on January 7, 2020 and must be transposed into national law by November 28, 2021.

1. Main changes in EU consumer protection law

The remake provides the following main changes:

- a) **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 and replacement.



- b) **Penalties/Fines:** In case of "widespread infringements or widespread infringements with a Union dimension" 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 %. See [Part 1](#) of our Client Alert.
- c) **More Transparency:** For example, when using an online marketplace consumers shall be informed clearly whether they are buying goods or services from a company 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. See [Part 1](#) of our Client Alert.
- d) **"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. See [Part 1](#) of our Client Alert.

2. Key elements of the draft Representative Actions Directive

The European Commission's proposal for a [Representative Actions Directive](#) published in April 2018 enables qualified institutions to bring representative actions against a company that has violated certain consumer protection rules, such as actions demanding injunctive relief, compensation, repair or replacement, or declaring termination of a contract. The qualified institution must not itself be affected by the infringement. Pursuant to the preliminary political agreement of June 22, 2020 each Member State will have to name at least one qualified institution (such as a consumer protection association or a public body) that will be empowered and financially supported to launch those representative actions.

The Representative Actions Directive provides for an Annex which lists the various consumer protection laws a violation of which shall allow for representative actions. Those include, for example: laws on general terms and conditions, distance selling and e-commerce, price indication, consumer goods purchases, data protection including electronic communication, unfair competition, financial services, travel and tourism, energy, telecommunication, environment and health (the Representative Actions Directive lists almost 60 EU legislations). Both domestic and cross-border infringements should be accessible to representative actions.

The objective of representative actions pursuant to the Representative Actions Directive is to obtain (i) preliminary injunctions for stopping or prohibiting the unlawful business practices and (ii) injunction orders declaring that the business practice constitutes an infringement of law. For this purpose, qualified institutions shall not have to obtain the mandate of the individual consumers concerned or provide proof that the consumers concerned have suffered actual damage. Furthermore, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, where the law provides for such rights, can be pursued with representative actions. Whether these objectives require the mandate of an individual consumer concerned is left to the Member States. Thus, the

envisaged representative action does not only have a broader scope of applicability but also enhances the legal consequences (not only ceasing and desisting, but also providing redress measures). To avoid abusive lawsuits, the preliminary political agreement of June 22, 2020 envisages the "loser pays principle" requiring the defeated party to pay the costs of the legal proceeding incurred by the prevailing party.

A final decision of a court in one Member State should be deemed as irrefutably established for the purposes of other legal actions concerning the same infringement in the same Member State, and be deemed a rebuttable presumption for the purposes of other legal actions in other Member States; moreover representative actions shall suspend or interrupt limitation periods for all consumers concerned.

Next step will be a final and binding approval of the EU Parliament and the Council as per the preliminary political agreement. Thereafter, Member States will have to adopt laws transposing the Representative Actions Directive into national laws within 24 months and apply those national laws 6 months after the transposition deadline (pursuant to the preliminary political agreement). Therefore, we expect that the Representative Actions Directive will be adopted by the EU law makers in 2020 and the national laws implementing the Representative Actions Directive could therefore apply as of 2023.

3. How can companies prepare?

Even though it is still unclear how the EU Member States will transpose the Representative Actions Directive (and the Better Enforcement Directive (see [Part 1](#) of the Client Alert)) into national law and what the detailed national rules will look like, 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-shops, online marketplace, online search functions)
- 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

Düsseldorf

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

Frankfurt am Main

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

München

Theatinerstraße 23
80333 München
Tel.: +49 89 5 52 38 0
Fax: +49 89 5 52 38 199

www.bakermckenzie.com

Get Connected:



This client newsletter is prepared for information purposes only. The information contained therein should not be relied on as legal advice and should, therefore, not be regarded as a substitute for detailed legal advice in the individual case. The advice of a qualified lawyer should always be sought in such cases. In the publishing of this Newsletter, we do not accept any liability in individual cases.

Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB is a professional partnership under German law with its registered office in Frankfurt/Main, registered with the Local Court of Frankfurt/Main at PR No. 1602. It is associated with Baker & McKenzie International, a Verein organized under the laws of Switzerland. Members of Baker & McKenzie International are Baker McKenzie law firms around the world. In common with terminology used in professional service organizations, reference to a "partner" means a professional who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

© Baker McKenzie