



European “New Deal for Consumers“ threatens German economy

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Background information

On 11 April 2018, the European Commission published two draft directives proposing a “New Deal for Consumers”, significant parts of which are giving cause for concern.

I. “New Deal” for consumers

The German economy is critical of the unnecessary and disproportionate tightening of existing consumer protection legislation and its negative effects on the economy. The Europe-wide introduction of collective redress mechanisms and the mandatory imposition of financial penalties will neither improve the European citizens’ trust in the Single Market nor foster cross-border trade. Moreover, these measures are not in line with the European Union’s legislative powers.

The European Union only disposes of regulatory powers where the European Single Market is restrained by diverging national public enforcement instruments. This does not include attempts to harmonise national civil procedure law and consumer protection law, where all regulatory powers remain with the individual member state.

The draft directives presented by the Commission, which mostly cover purely national scenarios, would entail fundamental changes to German civil procedure-, contract- and unfair competition law, placing an enormous burden on the German economy. The widely recognised, successful German system of enforcement under civil law – complemented by the new German collective instrument of model declaratory actions (“Musterfeststellungsklage”) – would be severely damaged by the “New Deal”. However, there is no need for this: German consumers are not in a structurally disadvantaged position, in need to be saved by a “New Deal”. As of December 2019, the CPC Regulation will be directly applicable across

Europe; as a consequence, cross-border infringements against European consumer law will be subject to uniform regulation in any case.

II. European consumer class action

The German economy is opposed to the current proposal for a Europe-wide introduction of collective redress mechanisms. It includes disincentives that risk giving rise to a litigation industry that goes far beyond the US system. Currently, there is wide consensus in Europe that any abuse of consumer representative actions is to be avoided. Unfortunately, the EU Commission does not sufficiently heed its own principles of 2013 regarding a legally sound implementation of safeguards against abusive actions:

- This holds particularly true for the principle according to which claimants must actively **opt in** to become part of the represented group. Under the “New Deal”, the mandate of the individual consumers concerned is not required to bring consumer representative actions. As a result, the individual consumers concerned are subject to court decisions without a legal hearing, which contradicts established European legal principles.
- Considering the risk of abuse, the intention of granting **ad hoc** qualified entities the standing to bring actions is particularly worrying.
- The draft proposal does include minimum criteria for entities qualified to bring actions and third-party funding; however, they are insufficient to efficiently prevent abuse. If any collective actions apart from injunctions are to be allowed, they should be strictly reserved for public entities or entities serving the public interest.
- Requiring the undertakings concerned to present evidence “which lies in their control” in the proceedings risks leading to **discovery** proceedings as practiced in Anglo-American law, including all its risks for European companies. This is likely to entail significant, unjustified burdens for the companies concerned and would mean abandoning the proven practice of sharing the risks of litigation.
- In case of mass harm situations, the draft requires the undertakings to direct their redress payments to a public purpose instead of the harmed consumers. Thereby, the Commission intends to establish an indirect funding of the consumer associations bringing the actions. Thus, the proposal aims at introducing punitive damages not intended to compensate damages suffered, which risks giving rise to disincentives on the part of the associations empowered to bring actions.
- Taking into account the principle of fair trial, judgements must be binding for both consumers and companies.
- Granting a suspension of the statute of limitations to an undefined group of consumers creates legal uncertainty for defendant companies and consumers and is to be rejected.
- The limitation of litigation costs for qualified entities and the unilateral simplification of the burden of proof in favour of the claimant party are not in line with the equality of arms principle, which is generally accepted across Europe.

III. Omnibus Directive

The German economy is opposed to the proposed harmonisation of penalties and the introduction of a right to remedies and a right to contract termination in case of unfair commercial practices, as provided for under the draft Omnibus Directive (amending four existing Directives). Some of the new provisions going beyond enforcement include appropriate approaches; however, they are not sufficient to make up for the negative effects the draft directive would have for the German economy. The draft not only suffers from a lack of underlying legislative powers and the fact that there is no need for regulation – it also includes serious substantive shortcomings leading to legal uncertainty for the companies and potential negative effects for the economy as a whole.

1. Harmonisation of penalties

The draft Omnibus Directive aims at harmonising penalties in all four consumer protection Directives mentioned. Currently, member states are free to decide which appropriate and efficient measures they wish to take in order to ensure enforcement. The proposed changes, however, would force member states to impose fines (up to 4 % of annual turnover) in specific cases. This would require the establishment of official structures which, as of today, are not provided for under German consumer protection legislation. These far-reaching harmonisation attempts are rejected for the following reasons:

- The European Union does not have the legislative power to adopt such far-reaching provisions on penalties in a subject matter under purely national responsibility.
- The Commission fails to acknowledge that individual member states (Germany and Austria, in particular) dispose of an efficient enforcement regime under private law that settles infringements almost without resorting to official structures or tax money. These finely balanced systems risk being weakened and unsettled without good cause.
- There is no evidence that financial penalties improve enforcement or consumer confidence (on the contrary: see results of the EU Consumer Conditions Scoreboard 2017 awarding high grades to member states with private enforcement systems).
- The directives concerned include various undefined legal terms (e.g. “main characteristics” under Art. 6 (1) (b) and Art. 7 (4) (1) of Directive 2005/29/EC and provisions under Directive 93/13/EEC). Hence, the regulatory contents of certain legal provisions and resulting potential infringements can be unclear for companies in some cases. However, imposing penalties for infringements which are not clearly defined and therefore unpredictable would be highly inappropriate.
- In line with Art. 7 (5) of Directive 2005/29/EC, the current Commission proposal would introduce fines for all information requirements enshrined in European Community law, despite the fact that numerous information requirements are known to provide no added value for consumers (e.g. trade register data indicated in the imprint). Therefore, the proposed provision is inappropriate and harmful to the economy.

To sum it up, existing shortcomings in individual member states' enforcement systems should be addressed in a targeted manner instead of establishing excessive bureaucratic measures across the EU which risk inhibiting innovation and damaging the Single Market.

2. Introduction of compensation for damages and the right to contract termination under the German Act on Unfair Competition (UWG)

According to the Commission proposal (Art. 1 (4) draft Directive), consumers should be entitled to unilaterally terminate contracts or have a right to compensation for damages where a company resorts to unfair commercial practices. This proposal would introduce individual legal claims of consumers into German unfair competition law – a far-reaching change of paradigm that is to be rejected. Unfair competition law, which does not aim at individual protection for consumers, and civil law must remain clearly separated:

- In cases of unfair interference, “victims” of unfair commercial practices already dispose of sufficient and differentiated legal remedies. Consumers are sufficiently protected, especially through the voidability rules under the German Civil Code (BGB) (§§ 119 ff. BGB), the right of withdrawal (§§ 312 ff. BGB, § 355 ff. BGB), damages for breach of duty (§§ 280, 288 BGB) as well as the provisions regarding liability in the consumer sales law (§§ 434 ff. BGB) and general tort law (§§ 823 ff. BGB).
- Moreover, consumers can take advantage of cross-border redress mechanisms under the CPC Regulation, e.g. by lodging a complaint with a national consumer protection authority.
- The legal evaluation of unfair commercial practices mainly depends on the question whether the relevant practices risk having an influencing, i.e. abstract/general effect. The concrete/individual protection of consumers, by contrast, is organised under contract law. These legal fields should remain clearly separated.
- The Commission proposal also risks increasing the level of legal uncertainty, especially with regards to small and medium-sized companies. Consumers are given the right to unilaterally terminate contracts at the slightest indication of unfair commercial practices – including cases where the consumer would have entered into the contract anyhow, even without the unfair business practice in question, where the unfair business practice has occurred unintentionally or where the contract does not provide for any termination rights.
- The proposal to ban selling products with different compositions under the same brand should also be disregarded – it fails to consider that according to applicable legislation, brands are indications of origin, not advertising or quality statements. Moreover, the proposal fails to acknowledge the fact that companies have to adapt their products to the requirements of different national market environments.

3. Modernisation of consumer rights in online trade

a) More flexible communication options

- We are critical of the planned amendments to information requirements regarding contact options – they will neither strongly reduce the bureaucratic burdens borne by companies nor significantly increase flexibility in communication processes. The EU Commission merely reacts to the changed behaviour of consumers and companies with regards to technology, without attempting a true reform of information requirements. Moreover, it creates new legal uncertainties and – depending on the interpretation of the ambiguous new provisions – even additional information requirements.

- Unfortunately, the Commission does not avoid redundant/overlapping provisions using different terminology, resulting in legal uncertainties for practitioners.
 - The pre-contractual information requirements should be reconsidered as a whole – in the field of online trade, some of them are useless for consumers (information on the right of withdrawal), others entail considerable legal uncertainties (main characteristics of goods). Furthermore, they inhibit the development of innovative ordering channels (e.g. Voice).
- b) Exclusion of the right of withdrawal after using the goods
- The exclusion of the right of withdrawal in case of excessive use of the purchased goods reduces economic burdens borne by the companies and creates legal certainty. It neither cuts back on the right of withdrawal nor violates consumer rights in any way. The right of withdrawal is merely intended to enable the consumer to try goods in the way as he or she might do in a retail store. Consumers who have used goods in an excessive manner only remain bound to the purchase agreement, without any further disadvantages.
 - The new provision is a relief to honest consumers who are currently forced to bear the consequences of other consumers' excessive use of goods, either through higher prices or a reduced offer.
 - The new option for traders to refuse purchase price refunds in cases of withdrawal until they have received the returned goods is consistent with the challenges faced and absolutely appropriate; moreover, it avoids unnecessary risks for companies and should therefore be maintained.
- c) Transparency in online marketplaces
- The purpose of most of the intended new information requirements for online marketplaces remains unclear. Therefore, it is questionable whether consumers will benefit from them at all. There is a high risk that the only result will be additional layers of bureaucracy at the expense of the marketplaces, without any added value for consumers.
 - Where online platforms fail to inform users about the fact that their rankings are not based on objective criteria, but instead third parties have paid for them, this is already considered "misleading of consumers". Therefore, the intended clarification in a "blacklist" is unnecessary. Such business practices can already be forbidden.
 - The new information requirements on online marketplaces only result in new bureaucratic burdens without giving any added value to consumers. Most of the new consumer information must already be provided under the Unfair Commercial Practices Directive. For this reason, it is paramount to superfluous double regulation that does not provide consumers with any new insights.

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