



EUROPEAN COMMISSION

*Brussels, 12.10.2018
C(2018) 6672 final*

*Ms Inge Posch-Gruska
President of the
Bundesrat
Dr Karl Renner-Ring 3
A – 1017 WIEN*

Dear President,

The Commission would like to thank the Bundesrat for its Reasoned Opinions on the proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC {COM(2018) 184 final} and on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC, 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 {COM(2018) 185 final}.

In line with the objectives of the 'New Deal for Consumers' announced by Commission President Juncker in his State of the Union address 2017¹ and included in the Commission Work Programme 2018², these proposals aim at improving compliance with European Union consumer protection legislation, modernising it in light of market developments and alleviating burdens on businesses where appropriate.

The Commission welcomes the Bundesrat's support of Fitness Check evaluations of the existing EU legislation. The Fitness Check carried out by the Commission in 2016-2017 on EU consumer legislation showed especially that many consumers are still confronted with insufficient compliance by traders and suffer detriment due to it. This is the background for the Commission's proposals for more effective individual and collective consumer redress and more deterrent public enforcement powers. Specifically, these proposals introduce collective redress possibilities for duly designated qualified entities

¹ https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2017_en

² https://ec.europa.eu/info/sites/info/files/cwp_2018_en.pdf

to protect the collective interests of consumers and modernise the already existing injunction procedures enabling such entities to stop consumer law infringements. The proposals also further harmonise rules on penalties for breaches of consumer law and provide for the rights to individual remedies for victims of unfair commercial practices.

The Commission notes the Bundesrat's objection to the proposed rules regarding the strengthening of penalties and the right to remedies for victims of unfair commercial practices. The Commission also notes the Bundesrat's concerns about the proposed rules on unsolicited doorstep selling and commercial excursions and about the notions of 'Qualified Entity' and consumer's mandate in the context of representative actions as well as about the scope of the Representative Actions proposal. The Commission is pleased to have this opportunity to provide the following clarifications regarding its proposals and trusts that these will allay the Bundesrat's concerns.

As regards the rules on penalties, the proposal amending four current European Union consumer law directives includes non-exhaustive criteria for the application of penalties, in particular in cross-border situations. Furthermore, it harmonises national rules on maximum fines available in the case of widespread cross-border infringements in accordance with Regulation (EU) 2017/2394³. Finally, the proposed rule requires Member States to consider consumers' general interest in the allocation of revenues from fines.

The Commission considers that the proposed (minimum) harmonisation of the national rules on maximum fines, which currently vary significantly between Member States, is necessary for effectively enabling coordinated enforcement action by the Member States' authorities on widespread cross-border infringements, which is required by Regulation (EU) 2017/2394. At the same time, such harmonisation is necessary for ensuring the deterrent effect of those fines. The proposed rule does not affect the organisation of the public enforcement of consumer law in the Member States, which can for example rely on administrative or judicial procedures for the imposition of penalties. The rule also does not prescribe the nature of penalties, which can be based on administrative, civil or penal legislation. The 4% is designed as the maximum fine available under the law – Member States authorities that are co-operating in the framework of Regulation (EU) 2017/2394 may decide on the imposition of fines that are below this maximum threshold depending on the type of infringement. Regulation (EU) 2017/2394 requires Member States' authorities to ensure proportionality and to comply with applicable procedural safeguards and with the principles of the Charter of Fundamental Rights of the European Union when imposing fines. The common criteria for the imposition of penalties provided in the proposed rules include taking into account the gravity and nature of the infringement.

In the area of remedies, the proposed rule requires Member States to make available remedies to consumers who have been victims of unfair commercial practices. The proposal leaves important flexibility to Member States, as it only requires that the

³ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004; OJ L 345, 27.12.2017, p. 1–26.

contractual remedy of contract termination and the non-contractual remedy of compensation of damages be made available. Member States can add or keep other remedies and determine the conditions for their application.

The proposed rule on unsolicited doorstep selling and commercial excursions aims at clarifying Member States' powers to regulate these selling channels in view of the fact that some Member States have already taken national measures regarding them to address specific national problems, such as misleading or aggressive practices towards vulnerable consumers. These national measures are currently based on different legal grounds and their compatibility with the Unfair Commercial Practices Directive 2005/29/EC⁴ is legally unclear. The proposed amendment therefore clarifies, in accordance with the principles of subsidiarity and proportionality, the legal situation in respect of these two specific selling channels. It does not apply to other selling channels.

The notion of 'qualified entity' in the Representative Actions proposal is an established concept in the current Injunctions Directive 2009/22/EC⁵. While the Representative Actions proposal does not provide a separate definition, it clarifies this notion by putting forward specific criteria that must be met in order to be considered a 'qualified entity', such as non-profit character, being properly constituted under national law and having a legitimate interest in ensuring compliance with the relevant EU law instrument.

As is the case under the current Injunctions Directive, no consumer mandate shall be required by the Member States for the injunctive representative actions. As regards the new actions for redress, the proposal is in principle neutral, leaving to the Member States the choice of opt-in or opt-out. The Representative Actions proposal provides only one exception in respect of the actions for small amounts for which no mandate shall be required. Several Member States have already chosen to use opt-out or a combination of the two approaches in their national systems.

The scope of the Representative Actions proposal covers both domestic and cross-border situations, as is the case also today for injunctions under the current Directive. Since the newly proposed redress actions build upon the actions for injunctions, there is no reason to restrict the scope of the proposal only to cross-border actions. Infringements of European Union law affecting the collective interests of consumers may occur in both domestic and cross-border situations.

The Bundesrat's Reasoned Opinion has been made available to the Commission's representatives in the ongoing negotiation with the co-legislators and will inform these discussions. The Commission remains hopeful that an agreement will be reached before the next European Parliament elections in 2019.

⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'); OJ L 149, 11.6.2005, p. 22–39

⁵ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; OJ L 110, 1.5.2009, p. 30–36.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Věra Jourová
Member of the Commission*