



EUROPEAN COMMISSION

*Brussels, 19.10.2018
C(2018) 6905 final*

*Mr Michael MÜLLER
President of the Bundesrat
Leipziger Straße 3 – 4
D – 10117 BERLIN*

Dear President,

The Commission would like to thank the Bundesrat for its 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 Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of European Union consumer protection rules {COM(2018) 185 final}.

In line with the objectives of the “New Deal for Consumers” announced by 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 consumer legislation in light of market developments and alleviating burdens on businesses where appropriate.

The Commission welcomes the Bundesrat’s support for a high level of consumer protection throughout the Union and a more level playing field for European Union enterprises.

The Fitness Check carried out by the Commission in 2016-2017 on European Union consumer legislation showed that many consumers are still confronted with, and suffer detriment due to insufficient compliance by traders. Therefore, the Commission proposed to complete the other measures already implemented or underway in the area of better enforcement with rules providing 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 to protect the collective interests of consumers and modernise the already existing injunctions procedure enabling such entities to stop consumer law infringements. The proposals also further harmonise rules on penalties for breaches of consumer law, which are currently highly divergent across the European Union, and provide for the right to remedies for victims of unfair commercial practices.

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

The Commission welcomes the Bundesrat's agreement in principle that it should be possible to protect the collective interests of consumers in the framework of representative actions brought by qualified entities and that the current possibilities pursuant to Directive 2009/22/EC³ are not sufficient. The Commission takes note of the Bundesrat's views on the specific parts of the proposal that it suggests to amend or clarify.

As regards the proposed modernisation measures, the Commission fully agrees with the Bundesrat on the need to close the existing gaps and to increase consumer protection and transparency regarding "free" digital services, in full consistency with the proposed Digital Content Directive, regarding contracts concluded on online marketplaces and regarding the presentation of online search results. These are all major elements of the current Commission proposals.

The Commission also welcomes the Bundesrat's support for the proposed burden-reduction measures regarding consumer information obligations and means of communication between traders and consumers and for the proposal to clarify Member States' powers to enact national provisions addressing unfair practices in the context of unsolicited doorstep sales and commercial excursions. At the same time, the Commission has assessed carefully the Bundesrat's concerns as regards the proposed changes to the right of withdrawal in respect of goods, the proposed right of remedies for victims of unfair commercial practices and the clarification of the rules on 'dual quality' of products.

In response to the specific remarks in each of the Bundesrat's Opinions, the Commission would like to refer to the attached Annexes I and II.

The Bundesrat's 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.

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*

³ 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.

Annex I

Concerning the Bundesrat's Opinion on the proposal for a Directive of the European Parliament and of the Council amending Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of European Union consumer protection rules {COM(2018) 185 final}.

The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinion and is pleased to offer the following clarifications.

Proposed amendments to Directive 2011/83/EU

As regards the pre-contractual information requirements under Articles 5 and 6 of Directive 2011/83/EU⁴ (paragraph 12 of the Opinion, 1st part), the Commission's evaluations used behavioural insights (experiments) to check the relevance of the mandatory general consumer information requirements. They showed that the current mandatory requirements in Directives 2005/29/EC⁵ and 2011/83/EU remain relevant for consumers and only a limited simplification is warranted. However, consumers' access to information, both to mandatory information and any additional standard Terms and Conditions established by the trader, clearly needs to be improved. The Commission is therefore currently working on a self-regulatory initiative with the main European business and consumer stakeholders on a better presentation of consumer information.

As regards the rules of Directive 2011/83/EU for off-premises contracts (paragraph 12 of the Opinion, 2nd part), the Commission's evaluation of that Directive did not identify a need to reduce current information requirements, such as through extending the scope of the regulatory choices available to Member States to exempt further categories of off-premises contracts from these requirements. Although some stakeholders consulted during the evaluation pointed to possible disproportionate burdens due to the level of detail in the information requirements for off-premises contracts under Directive 2011/83/EU, these indications were not considered serious enough for the Commission to propose a reduction of regulatory requirements. The Commission is instead focusing on helping small and medium-sized enterprises to comply with consumer law requirements. Specifically, a Union-funded training project "ConsumerLawReady"⁶ has been launched to help small and medium-sized enterprises comply with consumer law,

⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council; OJ L 304, 22.11.2011, p. 64–88.

⁵ 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.

⁶ For further information: <https://www.consumerlawready.eu/>.

including information requirements for off-premises contracts under Directive 2011/83/EU.

Strong consumer protection is especially important for the off-premises contracts since the consumer may be put under psychological pressure or confronted with an element of surprise. The Commission notes that some Member States have applied further national restrictions as regards unsolicited doorstep selling and commercial excursions to address their specific national problems with these selling techniques. This led the Commission to propose specific amendments to Directive 2005/29/EC clarifying the power for Member States to adopt national provisions addressing unfair commercial practices in the context of these two specific sales channels.

As regards the right of withdrawal in respect of goods (paragraphs 14, 15 and 21 of the Opinion), the Commission wishes to reassure the Bundesrat that it stands fully behind this right as one of the fundamental consumer rights in eCommerce. The proposal only amends two specific aspects of the right of withdrawal that, according to the Commission's assessment, put excessive burden on European Union businesses, in particular small and medium-sized enterprises, or do not strike the right balance between a high level of consumer protection and the competitiveness of enterprises.

First, the Commission proposes to exempt from the right of withdrawal those goods that consumers have used more than necessary to merely test them ("used" goods). The objective of the right of withdrawal in distance sales is to ensure that consumers have the same possibility to see and check the product as they can in a physical shop. The right of withdrawal was not meant to enable the actual use of the good during 14 days. The proposed changes will simplify the rules for both parties. Sellers will no longer have to deal with the returned "used" goods, such as organising their resale as second hand goods, and with the establishment of their diminished value. Consumers will no longer face the risk of paying up to the full value of the returned "used" good when it cannot be resold at all. Rather than increasing the number of disputes between traders and consumers, the proposed changes aim on the contrary to eliminate the occurrence of disputes over the determination of the specific amount of the diminished value.

Second, the Commission has proposed to remove the obligation of sellers to reimburse consumers on the sole basis of the proof of dispatch of the goods before actually receiving the goods back ("early reimbursement" obligation). The Commission would like to underline that the removal of this obligation has no impact on the allocation of the risk for goods during their sending back to the trader. Such risk is not expressly regulated in Directive 2011/83/EU and is therefore subject to national general contract law in accordance with Article 3(5) of the Directive. The current "early reimbursement" obligation can lead to situations where the seller has reimbursed the consumer on the basis of the proof of dispatch but the good, the transport of which may be legally at the consumer's risk, is damaged during the transport or does not arrive at all. The proposed change therefore offers a more balanced solution whereby the trader reimburses the consumer only after actual receipt of the goods.

The Commission has noted the Bundesrat's concerns about the possible abuse of the new rules by unreliable traders. It wishes to point out, however, that the risk of abuse by rogue traders already exists under the current rules whereby traders can claim up to 100% of the price paid as diminished value of the good. The proposed amendment aims at relieving the burden on the law-abiding sellers who respect consumers' rights but currently have difficulties in establishing the exact diminished value and in disposing of the returned "used" goods as second hand goods. Lack of compliance by unreliable traders must be addressed with stronger public and private enforcement. The Commission has therefore put a considerable focus in its proposals on providing stronger public and private means of enforcement, as well as in raising consumer and trader awareness of consumer law.

As regards the additional transparency requirements for contracts concluded on online marketplaces (paragraphs 13 and 18 of the Opinion), the Commission would like to note that the online marketplace's failure to comply with these requirements may qualify as unfair commercial practice in violation of Directive 2005/29/EC. Accordingly, the consumer may be entitled to exercise the right to remedies that the Commission has proposed to add to Directive 2005/29/EC. Furthermore, as with any breach of Directive 2011/83/EU, Member States will have to provide effective, proportionate and dissuasive penalties to deter such infringements in accordance with its Article 24. Finally, as regards the Bundesrat's remarks regarding the application of specific national civil law provisions to online marketplaces, the Commission notes that, in accordance with its Article 3(5), Directive 2011/83/EU does not affect national general contract law on the validity, formation or effect of a contract, such as general contractual legal remedies (see also recital 14 of the Directive).

As regards the scope of the additional information requirements for online marketplaces (paragraph 17 of the Opinion), the Commission would like to note that these requirements apply to those price comparison tools that act as online marketplaces, i.e. enable the conclusion of contracts on their online interfaces. This approach is in line with the general scope of Directive 2011/83/EU, which deals with the information requirements at the pre-contractual stage of the transaction. The commercial practices more generally, including information provided by price comparison tools and search engines that does not qualify as pre-contractual information in the meaning of Directive 2011/83/EU, is subject to Directive 2005/29/EC. The Commission has proposed to reinforce this latter directive by clarifying the application of its prohibition of 'hidden' advertising to online search results, including search results provided by online price comparison tools (point 11 of Annex I ('blacklist')).

As regards the obligations of online marketplace operators to protect consumers from disreputable traders and ensuring compliance of third party traders with consumer law (paragraph 19 and 20 of the Opinion), the Commission notes that the legal framework for the removal of illegal content, including illegal commercial practices online, is already provided in the E-Commerce Directive 2000/31/EC. This Directive, inter alia, harmonises the conditions under which certain online platforms (including online marketplaces) can benefit from the exception from liability for illegal content, which they

host. In 2017, the Commission issued a Communication⁷ laying down a set of guidelines and principles for online platforms to step up the fight against illegal content online in cooperation with national authorities, Member States and other relevant stakeholders. The Communication aims to facilitate and intensify the implementation of good practices for preventing, detecting, removing and disabling access to illegal content, so as to ensure the effective removal of illegal content, increased transparency and the protection of fundamental rights online.

Furthermore, online marketplaces are subject to the professional diligence requirements under Directive 2005/29/EC⁸. These requirements include taking measures which – without amounting to a general obligation to monitor in the meaning of Article 15 of Directive 2000/31/EC – enable third party traders to comply with European Union consumer law requirements. In particular, their online interfaces should be designed in a way that enables third party traders to provide the mandatory consumer information.

As regards the Bundesrat's comments on the legal guarantee obligations for defective goods, these are subject to Directive 1999/44/EC. This Directive is not amended by the current 'New Deal for Consumers' proposals but legislative negotiations on its revision are currently ongoing on the basis of a separate Commission proposal. Directive 1999/44/EC provides for a hierarchy of remedies whereby, in the first place, the consumer may require the seller to repair the defective goods or to replace them. Directive 1999/44/EC applies to all sales of goods, including sales via online marketplaces. Accordingly, the denial of repair or replacement in respect of goods sold via online marketplaces, to which the Bundesrat is pointing, may already now be contrary to Directive 1999/44/EC.

Proposed amendments to Directive 2005/29/EC

The Commission notes the Bundesrat's concerns regarding the proposed rules on the right to remedies for victims of unfair commercial practices (paragraph 24 of the Opinion). As explained in the Commission's Impact Assessment accompanying the proposals, the right to remedies in Directive 2005/29/EC should be developed in view of the finding of the Fitness Check that unfair commercial practices are the consumer-rights related problem that consumers experience most often. Yet, many consumers do not take any action when they are victims of unfair commercial practices. This lack of redress can be attributed at least to some extent to the absence, in a number of countries, of specific rules on consumer remedies in the event of unfair commercial practices. According to the information at the Commission's disposal, only 14 Member States have specific rules linking unfair commercial practices in breach of Directive 2005/29/EC to legal remedies. However, these remedies are usually contractual and, therefore, only applicable against the consumers' contractual counterparts but not to other traders, such

⁷ Commission Communication 'Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms', 28.9.2017, COM(2017) 555 final.

⁸ See Chapter 5.2. of the Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices, 25.5.2016, SWD(2016) 163 final.

as manufacturers, with whom the consumer has no direct contract.⁹ In the other half of Member States, no express link between unfair commercial practices and remedies exists.

The Commission notes the Bundesrat's assessment that the existing legal remedies under national law in Germany already allow consumers to terminate the contracts entered into because of fraudulent misrepresentation and that the existing claims in non-contractual relations offer sufficient legal protection. Indeed, in several Member States the proposed amendment to Directive 2005/29/EC will not require the actual introduction of new legal remedies but only creating a clear legal link between the unfair commercial practices in breach of Directive 2005/29/EC and those already existing remedies. Such clear legal rules should lead to greater consumer awareness of their right to redress in the event of unfair commercial practices and more frequent exercise of those rights. This should in turn lead to greater deterrent effect and, ultimately, better compliance by traders with Directive 2005/29/EC.

The Commission's proposal on remedies leaves important flexibility to Member States, as it requires, as a minimum, that the 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, such as conditions for the unilateral termination of the contract and the type of damages that a consumer can claim. The proposed remedies are also without prejudice to the application of other consumer remedies already available in other EU consumer law directives, such as remedies regarding defective goods in Directive 1999/44/EC.

As regards the Bundesrat's questions regarding the form of unfair practices covered by the proposed remedies and the identification of the responsible party, the Commission would like to stress that the proposed right to remedies is added within the existing legal framework of Directive 2005/29/EC. Therefore, it is the establishment of an unfair commercial practice in breach of Directive 2005/29/EC that gives rise to the proposed right to remedies. The existence of the unfair commercial practice and the responsible trader will continue to be established in accordance with the national rules on the enforcement of Directive 2005/29/EC, implementing the requirements of Article 11 of the Directive.

As regards the Bundesrat's comments on the absence of a causal link between unfair commercial practices and the conclusion of the contract, the Commission wishes to underline that, according to the general rules on establishing unfair commercial practices under Articles 5 to 9 of Directive 2005/29/EC, one of the conditions is that the commercial practice in question causes the consumer to take a transactional decision that he or she would not have taken otherwise.

⁹ For further details, see in particular Annex 8 to the Impact Assessment: COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposals for DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (1) 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 and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC; SWD(2018)96.

The Commission also notes the Bundesrat's assessment that legislation on commercial practices serves primarily to protect competitors and, therefore, that Directive 2005/29/EC should not grant individual rights to consumers. In this respect, the Commission would like to stress that Directive 2005/29/EC pursues both objectives of internal market integration and a high level of consumer protection. The Commission does not see a conceptual problem in strengthening the rights of consumers, and therefore the deterrent effect of Directive 2005/29/EC, even where the enforcement of its provisions also benefits the competing businesses.

Finally, the Commission notes the Bundesrat's opinion that there is no need to amend Directive 2005/29/EC regarding 'dual quality' products (paragraph 25 of the Opinion). The Commission agrees with the Bundesrat that misleading marketing, including of 'dual quality' products, can be addressed under the existing rules of Directive 2005/29/EC¹⁰. Notwithstanding this, enforcement authorities in Member States concerned by 'dual quality' problems have indicated a need for more specific rules to be set out in the Directive. To leave no room for doubt that Union law prohibits unjustified and misleading product differentiation in the Single market, the Commission proposed an amendment to make it explicit in the Unfair Commercial Practices Directive that marketing of products as being identical to the same product marketed in several other Member States, while those products have significantly different composition or characteristics, may constitute a misleading practice within the meaning of Article 6 of that Directive. The amendment is closely related to the Commission's efforts to coordinate the work of Member States on 'dual quality', in particular through the harmonised testing methodology developed by the Joint Research Centre.

¹⁰ As explained in the Commission Notice "on the application of EU food and consumer protection law to issues of Dual Quality of products — The specific case of food", C/2017/6532, 29 September 2017.

Annex II

Concerning the Bundesrat's Opinion 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}

The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinion and is pleased to offer the following clarifications.

The Commission takes note of the Bundesrat's comments on the definition of the collective interests of consumers and its preference for requiring a minimum number of consumers (paragraph 3 of the Opinion). The collective interests of consumers are defined in a broad manner without specifying a threshold for the number of consumers concerned, which is in line with the definition established in the recently revised Consumer Protection Cooperation Regulation 2017/2394¹¹.

As regards the clarifications requested by the Bundesrat concerning the non-profit criterion for qualified entities (paragraph 4 of the Opinion), this criterion is defined in a general manner with details left to national law. This would include details of what constitutes non-profit in case where consumer organisations receive public funding.

The Commission takes note of the Bundesrat's comments on the features of the proposed redress actions and its preference for an opt-in model (paragraphs 5 and 6 of the Opinion). The proposal is neutral concerning opt-in and opt-out in redress actions, leaving it to the Member States to make a choice between the two models, with some exceptions in the special cases referred to in Article 6(3) of the proposal. Several Member States have already chosen to use opt-out or a combination of the two approaches in their national systems.

The Commission also notes the Bundesrat's general request for clarifications regarding the requirement for mandate in Articles 5 and 6 (paragraph 9 of the Opinion). For injunction actions referred to in Article 5(2), the proposal makes it clear that no mandate shall be required from the consumers, as is presently the case under Directive 2009/22/EC. For actions aimed at redress measures referred to in Article 6, Member States may require the mandate of the consumers concerned. In the case of Article 6(3)(a), which regards clear-cut cases where the consumers are identifiable and suffered comparable harm caused by the same practice, mandates cannot be requested as a precondition for starting the action. In such cases it would be more efficient to request the mandates after the action has been launched, for example in order to benefit from the rules concerning evidence for identifying the concerned consumers. In the case of Article 6(3)(b), which regards cases where consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress back to them, no mandates may be

¹¹Regulation (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.

requested at all. These exceptions are necessary to facilitate the effective functioning of these specific types of representative actions.

The Commission takes note of the Bundesrat's comments on information obligations imposed on the traders in Article 9 of the proposal (paragraph 7 of the Opinion). The Commission considers these information obligations to be essential for facilitating consumer awareness about the breach of law and their redress opportunities. The court or administrative authority dealing with a specific case will ensure that the precise means of notification are appropriate to the circumstances of the case.

The Commission takes note of the Bundesrat's comments on Article 10 of the proposal and its suggestion to provide for a binding effect of final decisions in relation to the trader in case no infringement was established (paragraph 8 of the Opinion). Article 10 of the proposal focuses on the domestic and cross-border effects of final decisions establishing an infringement in order to facilitate subsequent representative or individual redress actions. In general, the proposal only regulates aspects of the representative actions framework that are essential to ensure its functioning, while leaving discretion for the Member States to address issues that are not regulated in the proposal, such as any other effects of final decisions.