

06.07.18**Decision
of the Bundesrat**

Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, 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; Council doc. 7876/18

At its 969th session on 6 July 2018, the Bundesrat adopted the following Opinion pursuant to §§ 3 and 5 of the Act on Cooperation between the Federal Government and the Federal States on Matters Pertaining to the European Union (*EUZBLG*):

General remarks on the proposal

1. The Bundesrat explicitly welcomes the Commission's objective to amend and supplement four existing EU Directives in order to reshape and strengthen the framework conditions for and protection of the economic interests of consumers by
 - strengthening consumer rights online,
 - improving the provision of information to consumers,
 - bringing consumer rights into line with digitalisation of the markets,
 - introducing effective penalties for violations of EU consumer law,
 - combating the sale of identical consumer products of differing quality.
2. The Bundesrat welcomes in particular the Commission's efforts to ensure that business-to-consumer relations are fair and transparent and to enhance the effectiveness of existing consumer protection provisions, where this is necessary. In other words, the current protection provisions are insufficient.

The Bundesrat considers that harmonisation of the legal framework for cross-border infringements of consumer protection serves a useful purpose. In particular, the facilitation measures for businesses as regards online sales are to be welcomed.

3. The Bundesrat has long been committed to ensuring that a high level of consumer protection, based on the standards of consumer protection in Germany, is guaranteed throughout Europe. This not only reduces competitive disadvantages faced by businesses in Member States with high standards of consumer protection, but also

effectively strengthens consumer rights in a converging internal market (cf. Bundesrat Opinion of 6 March 2009, BR official document 765/08 (Decision), point 17).

4. The Bundesrat therefore upholds its previous opinion that the review of the consumer *acquis* must not reduce the level of consumer protection, but should instead exploit the opportunity to close existing gaps and remove inconsistencies (cf. Bundesrat Opinion of 11 May 2007, BR official document 112/07 (Decision), point 1).
5. The Bundesrat nevertheless notes that, within the EU, gaps and inconsistencies now exist in a number of areas and there is a need to tackle the current challenges faced by consumer protection. This applies, for example, to ‘free’ digital services for which consumers do not pay with money but make their personal data available. This also applies to situations where consumers visit an online marketplace and do not always know if they are buying something from business operators or from other consumers. The Bundesrat welcomes the fact that the Commission addresses these problems in its proposal.
6. The Bundesrat also notes that, as shown by the information provided by the Commission, where consumer protection rules are infringed the penalties laid down in national provisions vary widely throughout the EU and are often set at a very low level.
7. The Bundesrat welcomes the fact that under the proposal for a Directive consumers are in future to be clearly informed, when buying a product from an online marketplace, whether they are acquiring products or services from a business or a private individual. Only in this way can consumers recognise and make use of the consumer rights available to them, such as legal guarantees or the 14-day right of withdrawal, when problems arise.
8. The Bundesrat also welcomes the fact that the proposal for a Directive seeks to achieve greater transparency with regard to the search results for online platforms by ensuring that in future consumers must be informed of not only the most important criteria of the search algorithms for determining the ranking and but also whether a search result is paid for by a business.
9. The Bundesrat explicitly supports the objective of placing consumer rights on the same footing in the case of digital services such as cloud storage services, social media or e-mail accounts where consumers make their personal data available rather than making a payment.

Specific remarks on the proposal

Amendment to Directive 2011/83/EU

10. The Bundesrat also welcomes the Commission’s objective of reducing the burden on traders with respect to fulfilling their obligations to provide information in the context of distance and off-premises sales.
11. The Bundesrat recognises the Commission’s efforts to introduce more flexibility with regard to communication options between traders and consumers by making it possible for web forms or chats to be used in future, provided that consumers are able to keep track of this communication (Article 8 of Directive 2011/83/EU).

12. The Bundesrat believes, however, that reducing the burden of information requirements in selected areas by means of the proposed amendment to Directive 2011/83/EU is insufficient. It therefore calls on the Commission to reduce the burden of the pre-contractual information requirements under Articles 5 and 6 of Directive 2011/83/EU for businesses as a whole. These information requirements can place disproportionate burdens on the business sector, in particular small and medium-sized enterprises. The legitimate interests of the business sector should therefore be better taken into account.

Article 3(4) of Directive 2011/83/EU makes provision for an exemption for off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50. Moreover, off-premises contracts for repairs and maintenance with a value not exceeding EUR 200 which are immediately fulfilled by both parties are subject only to restricted information requirements (Article 7(4) of Directive 2011/83/EU). However, those thresholds, which are uniform throughout Europe, do not reflect real life and differences in economic and purchasing power in the Member States. In a high-wage country like Germany they have virtually no effect. The thresholds should therefore be increased to a degree whereby corresponding services of relatively low value can be agreed and provided in all Member States without or only with limited information requirements.

13. The Bundesrat supports the consistency sought by the Commission between the current proposals to amend Directive 2011/83/EU and the Commission's proposal for a Directive on remedies for consumers for 'faulty' digital products (proposal for a Directive on certain aspects concerning contracts for the supply of digital content (BR official document 613/15)). Duplication of rules should in any event be avoided in the process.

Regarding the extension of the pre-contractual information requirements for online platforms and online marketplaces (Article 6a of Directive 2011/83/EU), the Bundesrat shares the Commission's view that online marketplaces should not be placed under an obligation to verify the legal status of third-party providers but should merely be obliged to enquire whether or not the third party is a trader for the purposes of consumer law and make this information available on the online marketplace.

The Bundesrat is nevertheless of the view that it should be made clear (at least in the recitals) that the consequences of online platforms and online marketplaces failing to comply with the information requirements are determined by national law.

14. The Bundesrat recognises the Commission's efforts to prevent the right of withdrawal from being abused in distance and off-premises contracts. It would point out, however, that the possibility of restitution is a key building block in the success of online trading. If, in line with the proposal for a Directive, sellers are to be able, in the event of withdrawal, to refuse to pay back the purchase price until they have actually received the product, this will place the burden of the risk associated with transportation upon consumers. Whether consumers receive their money back would in future depend on imponderables upon which they have no influence and against which they can protect themselves less easily than large businesses on the sellers' side. On top of this is the fact that sending a product back will become even more costly for consumers as they will be required to obtain evidence that the product has been handed over and will therefore be obliged to select a dispatch service with

- confirmation of receipt. The Bundesrat would therefore ask that the economic consequences of the proposed redistribution of the risk incurred by the person returning a product and the associated shifting of the risk of abuse be considered again carefully.
15. The Bundesrat is of the view that consumers should have the option, within the 14-day withdrawal period, of adequately examining the product they have ordered. Consumers have hitherto had the right to withdraw from contracts and return products even if they have used the products to a degree greater than that permitted. In order that the seller of the product does not suffer a financial loss, the buyer is required to compensate the seller for the reduction in the product's fitness for use. If this rule were to be abandoned, this would reduce the level of consumer protection and could undermine the right of withdrawal, as it would enable businesses in future to refuse to accept a product returned to them on the grounds that it had already been used to a degree beyond that permitted for examining its suitability. The Bundesrat would therefore ask the Federal Government to do what it can at EU level to ensure that the current version of Article 14(2) of Directive 2011/83/EU is maintained.
 16. The Bundesrat supports the Commission in its concern to increase transparency with regard to the personality and business status of the contracting partner and with regard to how search results are ranked when using online platforms.
 17. The Bundesrat notes that the rule on additional information requirements with respect to online marketplaces laid down in Article 6a of Directive 2011/83/EU does not apply to comparison websites. In the Bundesrat's view, there is also a risk that the obligation to disclose the main parameters of the ranking of search results could be circumvented if indirect connections in the context of multiple connection levels are not covered too. The Bundesrat would therefore ask the Federal Government to work towards expansion of the scope of the information requirements for online marketplaces.
 18. The Bundesrat is of the view that the objective of increasing legal certainty with respect to the use of online marketplaces will not be achieved through the proposed information requirements alone. As consumers are not always able to identify clearly who is their contractual partner with respect to the main obligation to be performed, especially where the operator of the online marketplace is also offering its own products or additional services, the Bundesrat considers it necessary for a rule to be established for cases of doubt. This could be geared to the principle enshrined in § 164(2) of the Civil Code, whereby the online platform is assumed to be transacting business for its own account in cases of doubt. At all events, the continued validity of § 164(2) of the Civil Code should be guaranteed despite the full harmonisation of Directive 2011/83/EU.
 19. The Bundesrat requests that steps be taken to verify whether the operators of online marketplaces could be placed under an obligation, within the bounds of what is technically and economically feasible, to take the necessary precautions in order better to protect consumers from disreputable providers, in particular from fake shops.
 20. In the Bundesrat's opinion, the operators of online marketplaces should also play a greater role in ensuring that the providers comply with their obligations under consumer law. For example, consideration could be given to introducing a duty of care to ensure that the providers indicate their name, address and contact details in full.

Consideration could also be given to introducing an obligation to structure ordering processes and the procedures for implementing and rescinding contracts in such a way that the fulfilment of consumer rights in distance contracts, and of warranty obligations in contracts of sale, are guaranteed and are not excluded in practice. In the case of warranty rights in particular, there is a certain tendency to make provision only for the contract to be rescinded rather than allowing the possibility of the contract being fulfilled subsequently, which can be advantageous to consumers in certain cases.

21. The Bundesrat takes the view that the planned amendment to Directive 2011/83/EU via Article 16n to exclude the right of withdrawal where a product is handled in a manner not necessary to establish its nature, characteristics and functioning could prevent consumers from exercising their right of withdrawal. The Bundesrat considers that the compensation laid down by law in these cases hitherto is a balanced and appropriate arrangement. Moreover, the introduction of an all-or-nothing principle would be likely to lead to an increase in legal disputes.

The Bundesrat also believes that the planned exclusion of the right of withdrawal, where a product is handled in a manner not necessary to establish its nature, characteristics and functioning, would pose a risk of abuse which would be to the detriment of consumers. Where a contract is rescinded in the usual way, traders have, in the Bundesrat's view, too great a freedom to judge whether the product which has been bought and sent back has been tried out and used by the consumer to an excessive degree. This can, in the Bundesrat's opinion, cause the right of withdrawal to be excluded in a manner which it considers abusive. This applies in particular to unreliable traders who deliberately send out substandard or damaged goods and deliberately abuse the exclusion of the right of withdrawal. The Bundesrat calls on the Federal Government to press for retention of the existing rules for maintaining an appropriate level of consumer protection.

Amendment to Directive 2005/29/EC

22. The Bundesrat welcomes the clarification to the effect that a commercial practice is misleading where a trader has paid for inclusion or placement on online marketplaces, comparison websites, app stores or search engines without this being made absolutely clear (Annex I, No 11 of the proposal for a Directive).
23. The Bundesrat also welcomes the opportunity for the Member States to restrict particular sales methods, such as questionable excursions involving sales events or the sale of goods or services at consumers' homes in order to protect young and old consumers more effectively from financial risks or health hazards (Article 3(5) of the proposal for a Directive).
24. By contrast, the Bundesrat does not see any need for an expansion of the remedies under EU law available to consumers as victims of unfair commercial practices (Article 11a of the proposal for a Directive).
 - a) The Bundesrat considers the needs assessment performed by the Commission to be inadequate. The Commission merely states in recital (14) that the national rules on individual remedies for consumers harmed by unfair commercial practices are diverging, without specifying exactly what these divergences are. Moreover, the Commission is unconvincing when it concludes, on the basis

that remedies are not being sought by consumers in significant numbers, that the existing options in terms of remedies therefore do not afford consumers who have been the victims of unfair commercial practices (recital (14)) sufficient individual opportunities to assert their rights. The Bundesrat would therefore ask the Commission to explain to what extent, in the contractual and non-contractual context, specific shortcomings exist in the Member States as regards the opportunities for consumers to seek legal protection.

- b) The Bundesrat takes the view that the existing legal remedies/remedial measures under national law, in particular under sales law, offer sufficient opportunities for consumers to extricate themselves, such as in the case of misleading advertising, from a disadvantageous contract (e.g. rescission on the grounds of fraudulent misrepresentation or error, withdrawal and return rights for distance contracts and doorstep selling, warranty rights). The existing non-contractual liability arrangements, such as product liability claims or claims in tort, also offer sufficient legal protection opportunities for consumers. There is no discernible need for European-level intervention, beyond the present level, in the different national systems for implementing the law on fair trading practices.
- c) The Bundesrat also doubts whether the legal remedies proposed by the Commission, to be used by consumers in the event of infringements of the law on fair trading practices, is in keeping with the rationale of European law on fair trading practices. While some provisions on fair trading practices protect consumers, the law on fair trading practices serves primarily to specifically protect competitors and ensure fair competition. It is therefore logically consistent that Directive 2005/29/EC has hitherto rightly refrained from granting consumers an individual right of action as the proper party if they have incurred losses as a result of unfair commercial practices. Recognition of individual rights of this kind for consumers could ultimately even call into question the existing high level of protection provided by European law on fair trading practices (cf. BT official document 15/1487, page 22).
- d) If Directive 2005/29/EC is to be opened to individual legal remedies for consumers, the Bundesrat would require the specific form of the measures to be laid down by the Member States so that they may be firmly enshrined within the corresponding national legal systems. Determining the conditions for and legal consequences of any legal remedies must be left to the Member States. The proposal for a Directive should make this clear with an explicit reference to national law.
- e) The nature of the obligation proposed by the Commission to create individual remedies in the contractual and non-contractual context for consumers who have incurred losses as a result of unfair commercial practices is not regarded by the Bundesrat as providing a sufficient basis for such remedies to be examined more closely, let alone put into practice in the Member States. It is not clear from the proposed Article 11a under what conditions consumers are supposed to extricate themselves from the contract (paragraph (2)) and are supposed to be able to demand restitution for the losses which they have incurred (paragraph (3)).

The Commission's proposal for a Directive leaves open what conditions are supposed to apply to the unilateral right of termination. According to the wording of Article 11a(a) of the proposal for a Directive, all effects of unfair commercial practices are to be eliminated by creating contractual and non-contractual remedies. Thus the only explicit requirement in paragraph (1) is that consumers must have suffered harm as a result of unfair commercial practices ('consumers harmed by unfair commercial practices'). No details are provided on whether consumers must have suffered specific harm in the sense of a pecuniary loss, infringement of their rights or similar, whether the unfair behaviour must take a certain form (such as unfair behaviour which is subject to prosecution) or whether the mere existence of unfair commercial practices should entitle consumers to extricate themselves from a contract. Nor does the proposal for a Directive indicate whether unfair commercial practices must exist when the contract is concluded, or whether blame on the part of the other contracting party is assumed. It is, after all, self-evident that no causal link can be assumed to exist between unfair commercial practices and the conclusion of a contract. The Bundesrat therefore calls on the Commission to make the provisions proposed in Article 11a(2) of the proposal for a Directive more precise and to clarify definitively the questions raised.

Regarding the obligation to create non-contractual remedies (paragraph (3)), the Commission's proposal only contains the requirement that consumers should be able to claim compensation for damages suffered by them. It is unclear, however, whether this corresponds to fault-based liability and whether the damages must have been caused by the unfair commercial practices. The Bundesrat therefore calls on the Commission to make the provisions proposed in Article 11a(3) of the proposal for a Directive more precise and to clarify the questions raised.

25. The Bundesrat does not see any need to include a new offence in Directive 2005/29/EC regarding dual quality products. Products are regularly adjusted to prevailing market requirements (such as the availability of raw materials) and tastes. Moreover, the proposal for a Directive itself recognises legitimate grounds for adjustments (recital (43)). Misleading marketing, however, has already been assumed hitherto to constitute an infringement of the Directive.

Direct transmission of the Opinion

26. The Bundesrat is sending this Opinion directly to the Commission.