

# A NEW DEAL FOR CONSUMERS – EFFECTIVE ENFORCEMENT OF CONSUMER RIGHTS

Position paper on the proposals of the European Commission for the Directive on representative actions, COM(2018) 184 final, and the Directive on better enforcement and modernisation of EU consumer protection rules COM(2018) 185 final.

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# I. SUMMARY

On 11 April 2018, the European Commission put forward a comprehensive legislative package proposing changes to a number of Directives with relevance to consumer law. Termed the ‘New Deal for Consumers’, the initiative consists of two proposals for new Directives – the Directive on Representative Actions<sup>1</sup>, which is intended to allow consumer organisations to bring legal actions to claim compensation on behalf of consumers, and an Omnibus Directive aimed at amending various horizontal consumer protection Directives<sup>2</sup>.

Overall, the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V. – vzbv) welcomes the initiative. It particularly welcomes the proposal for a Directive on Representative Actions, which appears to offer enormous potential. The disclosure of ranking criteria on online sales platforms is a first step towards greater transparency in platform-based transactions, but does not go far enough towards regulating platforms as a whole. In contrast, vzbv completely rejects the proposed amendments to the right of withdrawal. The full implications of certain aspects of the Commission’s proposal cannot (yet) be fully determined. This applies in particular to the Representative Actions Directive, which would necessitate far-reaching amendments to German law, and to the standardised criteria for penalties, which vzbv believes must not be allowed to undermine the established civil-law enforcement procedures. One thing that is clear, however, is that the current level of consumer protection must not be weakened.

- ❖ vzbv shares the view of the European Commission that compensation is the area of consumer law most in need of reform. Consequently, vzbv welcomes the Commission’s proposal to extend the existing injunction mechanism and make it an instrument for obtaining compensation. Under this proposal, companies would not just be ordered to cease and desist, but would also be required to provide redress for any harmful consequences of their unlawful conduct. In certain circumstances, consumer organisations would be able to bring a representative action to obtain recovery payments for consumers<sup>3</sup>. vzbv believes that linking the representative action to the action for an injunction – a familiar and effective remedy under German law – is the right approach, both in terms of creating the basis for consumers to obtain compensation and, at the same time, preventing abuse. It would also be a useful complement to the model case procedure recently adopted in Germany.
- ❖ vzbv is categorically opposed to the proposal that a right of withdrawal should not apply in cases where the purchased item has been used beyond mere trying on. The existing rules are fair and balanced. The obligation to pay compensation for diminished value provides an adequate remedy in the event that goods are used excessively before the right of withdrawal is exercised. The rules governing the way in which the reimbursement is performed should also be retained.
- ❖ The scope of the Consumer Rights Directive should also be extended beyond the Commission’s proposal, to include payment with non-personal data. In addition, all contracts should be covered – not just those relating to the provision of digital

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<sup>1</sup> COM(2018) 184 final.

<sup>2</sup> COM(2018) 185 final.

content or services. To ensure that transactions can be reversed when consumers provide data instead of paying a monetary price, a moratorium should be introduced – the length of which would be appropriate to the withdrawal period – during which only data that was essential for the provision of the service could be used. The Unfair Commercial Practices Directive should also include provisions on payment with data.

- ❖ The introduction of individual remedies in the case of breaches of the Unfair Commercial Practices Directive could be a useful addition to existing contractual and non-contractual claims. A minimum threshold should be considered in order to prevent excessively onerous legal consequences for providers.
- ❖ The disclosure of the parameters used to rank search results on online marketplaces and the additional requirements to provide information about the contractual partners and the applicability of consumer protection rules are a step in the right direction towards greater transparency and stronger regulation of platforms. However, these need to be phrased more precisely and should shift more responsibility onto the platform operators. Additional provisions are required concerning the liability of platforms, the regulation of ranking and review systems, and the portability of reputation capital.
- ❖ Standardised criteria for the imposition of penalties and revenue-based fines are, in principle, sensible elements of an effective enforcement system. Nonetheless, vzbv takes a sceptical view of the amendments proposed by the European Commission in so far as they may necessitate a system of consumer rights enforcement by public bodies. vzbv believes the selective use of enforcement by public bodies in addition to civil-law consumer enforcement measures in Germany makes sense, but warns against a general introduction of enforcement of consumer rights by public bodies where no specific need has been identified.
- ❖ The provision allowing individual Member States to introduce restrictions on doorstep selling is welcome, if this protects consumers against abusive marketing or sales practices.

The term ‘New Deal’ raises high expectations because of its association with the economic and social reforms of the US president Franklin Roosevelt in the 1930s. Compared with those radical reforms that reached into every level of society, the proposals of the European Commission appear rather small-scale. The amendment of the Injunctions Directive is certainly a comprehensive reform and could ultimately produce tangible benefits and lead to the promised fundamental reshaping of the framework for consumers. However, a ‘New Deal for Consumers’ worthy of its name would have to do more than simply improve the way rights are enforced. It would also have to introduce a ‘consumer-focused economic policy approach’ that reforms current competition policy and the way in which products and services are marketed to end consumers. When it comes to enforcement, at least, the European Commission must be measured by the high expectations it has created with its ambitiously named initiative.

## II. REPRESENTATIVE ACTIONS DIRECTIVE

The centrepiece of the ‘New Deal’ is the reform of the existing Injunctions Directive<sup>4</sup> to give consumers a means of obtaining compensation in the event of a breach of consumer law. The changes that significantly expand the legal consequences of the representative action are intended to have a broad impact similar to that of the model case procedure adopted by the German parliament in June 2018. Moreover, the proposed Directive will allow courts to issue redress orders that include payments to harmed consumers. vzbv welcomes these proposals as a useful addition to the regulatory framework governing representative actions in Germany. Like the model case procedure<sup>5</sup> recently introduced in Germany, the Commission’s proposals build on the type of representative action that is successfully and effectively used to obtain injunctions. The model case procedure can therefore to some extent be seen as a partial implementation of the ‘New Deal’ proposals. vzbv welcomes the fact that the Commission’s proposal for a Representative Actions Directive go further than the model case procedure and introduces measures to remedy the consequences of consumer rights violations. Where the loss suffered by a consumer can be easily quantified and there is a documented relationship between provider and consumer, the consumer should also be able to obtain compensation directly by means of the representative action.

### 1. EXTENDED ACTION FOR AN INJUNCTION

Until now, the action for an injunction has been a key instrument in enforcing consumer protection in civil law. It is used by consumer groups and other organisations working to ensure fair competition to force companies to cease anti-competitive behaviour, for example by requiring them to remove misleading advertising or amend unlawful terms and conditions. Used in this way, an action for an injunction is a tried-and-tested instrument for preventing future violations of consumer law.

However, an action for an injunction mainly has future effect. It is of little use to consumers looking for compensation for losses suffered as a result of consumer-law violations that have already been committed. The main problem here is one of limitation: many years can pass before a final and binding judgment is obtained in a representative action. During this time, the individual claims of the consumers affected in the same case become statute-barred. And even once a court has ruled that the affected consumers are entitled to compensation or refunds, in the past, this ruling has only applied to the parties to the representative action proceedings. Only in cases involving a company’s general terms and conditions are consumers entitled by right to rely on a representative action case judgment.<sup>6</sup>

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<sup>4</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests

<sup>5</sup> Federal Government bill for the introduction of a civil-law model case procedure, 9 May 2018, available from 15 May 2018 at [http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/DE/Musterfeststellungsklage.html;jsessionid=095FA08673BACDE59EA5F534B3A4B704.2\\_cid334](http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/DE/Musterfeststellungsklage.html;jsessionid=095FA08673BACDE59EA5F534B3A4B704.2_cid334) (in German only); Recommendation and report of the Legal Affairs and Consumer Protection committee dated 13 June 2018, printed paper 19/2741, available at <http://dipbt.bundestag.de/doc/btd/19/027/1902741.pdf> (in German only); Record of parliamentary proceedings 19/39 of 14 June 2018, available at <http://dipbt.bundestag.de/doc/btp/19/19039.pdf> (in German only).

<sup>6</sup> §11 of the German Injunction Act (Unterlassungsklagengesetz),

The proposal for a Directive, on the other hand, provides that actions for an injunction can also work in favour of consumers by suspending the limitation period for their claims from the time that the action is filed. Judgments also have binding effect in favour of consumers who have suffered loss. In this respect it corresponds to the model case procedure adopted in Germany, although overall it goes further than that legislation.

## 2. REDRESS ORDER

The 'New Deal' also provides that in certain cases the action for an injunction can be combined with a redress order – for example for a direct refund to consumers. The consumers directly affected by the breach of the law would thus benefit directly from the representative action.

vzbv has been calling for an uncomplicated refund mechanism of this kind in simple cases for many years. A right to demand a redress order essentially already exists in German law. Until now, however, there has been dispute as to whether a redress order can also include repayments.<sup>7</sup> The decision of the Dresden regional appeal court has now confirmed that it can.<sup>8</sup>

Cases in which this could apply include unlawful administration fees that have been collected from existing customers and could be refunded in the same way. If the amount to be refunded is not in dispute and the recipient and their bank details are known, the redress order offers an opportunity to end the dispute for all parties quickly, simply, and without additional cost, in particular without the need for subsequent individual claims to be brought. For categorisable or standardised amounts, the redress order could therefore provide a good complement to the model case procedure.

vzbv expressly welcomes the fact that the proposed Directive for the New Deal will enshrine in statute the mechanism to effect refunds that has been developed by judges in Germany.

The reversal of a transaction by means of a redress order will only be possible in cases where the repayments are not dependent on individual circumstances that cannot be decided by means of the representative action. Accordingly, the proposal provides that in simple cases where the consumers affected are identifiable and have suffered comparable harm as the result of a specific action or practice, there should be direct redress and an individual mandate to initiate proceedings is not required.<sup>9</sup> Where there is no long-term, documented customer relationship, an official announcement of the redress measures and subsequent registration of consumers is necessary for practical reasons, to enable the supplier to actually make the payments.

However, if the facts of the case are such that it is not suitable for a subsequent redress order, for example because the harm suffered varies too widely from consumer to consumer, the Member States can also provide that only a declaratory judgment establishing liability is issued.<sup>10</sup> This essentially corresponds to the model case procedure adopted in Germany by the German Bundestag.

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<sup>7</sup> See also judgment dated 10 December 2015 - 5 O 1239/15 - from the Leipzig regional court.

<sup>8</sup> Dresden regional appeal court, judgment of 10 April 2018 - 14 U 82/16.

<sup>9</sup> Article 6 (3) (a) of the proposed Directive.

<sup>10</sup> Article 6 (2) of the proposed Directive.

### 3. SEIZURE OF PROFITS

The proposal also provides that in cases where individual consumers have suffered only a very small loss but these losses, added together, can amount to a considerable sum, the redress order can be made in favour of a public purpose serving the collective interest of consumers, without any individual mandate being required.<sup>11</sup> An example would be unlawful charges that may only have cost individual consumers a few cents or euros so consumers have a rational disinterest<sup>12</sup> in pursuing individual claims.

vzbv welcomes this proposal as a sensible way of building on the German seizure-of-profits mechanism (§10 of the Act against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb - UWG]). In the past, seizure of profits has required the unjust gains to have knowingly been earned unlawfully. It is exceptionally difficult to prove such intent, and in view of the considerable sums at stake in profit seizure cases, this inhibits the willingness to bring such actions at all. Consequently, vzbv believes that the Commission is correct to focus in its proposal on the violation of the law and not on the question of fault.

Moreover, vzbv has for years advocated earmarking seized unjust gains for consumer protection purposes. The proposal also provides for such use. The money would then at least benefit consumers indirectly. The European Commission does not, however, stipulate who decides how the funds should be used and specifically who would benefit from them. There is a need for further clarification here.

It should also be emphasised that the seizure of profits will only be a subsidiary measure, even under the 'New Deal. It will only apply if the cost of refunding the consumers affected would be out of all proportion to the sums involved. Individual redress must always take precedence.

### 4. SCOPE

The scope of the Directive is determined by the provisions of Union law listed in Annex I.<sup>13</sup> In comparison to the annex to the current Injunctions Directive, which contains references to just 15 other Directives, the list here is considerably longer, with 59 Directives and Regulations. This is to be welcomed in principle, but in Germany, in view of the very broad and open formulation of §2 of the Injunction Act (Unterlassungsklagengesetz – UKlaG), it may essentially serve to provide clarification<sup>14</sup>, at least in terms of actions for an injunction.

It is unclear whether the list appended to the Representative Actions Directive is intended to be exhaustive in the sense of full harmonisation, or whether the Member States can determine, for example, that the implemented provisions also apply to other provisions of Union law. Article 1 (2) gives Member States the right to grant qualified entities to use *other* procedural means to bring actions aimed at the protection of the collective interests of consumers. However, it is not clear whether extending the scope

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<sup>11</sup> Article 6 (3) (b) of the proposed Directive.

<sup>12</sup> 'Rational disinterest' refers to a situation where consumers decide not to take legal action to pursue low-value claims because they consider the effort, cost, time and risk of enforcing their rights to be disproportionate to the value of the claim.

<sup>13</sup> Article 2 (1) of the proposal.

<sup>14</sup> §2 (1) sentence 1 UKlaG requires only that a provision of consumer protection law has been breached. This means that breaches of the Regulations and Directives listed by the European Commission can be made the subject of actions for an injunction under German law using the currently available mechanisms.

of application by adding other provisions not listed in Annex I falls within the definition of ‘other means’ in this sense. Article 7 of the current Injunctions Directive says that the Member States can grant qualified entities more extensive rights. The changes to the wording here could be construed as meaning that the scope of the procedural means listed in the Directive is solely governed by Annex I. This interpretation is supported by recital 24 which states that the collective redress mechanisms designed by the Member States must comply with the modalities set by this Directive.

In view of the wide scope of application provided by §2 UKlaG, a definitive European rule would be detrimental from a German perspective, as it would mean that qualified entities would not be able to file any applications for an injunction against the violation of any provision not listed in Annex I. vzbv therefore advocates allowing the list to be extended by the Member States and adapting the wording accordingly.

## **5. QUALIFIED ENTITIES**

Under the currently applicable Injunctions Directive, Member States are largely free to determine for themselves which entities they designate as competent to bring legal action and which criteria apply. The new proposal for a Directive deviates substantially from this starting point in two crucial respects: the approval of ‘independent public bodies’ and the specification of criteria that the qualified entities have to meet.

### **5.1 Independent public bodies**

There has been a system of predominantly private enforcement of consumer rights in Germany for more than 50 years, where breaches of the law can be effectively remedied by organisations entitled to bring legal actions. This system has worked well and should be retained. Against this background, the Member States should be allowed to decide whether to retain a system of private enforcement or implement a public system.

However, the proposal stipulates that both consumer organisations and independent public bodies should be authorised to bring legal proceedings within the meaning of the Directive. In Germany, the corresponding public-law structures and powers do not exist and would have to be created. It is likely that the changes would not stop at a simple extension, but would result in reform and a fundamental shift. This far-reaching measure, which would result in a radical intervention in the organisation of the German enforcement system, is neither expedient nor proportionate. It should not be allowed to be imposed by means of the Representative Action Directive.

vzbv therefore strongly advocates amending this provision of the Directive proposal (Article 4 (3)) to the effect that only consumer organisations have to be qualified. The designation of public bodies should be an additional, non-mandatory option available to Member States when transposing the Directive into national law. This option of allowing public bodies to enforce consumer rights is especially important in countries where consumer organisations are permitted by law to bring legal action, but in reality are not in a position to guarantee compliance with consumer law. This is not the case in Germany.

### **5.2 Harmonisation of the criteria for approving qualified entities**

Under the currently applicable Injunctions Directive, the Member States themselves decide the criteria used in the approval of qualified entities. This approach has often

been criticised in Germany, because the control and approval of entities authorised to bring actions is determined solely by the home country where they are based.

This criticism is generally justified. However, the political answer should not be national isolation. Cross-border access to justice for consumers, including collective redress, is an absolutely essential part of the single market. Export-oriented economies such as Germany in particular cannot expect to be able to sell goods and services across the entire single market while preventing their customers from collectively exercising their rights by ensuring that certain rights are reserved exclusively for national bodies.

The right – European – solution must instead be to retain the principle that qualified entities are approved by their home country, and to ensure the quality of the entities entitled to bring legal action through the application of harmonised criteria. To ensure that the approval procedure is carried out properly, courts could be given a supervisory role. vzbv has always been of the view that the country-of-origin principle for goods and services can only be accepted if it is underpinned by a high level of consumer protection in terms of product safety and consumer rights. Companies should be able to demand exactly the same thing when it comes to the approval of entities authorised to bring legal action.

The fact that the proposal for the new Directive places wide-ranging requirements on the qualified entities (Articles 4 to 6) is therefore to be welcomed. The proposal makes clear that the purpose of the Directive is to establish safeguards to avoid abusive litigation (Article 1 (1)). It therefore sets out criteria that the entities need to satisfy in order to qualify. The entity must be properly constituted and non-profit making and must pursue legitimate objectives (Article 4 (1)). These criteria do not constitute a one-off hurdle that the entity has to clear in order to gain certification, but must be assessed on a regular basis to ensure continued compliance. If the entity no longer complies with these criteria, it loses its status. The Commission also makes it clear that the courts can examine in a specific case whether the purpose of the duly approved qualified entity justifies its taking action (Article 4 (5)). The action is admissible only if there is a direct relationship between the main objectives of the qualified entity and the provisions of law alleged to have been violated (Article 5 (1)).

vzbv takes a critical view of the proposal to give Member States the right to "designate a qualified entity on an ad hoc basis for a particular representative action" (Article 4 (2)).

The proposal also sets out comprehensive requirements in terms of the funding of the qualified entities (Article 7). Qualified entities seeking a redress order must declare at the start of the action the source of the funds used for its activity in general and to support the specific action. If the action is funded by a third party, special provisions apply: the third party is prohibited from influencing decisions of the qualified entity in connection with the proceedings, such as any settlements, for example. The third party is also prohibited from funding proceedings against competitors or against a defendant on whom the third party is dependent. These circumstances must be assessed by the courts and may lead to qualified entities not being allowed to assert claims in individual cases. However, the criteria against which the merits of the action are judged in connection with third-party funding need to be made more specific so that the courts can decide in an individual case whether an action is permitted or not.



If commercial litigation financiers are used, there needs to be a discussion about whether better solutions are available to avoid the substantial deductions that consumers have to pay if the action is successful.

Overall, vzbv explicitly welcomes the precautions taken to protect against abuse. vzbv proposes introducing additional approval restrictions in order to strengthen trust in collective redress and to allay fears of abuse:

❖ In a cross-border action, the right to bring actions in the specific case could be made dependent on it having a significant impact on consumers in the home country of the litigating entity. The current proposal does not differentiate between domestic and cross-border legal violations (Article 2 (1)) and explicitly permits Member States to designate as qualified entities consumer organisations that represent members from more than one Member State (Article 4 (3) sentence 2). According to Article 16, qualified entities can in reality decide for themselves which Member States they wish to be active in.

It would be better to allow Member States to decide whether they wish to approve collective actions by an entity that represents consumers from Member States other than that in which it is approved. This would ensure that there is a sufficiently strong relationship between an entity bringing action and the consumer interests in the Member State of this entity.

❖ vzbv also proposes banning contingency fees (“no win no fee”) for lawyers in connection with representative actions. The aim of a representative action should always be to compensate consumers fully, not to use the majority of the sum in dispute to pay the lawyers’ fees. Large proportions of the payout going to lawyers and inflated demands for punitive damages are the key features on which the EU’s proposed Directive are intended to differ from the American class action lawsuit. This could also dispel fears of the Directive paving the way for a claims industry in a similar mould to the American model.

**This proposal for the amendment of the Injunctions Directive may help to remedy some of the deficits in the area of collective redress. vzbv believes that linking the representative action to the action for an injunction – a familiar and effective remedy under German law – is the right approach. The provisions concerning redress fit well into the existing system. However, there is a need for further adjustment in the aspects dealing with the approval of qualified entities.**

### III. RIGHT OF WITHDRAWAL

The right of withdrawal is the central right of consumers in online shopping and other forms of distance selling. It protects the legal position of consumers by giving them a 14 day cooling-off period from the day they receive the goods. This is necessary to enable consumers to thoroughly inspect the goods in the same way as they can in a bricks-and-mortar store. The right of withdrawal thus helps to build trust and may be one of the reasons why the number of distance selling transactions, and the share of revenue earned through such transactions, is steadily growing.

#### 1. NO RIGHT OF WITHDRAWAL IF GOODS HAVE BEEN USED

Businesses have long been claiming that consumers are increasingly abusing the right of withdrawal<sup>15</sup>. In the fashion sector, in particular, it is alleged that consumers do not just try clothes on, but actually wear them several times before seeking to rescind the contract of sale. In many cases, the returned garments are not suitable for resale and have to be disposed of. In its New Deal, the European Commission regards the obligation of a retailer to accept returns even in this condition as excessively onerous. It believes that this obligation distorts the balance between a high level of consumer protection and the competitiveness of enterprises (recital 35). It proposes amending Article 16 of the Consumer Rights Directive<sup>16</sup> to remove this right of withdrawal in future if a consumer has used goods more than is necessary to assess their qualities and functioning (Article 2 (9) third subclause of the Omnibus Directive).

vzbv does not agree with the European Commission's conclusion in this regard. Under the current legislation, the consumer is liable for any diminished value of the goods where this results from the goods being handled beyond the extent necessary to establish their nature, characteristic and functioning (Article 14 (2) of the current version of the Consumer Rights Directive). Contrary to the view of the Commission, this provision strikes a good balance between the interests of the consumer and those of the seller, and as such should be retained. There is no quantitative evidence of any 'abuse' of the right of withdrawal in certain sectors. Without this evidence there can be no justification for any such far-reaching changes to the existing balanced law. During the REFIT process, the European Commission specifically consulted small and medium-sized enterprises ('SME Panel') to obtain qualitative and quantitative evidence of the need for a change in the provisions governing the right of withdrawal. The figures collected during this exercise do not, in the view of vzbv, provide sufficient evidence of a need for the proposed changes. On page 18 of the grounds for the proposed Directive, the Commission reports that small and medium-sized businesses incurred average annual losses of 2,223 euros as a result of the current obligation to accept such 'unduly tested goods', with a median of 100 euros (!). The figures presented by the Commission certainly do not substantiate the claim that an 'abuse' of the right of withdrawal is causing substantial loss, particularly among small and medium-sized businesses. The low median value in particular suggests that the majority of businesses suffer no loss at all, or very low losses, as a result of the current right of withdrawal.

If transparent figures can be produced to prove that the right of withdrawal is indeed being abused in certain sectors, such as the fashion industry, then consideration should be given to other means of preventing such abuse. One possibility, for example, might be for clothing retailers to put technical safeguards in place that allow the goods to be tried on, but only worn if clearly visible labels or similar are removed first. The removal of such a protective device would invalidate the right to withdrawal. Similar measures could be used for technical devices such as televisions, which would initially be supplied in a restricted test mode. Active steps would be required to activate the full functionality of the device, and the user would be warned that by taking these steps, they would lose their right of withdrawal. The maximum number of permitted operating

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<sup>15</sup> See also the response of the German Retail Federation (HDE) to the draft legislation concerning compensation for diminished value when distance-selling contracts are cancelled:  
[https://www.einzelhandel.de/index.php?option=com\\_attachments&task=download&id=5540](https://www.einzelhandel.de/index.php?option=com_attachments&task=download&id=5540) (available in German only).

<sup>16</sup> Directive 2011/83/EC of the European Parliament and of the Council of 25 October 2011 on consumer rights

hours within the test period could be limited. Many technical devices already record operating hours. Such measures would be more effective than the proposed provisions because they would largely exclude disputes about whether goods had been used in a manner that was not necessary to test them.

vzbv believes that any instances of excessive usage could still be managed by means of a claim for diminished value – which in an individual case, such as the destruction of the item through improper usage, may be up to 100 percent of the purchase price<sup>17</sup>. Completely removing the right of withdrawal in these cases would ultimately lead to greater uncertainty and a loss of trust on the part of consumers, which cannot be good for retailers as it could result in a decline in the volume of online shopping. Individual companies might even try to stem this anticipated loss of trust with goodwill measures. Generally speaking, only larger companies are in a position to do this. So this would strengthen large companies who would be able to further consolidate their market power.

vzbv also points to further changes that would be necessary if the proposed provisions concerning the removal of the right of withdrawal were to be implemented. Under current law, companies have to inform consumers in clear and understandable language, prior to the conclusion of a contract, of the circumstances under which they lose their right of withdrawal (Article 6 (1) (k) of the Consumer Rights Directive). However, the Directive does not state specifically what happens if no such information is provided. Article 10 of the Directive only relates to cases where the consumer has not been advised of their right of withdrawal. It does not explain what happens if the customer is not informed about the possible loss of their right of withdrawal. It is accepted in the literature and in the case law in Germany that, in the event of a breach of the duty to provide information, consumers have a right to claim compensation pursuant to §§280 and 241 (2) of the German Civil Code (Bürgerliches Gesetzbuch – BGB). In such cases, consumers can demand to be put in the position they would have been in had they been properly informed, i.e. in the position they would be if they still had a right of withdrawal available to them.<sup>18</sup> To ensure legal certainty, Article 10 of the Consumer Rights Directive should be extended to provide for the scenario described here.

Finally, the Commission's proposal does not explain who would be liable for the cost of a second delivery if the seller were to reject the withdrawal and send the goods back to the consumer, nor who bears the risk if the goods are damaged or lost during the second delivery.

## 2. TIMING OF THE REIMBURSEMENT

The European Commission also sees a need for action on another aspect. It proposes amending Article 13 (3) of the Consumer Rights Directive to allow retailers to refuse to reimburse the consumer until the goods have been returned. Changing the time at which the purchase price is refunded further weakens the position of the consumer. Under the Distance Selling Directive<sup>19</sup>, the principle of reciprocal and simultaneous

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<sup>17</sup> cf. Bundestag printed paper 17/12637, p. 63.

<sup>18</sup> cf. BeckOK BGB/Martens BGB §312g para. 13.

<sup>19</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

performance applied<sup>20</sup>. However, the Consumer Rights Directive abandoned this principle and required the consumer to perform their part of the bargain first.

Until now, however, it has been sufficient for the consumer to provide evidence – such as proof of posting – that they have sent the item back (Article 13 (3) of the Consumer Rights Directive). In most cases it is unlikely to matter to the consumer whether the reimbursement is fulfilled as soon as the goods have been sent back or when they are received by the seller. Generally speaking, the difference between these two points in time is only a few days. If a retailer is on the verge of insolvency, however, every day of delay can significantly affect the chances of the consumer getting the reimbursement, and there is a risk that they may end up without either the goods or the money. As the consumer has done everything required of them by handing over the parcel to the carrier, evidence of this should be sufficient to trigger the obligation to reimburse.

If the returned goods are damaged in transit, there is also a risk of further legal disputes where the consumer is in an extremely weak position purely by virtue of the fact that they no longer have the goods in their possession and, at the same time, haven't been reimbursed either. It is unclear whether the change also implicitly indicates who bears the risk for the return of the goods. The current Consumer Rights Directive is silent on this point, which means that Member States have been able to adopt their own rules. But this lack of clarity should be resolved with an explicit provision that places the risk of sending back the goods on the seller. The proposed change will put the consumer in the position of potentially having to sue to recover the refund. In practice, this de facto weakened position will deter consumers from making claims – particularly where small sums are involved. This particularly applies in combination with the restriction on the right of withdrawal outlined under point 1 above. In future, retailers would be able to wait until they have received the returned goods and could then decide whether to accept the withdrawal or not, because they believe the goods have been 'used' excessively by the consumer.

In vzbv's view, the figures collected by the Commission from the SME Panel provide a further argument against the need for change. According to those figures, small and medium-sized enterprises lose an average of 1,212 euros a year in this way, with a median value of 0 euros (!).

**The existing provisions on the right of withdrawal are fair and balanced. The obligation to pay compensation for diminished value provides an adequate remedy in the event that goods are used excessively before cancellation. The provisions governing the way in which reimbursements are processed should also remain unchanged.**

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<sup>20</sup> §357 (1) BGB (old version) in conjunction with §348 BGB; only in cases where a consumer exercised their right of return pursuant to §356 of the old version of the BGB (a provision that was repealed in 2013) did the principle of reciprocal and simultaneous performance not apply, as in that instance the retailer did not know the consumer was exercising their right to return goods until the item had been returned.

## IV. PROVIDING DATA INSTEAD OF MONETARY PAYMENT

Consumers are increasingly using online services for which they do not have to pay money. These include social media, online services and messaging services. However, such products are not 'free' in the wider sense. Users supply data to providers who use this data as part of their business model. This is how the product or service is financed. In the past, vzbv has spoken out in favour of recognising such business models in contract law<sup>21</sup>, for example in connection with the proposal for a Directive on certain aspects concerning contracts for the supply of digital content. It is important to reiterate that it is not a question of putting personal data on an equal footing with money as a form of payment. In its opinion on the proposal for a digital content directive<sup>22</sup>, the European Data Protection Supervisor rightly pointed out that data protection enjoys priority over contract law and cannot be supplanted by it. However, consumers should be able to enforce certain contractual rights beyond and independently of the provisions of data protection law.

In Article 2 (1) (d) of the Omnibus Directive, the European Commission proposes extending the scope of the Consumer Rights Directive to include contracts governing the provision of digital services where consumers provide personal data. As a result, the information obligations and the right of withdrawal under the Consumer Rights Directive should apply to such services. The definitions of digital content according to the revised Article 2 no. 11 of the Consumer Rights Directive and digital services under the new Article 2 no. 17 of the Consumer Rights Directive correspond to those of the draft for a Directive on certain aspects concerning contracts for the supply of digital content. The reform proposal does not cover contracts that do not involve the provision of digital content or services, but for which data is nevertheless provided as counter-performance. Such a scenario may not be very common at present, but in order to future-proof the Directive these contracts should also be included in its scope. Furthermore, it is extremely important that not only personal data but data of all types is regarded as contractual counter-performance. Non-personal data, such as some machine-generated information, will play an increasingly important role in future as 'merchandise'. It would be extremely short-sighted not to recognise and prepare for this.

Consequently, the requirements of the Consumer Rights Directive also apply to these contracts. Pursuant to Article 5 and Article 6 of the Directive, consumers must therefore be informed – before entering into a contract – of aspects such as the identity and contact details of the trader and the functionality of the digital content or the services. This is essentially to be welcomed.

Furthermore, consumers are supposed to have a right of withdrawal pursuant to Article 9 of the Consumer Rights Directive. For the reversal of a transaction involving the consumer's personal data, reference is supposed to be made to the provisions of the General Data Protection Regulation. Unfortunately, it is not clear precisely what this means. In respect of other digital content (other than personal data) created or

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<sup>21</sup> For vzbv's position on this, see: [https://www.vzbv.de/sites/default/files/17-01-10\\_vzbv\\_stellungnahme\\_digitale\\_inhalte.pdf](https://www.vzbv.de/sites/default/files/17-01-10_vzbv_stellungnahme_digitale_inhalte.pdf) (available in German only).

<sup>22</sup> [https://edps.europa.eu/data-protection/our-work/publications/opinions/contracts-supply-digital-content\\_en](https://edps.europa.eu/data-protection/our-work/publications/opinions/contracts-supply-digital-content_en)

uploaded by the consumer, the provisions of the Digital Content Directive concerning the termination of contracts are supposed to apply.

In vzbv's view, the provision proposed here is not adequate to guarantee a high level of consumer protection. It must be made sufficiently clear that consumers are able to withdraw their consent to the processing of personal data at any time, in accordance with the General Data Protection Regulation. The consequences under contract law of this data protection principle should be adequately specified. The proposal only seeks to exclude the right of withdrawal for contracts where the consumer pays a price as counter-performance, and where performance of the contract will begin with the prior consent of the consumer. However, the right of withdrawal in cases where the consumer provides data instead of paying a price for services does not bring the consumer any benefit over and above the provisions governing withdrawal of consent under data protection law, as the trader is allowed to process the data from the time at which the contract entered into force and therefore gains an irreversible benefit. Only once the contract has been withdrawn is the trader no longer permitted to use the data. To ensure that the contract can be reversed as fully as possible after the consumer has withdrawn from the contract, it is necessary to introduce a 14-day moratorium on use of the data by the trader. This is the only way to ensure that the right of withdrawal has any true value in a 'payment with data' transaction. This moratorium should apply to data that is not essential to enable performance by the trader.

It would also be sensible to extend Article 6 (1) of the Consumer Rights Directive to include a requirement to inform consumers that, although they are not paying in money for the goods or services, the data they are providing is commercially exploited. In accordance with Article 8 (2), such information should be provided in a clear and prominent manner, immediately before the consumer places their order.

The Commission's proposal is limited to changes to the Consumer Rights Directive. In vzbv's view, a similar change to the Unfair Commercial Practices Directive would also be useful. Annex I of the Directive lists a number of business practices that are considered unfair in any circumstances. Number 20 states that it is misleading to describe a product as 'gratis', 'free' or 'without charge' if the consumer has to pay anything other than the unavoidable cost (...). In the relevant case law, only financial charges are regarded as costs. Payment with data is not covered. In a recent action against Facebook, vzbv sought an injunction to prevent the company from using the slogan 'Facebook is free and always will be' but lost in the court of first instance.<sup>23</sup>

**The scope of the Consumer Rights Directive should also be extended beyond the Commission's proposal, to include payment with non-personal data. In addition, all contracts should be covered – not just those relating to the provision of digital content or services – and additional requirements concerning the provision of information should be included. To ensure that transactions can be reversed when consumers pay with their data, a moratorium should be introduced – the length of which would be equal to the withdrawal period – during which only data that was essential for the provision of the service could be used. The Unfair Commercial Practices Directive should also classify statements that refer to payment with data as gratis, free, or similar, as misleading.**

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<sup>23</sup> Berlin Regional Court, judgment of 16 January 2018 - 16 O 341/15.

## V. INDIVIDUAL REMEDIES FOR VICTIMS OF UNFAIR COMMERCIAL PRACTICES

In Article 1 (4) of the Omnibus Directive, the Commission proposes adding a new Article 11a to the Unfair Commercial Practices Directive (UCPD)<sup>24</sup>. Subsection 1 of this new provision states that contractual and non-contractual remedies should be available for consumers harmed by the unfair business practices covered by the Directive. Subsection 2 provides that contractual remedies must, as a minimum, include the possibility for the consumer to unilaterally terminate the contract. Subsection 3 requires non-contractual remedies to be provided that enable consumers to claim compensation for loss or damage suffered.

vzbv believes that individual remedies of this kind may be a useful addition to existing contractual and non-contractual claims in specific cases. The provisions of the German Unfair Competition Act (UWG), which transposes the UCPD into national law in Germany, have so far largely not been regarded by the courts as protective laws within the meaning of §823 (2) BGB, as they are merely intended to protect consumers as a group.<sup>25</sup> This protection is primarily ensured through general preventive claims for injunctive relief that can be brought by consumer organisations on the basis of unfair competition law.<sup>26</sup> These provisions are supposed to be final. The breach of competition law does not have a direct impact on civil law in general. Individual claims can therefore only arise on the basis of the other provisions of civil law that apply to private individuals. There are a number of remedies that come to mind here, such as voidability of declarations of intent under §§119, 123 BGB, rights of withdrawal under §§312 et seq. BGB, or the classic legal guarantee right. Claims for compensation can also be brought via the *culpa in contrahendo* provisions (§§311 (2), 280 BGB) or §§823 (1), 824 and 826 BGB.

Nevertheless, it appears appropriate to enshrine other individual rights for consumers directly into competition law. Not every breach of trade practices legislation has civil law consequences, as the elements of these provisions do not run in parallel. In many cases, individual legal remedies for breaches of the UCPD would plug a gap and be a useful addition to existing rights. It is also worth considering whether breaches of competition law could be given particular consideration in the interpretation of the existing contract law provisions and be integrated into the existing system in this way. For legal guarantee rights under contracts of sale, there is a fundamental principle that priority is given to supplementary performance (*Nacherfüllung*). Consideration could be given to whether a (serious) breach of competition law could be regarded as an indicator that any supplementary performance would be unreasonable for the consumer so that immediate revocation would be an option, as provided for under §440 BGB. Unfortunately the Directive is silent on the specific modalities of individual claims. There

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<sup>24</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market.

<sup>25</sup> cf. Köhler/Bornkamm/Feddersen/Köhler UWG §3 para. 10.7; MüKoUWG/Micklitz UGP-Richtlinie Art. 11 para. 19, which describes the German legal position against the background of the adoption of consumer protection as the explicit aim of the Unfair Competition Act as 'no longer tenable'.

<sup>26</sup> cf. Köhler/Bornkamm/Feddersen/Köhler UWG §1 para. 39.

would be questions to answer, such as whether Member States have to provide a right to terminate the contract in the event of any breach of the provisions of the UCPD, and whether some kind of limitation period could be introduced.

However, these measures alone are not expected to have a significant widespread impact, as consumers are often reluctant to take legal action in cases of competition law infringements because of the risk of incurring costs and the effort involved. For this reason, strong legal instruments providing collective redress are needed, of the kind proposed by the European Commission with its reform of the Injunctions Directive. If qualified entities pursuant to Article 5 (2) of the proposed Representative Actions Directive win an injunction prohibiting unfair commercial practices, consumers could – if they were entitled to direct, individual legal remedies as a result of the breach – benefit directly from the binding effect of such a final judgment pursuant to Article 10 (1) of the Directive.

Those who are opposed to the introduction of individual legal remedies often claim that they would constitute popular actions and businesses would face a barrage of formal warnings and lawsuits from consumers.<sup>27</sup> However, this argument is not persuasive. It is certainly not the case that disinterested and uninvolved consumers can declare themselves representatives of the general population. It is necessary in a specific case for the consumer to be personally affected by the anticompetitive practice in order to assert a claim.<sup>28</sup> The Commission's proposal does not provide any further details on the precise nature of individual legal remedies. That gives rise to fears that such additional remedies would potentially lead to disproportionate legal consequences because consumers may be able to demand reversal of a contract even years after the actual breach of competition law took place. Such fears could be allayed through a minimum threshold for the assertion of individual remedies or by explicit acknowledgement that Member States have freedom to decide their own rules.

**The introduction of individual legal remedies in the case of breaches of the UCPD could be a useful addition to existing contractual and non-contractual claims in individual cases. A minimum threshold should be considered in order to prevent excessively onerous legal consequences for providers.**

## VI. PLATFORM TRANSPARENCY

Consumers use online sales platforms for speed and convenience. When they enter a search query, it is the algorithm used by the platform operator that determines which products are displayed, and the order in which the results are ranked. Consumers usually have no means of knowing whether products of certain manufacturers or suppliers are given preference in the listings. Nor are platforms always fully transparent. It is often hard for consumers to tell who their contract partner is. In Article 2 (4) of the Omnibus Directive, the European Commission therefore proposes adding a new Article 6a to the Consumer Rights Directive with special provisions for online marketplaces. According to the definition of the new Article 2 no. 19, online marketplaces are platforms that allow consumers to conclude contracts with traders

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<sup>27</sup> cf. Köhler/Bornkamm/Feddersen/Köhler UWG §8 para. 3.4;

<sup>28</sup> See also *Sack* in GRUR 2011, 953, 963.



and other consumers via the platform's online interface. A more detailed definition of the online interface is provided in Article 2 no. 16 of the Geo-blocking Regulation<sup>29</sup>.

## 1. TRANSPARENCY IN RANKINGS

Subparagraph (a) of the new Article 6a of the Consumer Rights Directive requires online marketplaces to provide information on the main parameters determining the ranking of search results returned following a search query. vzbv very much welcomes this fundamental approach. The organisation has long been calling for greater transparency among online platforms. For ranked search results in particular, it is often hard for consumers to tell how the rankings have been produced and whether money has been paid to the platform operator to ensure particularly prominent placement. However, there are doubts as to whether the provision is sufficiently clear on what is meant by 'main parameters'. This could be made clearer by listing examples of specific parameters as part of the recitals.

According to a representative survey conducted by vzbv, two out of three consumers (67 percent) who use comparison websites assume that the sites provide objective information about the price and quality of products.<sup>30</sup> However, this is not always the case. In many cases, payment is made to the platform operator to ensure results are placed prominently. The Commission therefore proposes reformulating no. 11 of Annex I to the UCPD (Article 1 (6) of the Omnibus Directive). Failing to make it clear that traders have paid for the promotion of search results will explicitly be regarded as a misleading commercial practice. Landgericht München I (Munich I regional court) has already ruled that the failure to make it clear that payment has been made to secure top placement on a medical practitioner rating platform is misleading under §5 (1) sentence 2 no. 1 UWG.<sup>31</sup> The codification of this case law is welcome. vzbv also welcomes the fact that, unlike the new Article 6a of the Consumer Rights Directive, the rule applies not just to online marketplaces but also to pure comparison or ranking websites. In addition to manipulation of a ranking by means of direct or indirect payment, influencing the ranking through a corporate relationship between the platform operator and the provider ('giving preference to its own products') is also explicitly defined as a misleading practice.

Disclosure of the criteria that determine the ranking on online sales platforms and in search engines is also an important part of another initiative of the European Commission. On 26 April 2018, the Commission presented a proposal for a Regulation to promote fairness and transparency for commercial users of online sales platforms ('Platform-to-business initiative').<sup>32</sup> The relationship between the transparency requirements proposed in that document and those in the 'New Deal for Consumers' requires clarification, as they are more detailed than the provisions proposed here.

Article 5 (1) and (2) of the proposed Regulation for the platform-to-business initiative requires platform providers to set out in their terms and conditions for commercial users

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<sup>29</sup> Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market.

<sup>30</sup> <https://www.vzbv.de/pressemitteilung/eu-muss-verbraucherrecht-verbessern> (available in German only).

<sup>31</sup> Landgericht München I, judgment of 18 March 2015, case no. 37 O 19570/14.

<sup>32</sup> COM (2018) 238 final.

the main parameters used in the ranking of search results. The specific effects of direct or indirect payments to influence a ranking must also be disclosed. Subsection 4 specifically states that these requirements do not oblige providers to disclose trade secrets as defined in Article 2 (1) of the Trade Secrets Directive<sup>33</sup>. As the term ‘trade secrets’ is defined very broadly in the Directive, it is to be expected that businesses may seek to circumvent the sensible provisions by citing protection of trade secrets. But the Trade Secrets Directive does not require this. Under Article 1 (2) (b), the Trade Secrets Directive does not affect the application of Union or Member State rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public (...). As part of its ‘New Deal for Consumers’, the Commission has proposed a form of wording similar to that in Article 5 (4) of the Platform Regulation. This is contained in recital 19 of the Omnibus Directive and says that the obligation to provide information about the main parameters determining the ranking of search results is without prejudice to any trade secrets regarding the underlying algorithms. Even if this means only that the actual algorithms do not have to be disclosed, there are fears that the unclear formulation will lead to companies refusing to comply with their duties under Article 6a and invoking protection of trade secrets as justification. The wording should be more explicit, to make it clear that operators of online marketplaces cannot cite protection of trade secrets as a reason to refuse to provide information about the main parameters determining the ranking of search results.

## **2. TRANSPARENCY AS TO WHETHER GOODS OR SERVICES ARE BEING OFFERED COMMERCIALY OR PRIVATELY**

Under the new Article 6a (b), operators of online sales platforms will also have to ensure that consumers know whether their contractual partner is a commercial trader or not. This information should be supplied by the provider. The point at which the line is crossed and a private seller engages in commercial dealing in accordance with the definition of a trader in Article 2 (2) of the Consumer Rights Directive is often hard to determine in practice.

Article 6a (c) also requires information to be provided on whether EU consumer rights apply. It is unclear whether this is simply the legal consequence deriving from the classification under subparagraph (b), or whether it has an additional explanatory value. And the purpose of the requirement under Article 6a (d) – to clarify which trader has responsibility for ensuring that consumer rights apply – is not immediately apparent. It seems to mean cases where another trader – such as the platform operator— is potentially responsible for ensuring the information is provided.

There is also the question of what happens if a provider is incorrectly classified as a commercial trader contrary to its self-declaration to the platform operator. In the event of a dispute, can the consumer invoke the information provided on the platform against the provider, too, or is the platform operator only obliged to pay compensation?

To sum up, vzbv believes it is right that the European Commission is seeking to establish clarity as to whether sellers are operating in a commercial or private capacity, and important that it does so. However, the Commission’s proposals leave many questions unanswered and make the individual providers primarily responsible for the

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<sup>33</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

correctness of the declaration, rather than requiring action from the platforms. And yet it would be very easy for platforms to draw up criteria and checklists for a self-declaration and to check the correctness of the self-declaration, for example using revenue figures.

### 3. OVERALL ASSESSMENT OF THE TRANSPARENCY REQUIREMENTS APPLICABLE TO PLATFORMS

Overall, vzbv welcomes the requirements to supply information proposed by the Commission in the area of internet platforms. However, further action is needed to ensure a high level of consumer protection in the platform economy.

Matters such as incorrect and personalised pricing and the issue of the liability of platform operators require closer examination. There is also a need to regulate what rights individual consumers have when platform operators fail to comply with transparency requirements and consumers suffer loss as a result. In addition, legal requirements relating to platforms' rating systems should be drawn up requiring platform operators to take steps to prevent fake reviews. The Commission's proposals do not address lock-in effects at all. These arise when consumers use a platform for an extended period of time and thereby accumulate positive ratings that have a financial value, but this value is restricted to one platform. vzbv is aware that the New Deal is not intended to provide comprehensive regulation of the use of platforms. In addition to the transparency requirements, however, the proposals should at least look at the liability aspects. Starting points for such provisions may be provided by a discussion paper for a possible Directive on online intermediary platforms published by a network of European legal researchers.<sup>34</sup> This sets out obligations of the platform operator to remove misleading provider information and provisions governing the liability of the platform operator towards the consumer where the platform operator has a controlling influence. The document also contains proposals for the portability of reputation capital which go further than the requirements of the General Data Protection Regulation.

**The transparency requirements concerning the parameters used to rank search results on online marketplaces and the additional requirements to provide information about the contractual partners and the applicability of consumer protection rules are a step in the right direction towards greater transparency and stronger regulation of platforms. Some of these need to be formulated more precisely. Additional provisions are required concerning the liability of platforms, the regulation of rating systems, and the portability of reputation capital.**

## VII. STRENGTHENING PENALTIES FOR BREACHES OF CONSUMER LAW

A key element of the Commission's proposals is the strengthening of penalties for breaches of EU consumer protection law. An identically worded penalties clause is to

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<sup>34</sup> Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 2016, 164.

be inserted into the UCPD<sup>35</sup>, the Consumer Rights Directive<sup>36</sup>, the Unfair Contract Terms Directive<sup>37</sup> and the Price Indication Directive<sup>38</sup>, or any existing penalties clause is to be replaced by such a clause.

Subsection 1 of the new penalties clause largely corresponds to the penalties provision of Article 24 (1) of the current Consumer Rights Directive, Article 13 of the UCPD and Article 8 of the Price Indication Directive. The Unfair Contract Terms Directive does not currently contain a penalties clause. The clause obliges Member States to formulate penalties provisions to deal with breaches of the national implementation measures for each of the directives concerned. The penalties must be effective, proportionate and dissuasive. This obligation already exists but has not, in the Commission's view, resulted in the Member States introducing appropriate measures. According to the European Commission, standardised criteria for the application of penalties therefore need to be introduced, along with mandatory fines specifically for serious cross-border violations.

Member States should consider the criteria listed in subsection 2 when considering whether penalties should be imposed for breaches of the provisions of the relevant Directive and, if so, in what form. These criteria include the duration and severity of the breach, the number of consumers affected and the degree of culpability.

vzbv has mixed views on the strengthening and harmonisation of the penalties. On the one hand, vzbv supports the efforts of the Commission to ensure that consumer law can be applied in practice across the EU by introducing effective sanctions. On the other, the criteria and systems used for the sanctions proposed by the Commission create difficulties for the well-established system of civil enforcement of consumer rights in Germany.

In common parlance, the term 'penalties' is associated with state measures imposed by a government body or a court. And indeed subsection 2 states that the competent authorities or courts must give due regard to the criteria. vzbv has doubts as to whether the measures proposed by the Commission can be integrated into the system of civil enforcement. The seizure of excess profits comes closest to the concept of a 'penalty' as defined by the Commission. In Germany, contractual penalties or the imposition of fines are not the direct consequence of a breach of consumer law, but rather the consequence of a breach of civil law measures to remedy the breach of consumer law. It is not clear whether such measures meet the Commission's requirement that penalties be effective, proportionate, and dissuasive. The same applies to the imposition of a coercive fine in the event of a breach of an injunction granted by a court pursuant to §890 of the German Code of Civil Procedure (Zivilprozeßordnung - ZPO). This provision merely states that such a fine cannot exceed a sum of 250,000 euros. The specific amount is at the discretion of the court, whereby case law has established various criteria for determining the amount. These largely correspond to the criteria proposed by the Commission.<sup>39</sup> vzbv calls for clarification that a public enforcement

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<sup>35</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market.

<sup>36</sup> Directive 2011/83/EC of the European Parliament and of the Council of 25 October 2011 on consumer rights

<sup>37</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>38</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

<sup>39</sup> cf. MüKoZPO/Gruber ZPO §890 para. 36.

regime does not have to be established in consumer law in order to transpose the penalties provisions from the Omnibus Directive.

**Standardised criteria for the imposition of penalties and revenue-based fines are, in principle, sensible elements of an effective enforcement system. However, vzbv strongly opposes having to establish – *de facto* or *de jure* – a public enforcement system in consumer law in order to transpose the penalties provisions into national law.**

## VIII. REGULATION OF DOORSTEP SELLING

Article 1 (1) (a) of the Omnibus Directive amends Article 3 (5) of the UCPD and makes it clear that Member States are not prevented from adopting provisions to protect the legitimate interests of consumers with regard to practices in the context of unsolicited visits from a trader to a consumer's home ('doorstep selling') or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Such provisions must be justified on grounds of public policy or the protection of the respect for private life.

Doorstep selling is generally permitted in Germany, even when no appointment has been made in advance.<sup>40</sup> This area is only partially regulated under EU law. Annex I no. 25 of the UCPD, for example, provides that ignoring the consumer's request to leave or not to return when conducting personal visits to the consumer's home constitutes an unfair, aggressive commercial practice. The ECJ has examined the issue of permissibility under EU law of a ban on doorstep selling in a number of cases and has found that a ban on doorstep selling of teaching materials, for example, does not contravene Article 34 TFEU.<sup>41</sup>

vzbv welcomes the intention of the Commission to establish legal clarity in this area. However, vzbv believes it is still not sufficiently clear whether the Member States can ban such doorstep selling completely or at least with regard to certain sectors, or at least make it dependent upon consent. Recital 44 states that it should be clarified that the UCPD does not restrict Member States' freedom to make arrangements without the need for a case-by-case assessment of the specific practice. Such provision must however be proportionate and non-discriminatory. Whether a blanket ban on doorstep selling would meet this requirement, remains to be seen. In any event, Member States should be free to make doorstep selling contingent upon prior consent having been given and to define any breach of this requirement as an anticompetitive practice. This should be made clear and explicit.

**The provisions relating to the permissibility of regulating doorstep selling under EU law are sensible, but need to be formulated more precisely.**

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<sup>40</sup> cf. Köhler/Bornkamm/Feddersen/Köhler UWG §7 para. 43-44;

<sup>41</sup> Harte-Bavendamm/Henning-Bodewig/Schöler UWG §7 para. 86