

Position Paper

European Commission Guidance on the Consumer Rights Directive

20.01.2014

page 1

The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 2,000 companies in Germany. Its 1,200 direct members generate an annual sales volume of 140 billion Euros annually and employ 700,000 people. They include providers of software and IT services, telecommunications and Internet services, manufacturers of hardware and consumer electronics, and digital media businesses. BITKOM campaigns in particular for a modernisation of the education system, for an innovative economic policy and a future-oriented Internet policy.

Federal Association
for Information Technology,
Telecommunications and
New Media

Albrechtstr. 10 A
10117 Berlin-Mitte
Germany
Tel.: +49.30.27576-0
Fax: +49.30.27576-400
bitkom@bitkom.org
www.bitkom.org

On 11 December 2013 the European Commission presented its preliminary considerations regarding the Guidance on the Consumer Rights Directive (CRD) and a model for the display of consumer information on online digital products. BITKOM appreciates the EC's approach to involve in the further development of these drafts relevant stakeholders across the EU. By submitting the position paper at hand BITKOM would like to respond to the EC's invitation to comment on the ideas raised.

Contact

Adél Holdampf-Wendel
Head of Department
Media & Internet Policy,
Competition & Consumer
Law
Tel.: +49.30.27576-221
Fax: +49.30.27576-51-221
a.holdampf@bitkom.org

1 Preliminary remarks

BITKOM welcomes that guidance is provided at EU level concerning the implementation of the CRD. This approach is best placed to achieve harmonised application of provisions and to avoid national fragmentation on the one hand, and to foster the Internal Market on the other hand. Legal certainty and facilitation of cross-border commerce are vital for businesses operating in the EU.

We welcome the non-binding character of both instruments and wish to emphasise that it must be preserved. In particular, the optional use of the model should explicitly be communicated vis-à-vis courts and authorities seeking for interpretative aid.

President

Prof. Dieter Kempf

Management

Dr. Bernhard Rohleder

Given the German law transposing the CRD was passed in summer 2013¹ with the new provisions being applicable as of 13 June 2014, our members have already been in the course of adjusting their technical and business processes to new requirements since summer 2013. Technical implementation of such significant changes in legislation takes several months or even a year; this is especially the case if hardware-based systems are involved (e.g. set-top boxes). The practical implementation of new rules would incur substantial expenses as well as time-consuming adjustments and coordination of legal, technical and market-

¹ It was published in the official journal on 27.09.2013: Gesetz vom 20.09.2013 - Bundesgesetzblatt Teil I 2013 Nr. 58 27.09.2013 S. 3642
[http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI&start=/**\[*@attr_id=bgbl113s3642.pdf\]#_Bundesanzeiger_BGBI_%2F%2F*%5B%40attr_id%3D%2Fbgbl113s3642.pdf%5D_1386357740090](http://www.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBI&start=/**[*@attr_id=bgbl113s3642.pdf]#_Bundesanzeiger_BGBI_%2F%2F*%5B%40attr_id%3D%2Fbgbl113s3642.pdf%5D_1386357740090)

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 2

ing expertise involving multiple company departments and /or external experts. Consequently, it will be hardly manageable for traders to re-adjust processes with a view to implement concrete and very detailed suggestions of the Guidance and the model in particular, upon their official publication.

Having said this, we are pleased to comment concepts put on consultation as follows:

2 Guidance on the Consumer Rights Directive

2.1 Article 3 CRD – scope of application - contracts for free digital content

According to the presentation on the draft Guidance, only sales and service contracts which are subject to the condition of payment of price by the consumer fall under the CRD. This includes contracts on digital content supplied on a tangible medium. However, the CRD does not provide a definition for contracts on digital content which is not supplied on a tangible medium. In addition, contracts for the latter with no monetary remuneration are not explicitly excluded from the CRD (Article 3 – Scope). In the non-paper addressing questions of implementation raised by Member States² the Commission services draw the conclusion that a contract on digital content not supplied on a tangible medium shall be included in the scope of the Directive even if it is free of charge.

BITKOM is of the view that this interpretation would lead to a differentiation between tangible and non-tangible digital content which can hardly be objectively justified: A contract on digital content on a free CD-ROM is clearly excluded from the scope of the directive, whereas a contract on the same digital content provided via free download would require the trader to comply with comprehensive information requirements and special rules on the right of withdrawal. The general information requirements pursuant to Article 6 CRD include, above all, the price of the product or service. In case of free digital content this would be estimated at zero EURO. Consequently, the condition of payment of price should apply to all digital content, irrespective whether it is supplied on a tangible medium or not.

The Commission services' non-paper further elaborates, that in case of a contract on free digital content not supplied on a tangible medium the remuneration of the trader may be non-monetary, e.g. personal data.

Free digital content can hardly be provided to the consumer online without collecting any personal data. This applies all the more considering the expected extension of the scope of "personal data" in the Draft General Data Protection Regulation. Therefore, any contract on free digital content provided online would oblige the trader to surfeit the consumer with information of little relevance. On the contrary, obliging the trader to provide for all relevant information prior to conclusion of the contract and thereafter, would generate even more personal data (e.g. acquiring the email address of the consumer to provide the confirmation of the contract in accordance with Article 8 (7) CRD).

In addition, there is no need to overwhelm the consumer with information such as on the right of withdrawal in this case. Should the consumer make use of such right, he or she might offer even more personal data as opposed to mere deletion of the content in case of unsatisfactory acquirement.

² Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 3

Against this background, BITKOM urges the Commission to clarify in the Guidance that digital content with no monetary remuneration is never included in the CRD, neither when provided on a tangible medium, nor when supplied without such carrier.

2.2 Article 3 (3) (m) CRD – scope of application – contracts concluded for the use of one single connection by telephone, Internet or fax

BITKOM fully supports the Commission services' interpretation of Article 3 (3) (m) CRD as laid down in the non-paper on the implementation of the Directive³. To this effect, single contracts concluded by consumers' use of telephone connections which are immediately and completely performed through the call are exempted from the application of the CRD. In such cases the billing is usually performed through the customer's telephone bill.

Indeed, providers of services such as carrier selection and premium rate services over non-geographical telephone numbers would be technically and practically unable to fulfil all requirements on withdrawal and contract information enshrined in the CRD.

Furthermore, the legislative history of the Directive shows that a further substantiation or limitation in the scope of Article 3 (3) (m) CRD regarding information and the right of withdrawal was not intended: The draft Recital 22a⁴ was deliberately deleted from the Council Position at First Reading in December 2010. This Recital would have introduced a substantiation of the interpretation of Article 3 (3) (m) by highlighting that it should apply *'for instance'* to carrier-selection (*'dialling a prefix'*) services. By deleting this Recital EU law makers confirmed, that a broad range of single connection services should be exempted from the CRD, i.e. clearly beyond mere carrier-selection services.

In addition, the Universal Service Directive 2002/22/EC as amended by Directive 2009/136/EC (USD) already provides a broad range of effective protective measures for consumers when using services such as carrier selection and premium rate services, and in order to improve contract information for consumers. These legal provisions from the EU's regulatory framework for electronic communications establish *lex specialis* for electronic communications services; while following the same objectives as the objectives set out in the CRD, they effectively ensure consumer protection in the telecoms sector.

2.3 Article 8 (2) CRD – requirements as to the positioning of essential information (spatial aspect)

The so-called "Button-solution" was transposed in Germany by separate legislation and entered into force already on 1 August 2012⁵.

The explanatory note of the law stresses that the obligation for the trader to provide information to the consumer "directly before" he places his order (by

³ Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

⁴ "(22a) *The provisions regarding information and the right of withdrawal for distance sales should, due to the nature of these services, not apply when a consumer uses a public pay phone, pays to use an Internet connection or chooses a specific provider for one single telephone call, for instance by dialling a prefix, in contrast to what is the case for telephone or Internet subscriptions.*"

⁵ Gesetz vom 10.05.2012 - Bundesgesetzblatt Teil I 2012 Nr. 21 16.05.2012 S. 1084

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 4

activating a button or a similar function) concerns both a temporal and a spatial aspect⁶. Furthermore, the explanatory note states, that placing consumer information below the button, in case the information only becomes visible when scrolling, cannot ensure that the consumer perceives (receives) the information prior to making his order. Thus the requirement of placing the information in the close vicinity of the button would not be fulfilled in this case. In its report the Legal Committee of the German Bundestag⁷ further clarifies, that scrolling may be allowed, e.g. if buying several items at once, provided all information required is displayed directly above the button. Against the background of this legislative interpretation the Berlin Court recently ruled⁸ that consumer information must necessarily be placed above the button.

BITKOM is of the view that the above interpretation of the requirement to display information in the close vicinity of the button is too restrictive in Germany and goes beyond the relevant provisions of the CRD. We appreciate, that the Commission services' non-paper on the implementation of the CRD⁹ clarifies that the term "*directly before*" in Article 8 (2) CRD covers only the temporal aspect; whereas the spatial aspect is deemed to be addressed by the requirement to present consumer information *prominently* and in the *close vicinity* of the button (Recital 39 CRD). We would therefore welcome, if the Commission further clarified that consumer information pursuant to Article 8 (2) CRD must not necessarily be placed above the button in order to ensure that it is given in a clear and prominent manner.

Furthermore, in case of smaller-sized screens (e.g. tablets and smartphones) or if the consumer buys several products/services at the same time, the display of product information is not possible for the trader without making the consumer scroll on the page. To this end, we would like to invite the Commission to specify in its Guidance, that scrolling is allowed within the purchase process in relation to the trader's obligation to provide the consumer with information.

2.4 Article 8 (7) CRD – confirmation of the contract on a durable medium

BITKOM strongly agrees with the Commission services' view concerning so-called qualified/advanced websites by which the confirmation of the contract on a durable medium could be made available to the consumer. This interpretation is supported by judgment E-4/09 of the EFTA Court¹⁰, which considered the concept of a durable medium.

It is entirely appropriate to acknowledge that providing obligatory information in the customer's private online account with the trader instead of sending an email serves both, the trader's as well as the consumer's interest. This established way of communication protects the customer in all respects: personal data economy, clarity and comprehensibility of all communication concerning a certain trader or set of contracts, and also authenticity and integrity of correspondence. From the trader's point of view, customers' private online accounts facilitate the administration of customer care and ensure the flow of communication.

⁶ BT-Drucksache 17/7745; pages 10 and 18. <http://dipbt.bundestag.de/dip21/btd/17/077/1707745.pdf>

⁷ BT-Drucksache 17/8805; page 6. <http://dipbt.bundestag.de/dip21/btd/17/088/1708805.pdf>

⁸ LG Berlin, Judgment of 17.07.2013 – 97 O 5/13. <http://www.jurpc.de/jurpc/show?id=20130191>

⁹ Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

¹⁰ EFTA-Court Judgment of 27.01.2010 - E-4/09.

http://www.eftacourt.int/uploads/tx_nvcases/4_09_Judgment_EN.pdf

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 5

The use of advanced websites may also prevent practical difficulties when it comes to the separate and subsequent purchase of multiple digital products from the same platform within a short period of time, such as songs for download from a music store. By sending confirmation to the customer's account on the platform, the customer's email account can be spared from a vast amount of separate confirmation emails.

BITKOM also strongly agrees with the Commission services' interpretation of Article 8 (7) CRD as laid down in the non-paper on the implementation of the Directive¹¹ by which it is clarified, that the requirements in Article 8 (7) will be satisfied if the confirmation e-mail is sent (presumably meaning if its transmission is initiated) immediately before the start of the supply of digital content. Consequently, the confirmation of contract must not necessarily be received by the consumer prior to the start of the digital supply. BITKOM would welcome if the Commission could similarly clarify that, if the confirmation of contract is made available to the consumer on a durable medium in form of an advanced/qualified website the same interpretation applies, i.e. that it is sufficient if the provider initiated the confirmation of contract to be placed on the advanced/qualified website, since the requirement to provide the consumer with such confirmation cannot depend on the delivery method. Any other interpretation would result in the obligation to add extra steps to the purchase process, which would obviously harm the seamless consumer experience if the consumer can no longer initiate the download immediately after completing his purchase but first has to wait for the receipt of confirmation.

2.5 Article 19 CRD – fees for the use of means of payment

BITKOM fully agrees with the objective of the CRD to prohibit surcharges and to make consumers aware in a clear and comprehensible manner of the share of costs of payment within the total price of the purchase.

The wording of the CRD prohibits traders to charge consumers fees that exceed the cost borne by the trader for the use of a specific means of payment. In our view this wording suggests that *real* costs incurred for the trader should be able to be taken into account in a transparent manner when calculating fees for the use of payment.

The Commission services' non-paper¹² concludes that only fees which are directly charged to the trader for the use of a means of payment should be considered as the "cost" of payment within the meaning of Article 19 CRD.

Bearing in mind that costs for means of payment only make up a small proportion of the total purchase price, it is certainly not the intention of our members to generate profit by surcharging for the use of selected means of payment. However, in case of subscriptions for instance, traders nevertheless should be put in a position to be able to transfer to the consumer efficiencies gained by the use of cheaper means of payment which are based on lower internal (administrative) costs. This could be the case for example, if the consumer has signed up to pay monthly subscription fees within a direct debit system.

¹¹ Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

¹² Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 6

Therefore BITKOM would like to ask the Commission to take a position in the planned Guidance which considers all real and reasonable cost elements that can be taken into account for the purposes of the interpretation of the cost borne by the trader for the use of a means of payment under Article 19 CRD.

2.6 Article 21 CRD – communication by telephone – “basic rate”

The CRD does not provide a definition of the term “basic rate” used in Article 21 CRD.

The Commission services’ non-paper on the implementation of the CRD¹³ explains the meaning of “basic rate” by referring to the objective of the provision and pointing out that traders should not be enabled to draw additional revenue from these telephone calls through revenue sharing with telecom operators.

We welcome the Commission services’ approach to give guidance by identifying qualitative characteristics for the notion of “basic rate”; rather than arguing for a quantitative approach and suggesting a fixed or an average price.

We also appreciate, that the planned Guidance emphasises, that consumer protection regulations in Article 21 CRD do not intend to affect the functioning of telecommunication markets, and/or preserve telecommunication service providers’ right to charge for calls pursuant to Article 21 CRD. As also stated by the EC services, this is important because telecommunication markets are subject to specific rules and a sector specific regulation under the EU regulatory framework for electronic communications.

As a logical consequence of this argumentation and to avoid that the planned Guidance may be misunderstood as an attempt to impose price control on telecommunication operators, a reference to “*pure cost of the telecom service*” or to “*exclusive cost of the telecom service*”¹⁴ should be avoided. Instead, the EC should highlight that consumers do not have to pay more than the “*price of the telecom service*” for calls subject to Article 21 CRD.

In this context it is additionally important to be aware that the preservation of the right to charge for calls also implies that telecommunication service providers are able to freely compose bundles. Accordingly, the interpretation of “basic rate” as a requirement for traders to use either geographic numbers or non-geographic numbers that are normally included in telecommunication service providers’ basic inclusive packages (bundles of minutes) would be in complete contradiction to the above mentioned general principles underlying the regulations in Article 21 CRD. BITKOM therefore appeals to the Commission not to include this interpretation in the planned Guidance on the Consumer Rights Directive.

2.7 ANNEX I A. CRD – model instructions on withdrawal

Item 1- Indicating the expiration date

The exact expiration date of the consumer’s right of withdrawal is depending on various scenarios on how and when the consumer receives his order. The trader

¹³ Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

¹⁴ As stated on page 16; section on “Article 3 (3) (m) CRD - contracts concluded for the use of one single connection by telephone, Internet or fax” in the Non-Paper to the 3rd Expert Meeting on the Consumer Rights Directive of 19 September 2013.

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 7

is required to cover all different possibilities in the model instructions and has to adjust those for every type of product he sells. This in itself is highly burdensome for the trader.

Besides, there are also practical problems with the model instructions. If a consumer orders several goods, it is in that moment not always foreseeable for the trader if he will send out the goods in one or in several packages. That can be the case for example because of the uncertainty about the availability of some of the goods or the uncertainty if a specific threshold of a package-size is met or exceeded.

If the trader uses one package, he is obliged to choose insertion Nr. 1 c of the model instructions. In the case of multiple packages, he is obliged to choose insertion Nr. 1 d of the model instructions. While one possible solution for such cases could be to use both Nr. 1 c and Nr. 1 d in one text, this would clearly be contrary to the model (saying 'Insert one of the following texts') and the trader would lose the legal certainty that come with the use of the model instructions.

Item 5 - Estimation of the costs of returning goods that cannot normally be returned by post

Another practical problem is the estimation of the costs of returning the goods that cannot normally be returned by post. These costs are dependent on several circumstances that are unique for the very customer (e.g. on which floor does the consumer live; additional costs if the original packaging cannot be used anymore) and differ for various goods. Therefore, a trader cannot use one general model instructions.

Thus besides the significant additional time that needs to be invested to adjust the individual information for every product, depending on the order, logistics, or the customer's purchasing behaviour, in certain cases, the trader is simply not able to provide all the required information at the point of the purchase. Indicating a very high price could lead to the assumption that the trader wants to prevent consumers from executing the right of withdrawal. If, however, the costs that are indicated are lower than the actual costs this too could be seen as misleading.

Additionally, there is again the problem to find the right text if the consumer orders some goods that can and some goods that cannot normally returned by post.

Against this background BITKOM would like to call on the Commission to clarify the above issues in its planned Guidance and to suggest practical solutions on how to apply the model instruction on withdrawal in case conflicting scenarios of application arise.

3 Model for the display of key information on online digital products

3.1 General remarks

BITKOM appreciates the Commission's effort to establish a model for facilitating compliance with legal information requirements. We also believe in the competitive effect of transparent and comparable information.

However, considering the unknown extent of acceptance of the model by European consumers, the model would have to remain non-obligatory. Should na-

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 8

tional courts require application of the model for fully fledged compliance, it would turn into an additional burden for traders even before establishing an advantageous effect on consumers. The adaptation of any model require traders to cover substantial expenses as well as to undertake time-consuming adjustments with the coordination of legal, technical and marketing aspects involving multiple company departments and /or external experts.

Therefore, the Commission should explicitly clarify in the publication of the model that making use of the set of symbols, or part of it, is entirely free of charge and voluntary to traders. Its use shall always remain only one possible option. Further, the Commission should explicitly clarify that the information identified as being key in the voluntary model may vary depending on the presentational aspects of the traders online shop and on the requirements of the different products (e.g. while the file size may be a key information for the purchase of a movie given its volume requires significant storage space on the hard drive it will not be a key information for music downloads).

Moreover, the presentation of the model seems to consider only digital products provided over the open internet in a desktop or smartphone environment. The CRD will also apply, however to digital products provided over any connected device (e.g. set-top box or smart TV). In this regard we would like to stress that technical implementation of the model would be even more complicated if a hardware-based system is involved, such as set-top boxes, and/or new graphical elements are supposed to be inserted in the user interface.

3.2 Focusing on relevant (applicable) items

The draft model intends to introduce a standardised description with a set of items for each and every online digital product that shall be provided by the trader to the consumer. Such a standardised presentation of product characteristics not only requires traders to undertake significant efforts for its implementation but may also lead to a lack of clarity for the consumer. Moreover it restricts the traders' scope to develop an individual, innovative design and purchase process which best reflects customers' needs. Also, some items may not be applicable for certain products. Furthermore, with limited space available on some screens (e.g. tablet PCs) the planned standard could not always be technically realised. BITKOM thus suggests clarifying, that traders should select relevant items when using the standard description of the model to update their purchase process.

Also, the survey undertaken by the EC resulted in the finding that consumers are less likely to acknowledge information if they are overloaded with information. Various generic information that shall be presented according to the model remain the same for a particular type of content, which an average informed consumer is able to comprehend at once, and so it seems unnecessary to prompt these over and over again (e.g. file type, access type, access conditions, internet connection, geographical restriction, tracking, digital rights management and interoperability). On the other hand, specific information about the product itself (such as song title, artist, duration and price in case of music for download) varies each time.

Therefore, in our view a differentiation should be made between characteristics of a purchase platform and characteristics of a product. Specifications attributed

Position Paper

European Commission Guidance on the Consumer Rights Directive

page 9

to the platform, which are always the same when using the platform, should be provided to the consumer once, for example when registering to (opening an account at) the platform.

3.3 Avoiding a restrictive interpretation of Article 8 (2) CRD as regards desktop environment

Slide 19 of the EC's presentation could be misunderstood in a way that it implies a restrictive interpretation of Article 8 (2) CRD by stating that the information should be provided "on the same page" when ordering in a desktop environment. Despite the need for flexibility in order to maintain the traders' margin of manoeuvre for an individual, innovative design and purchase process, in case of smaller screens or if the consumers buys several products at the same time, the display of information "on the same page" is not possible for the trader; thus the possibility to place key information elsewhere in close vicinity of the button and the possibility for scrolling must be ensured. (See our comments under section 2.3.)

BITKOM therefore would like to urge the Commission not to restrict the provisions of the CRD by the Guidance or the model in this respect.