

Strengthening of consumer rights

The "Button Solution" – Why e-commerce businesses should take a closer look



On August 1st, 2012 the Act for improving the protection of customers against cost traps occurring in the e-commerce came into force. Intended to protect customers, what does the new law demand from online traders?

Since when and to whom does the new legislation apply?

Since August 1st, 2012 all online traders (e- and m-commerce businesses) are obliged to provide consumers with information in a more explicit way. The new provisions implementing the new Consumer Rights Directive (2011/83/EU) apply to B2C contractual relationships only. Affected are scenarios for example like downloading applications or games on smartphones or the "sale" of virtual in-game currency for online games (against payment). The new rules, however, can be ignored where contracts have been finalised on the basis of an individual offer and acceptance.

So, what's new?

Already until the beginning of this month e-commerce traders had to provide their customers with specific information. Traders remain obliged to deliver this information. But for some information particular rules regarding their presentation have to be considered now. Secondly, the last step of the ordering process must state unmistakably that proceeding results in closing a contract leading to payment obligations for the consumer. Thirdly, if the trader violates the obligation to label the order button correctly, the contract as a whole becomes invalid by law.

Which information is there to give and how must it be displayed?

Before consumers reach the order button to click and thereby finally buy the chosen product, they must get informed about (i) the essential characteristics of the product, (ii) the minimum term of the contract, if the contract's subject is a permanent or regularly recurring contractual performance, (iii) the total price (including VAT) and (iv) the shipping costs (if incurred).

Contrary to the old provisions, online traders now must ensure that consumers are provided "clearly and unequivocally" with this information. The information must be highlighted and for the consumer visible immediately before closing the contract. In other words it must be placed right above the order button; hyperlinks to other pages or referring to information below the order button is not sufficient. Furthermore, the requirement of immediateness will not be met where elements or structures separate the order button from the information part. Such separations are regarded as to give consumers the wrong impression that information and button are not in relation to each other.

Difficulties arise where e-/m-commerce contracts are concluded. The new law is also applicable here. But as displays of smartphones are limited in size, traders must pay close attention not to violate the new provisions by using, for example, a too small font size.

Exception for eBay and other online auction portals

Like any other e-commerce companies closing contracts with consumers via the internet, also online auction portals (such as eBay) are legally bound to list the above mentioned information. However, one exception exists: As it is up to the consumer only (and not to the seller) to determine how much he is willing to pay for a certain product, its total price cannot be displayed. Therefore, it is sufficient to show only the highest bid the consumer has placed.

How should the order button now look like?

According to the new law the labelling of the order button must mention the words "order with costs" or any other unequivocal wording pointing out that the consumer will face payment obligations, for example like "conclude contract with costs" or simply "buy". It is the legislator's intention that traders inform consumers at the latest step before contracting, that by clicking the button they will face claims for money. Words such as "continue", "register", "order" or "place order" etc. do not fulfil the legal requirements. In any event, the wording must be clearly visible. Placing grey letters against a light grey background, for example, will not be acceptable. Moreover, using icons (e. g. currency symbols such as "\$") instead of words is neither an option. The new law unmistakably demands the usage of words. Although order buttons are most frequently used, sellers are not limited to them. Other devices, such as hyperlinks or check boxes are equally allowed as long as they correspond to the legal requirements.

The burden of proof for complying with this provision lies with the trader – in a law suit he must proof that the order button was correctly labelled.

Exception for eBay and other online auction portals

Again, there exist exceptions for online auction portals: instead of "buy" etc. the order button may be labelled with "bid" or "confirm bid".

What are the consequences in the case of a violation?

If a trader violates the provision to clearly label the order button in the above mentioned way, the entire contract will be invalid. Consequently the trader may not demand payment, on the one hand, and on the other, the consumer may not demand performance. The legality of this legal consequence, however, can be debated (see below).

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Are there any further consequences?

Violations of the new provisions, which serve the protection of consumers, entitle consumer advice agencies or chambers of commerce or crafts to take action for an injunction. Competitors along with the above mentioned chambers are furthermore entitled to sue for removal, for skimming of excess profit and for damages (competitors only).

Are there any further changes to be expected?

There are. As mentioned above, any violation of the provision to label the order button correctly will lead to the invalidity of the contract. The contract is regarded as to never have been concluded. This legal consequence is contradictory to the wording of the EU consumer rights directive which only speaks of the consumer not to be bound by the contract. The idea behind is to force traders to follow the provision to label order buttons correctly: in the event of a violation consumers shall be able to demand performance whereas they shall not be obliged to pay. Should the German parliament not change the actual law, it will be interpreted in the light of the directive. By December 13th, 2013 the directive must be implemented. However, there exist critics who demand such an interpretation in conformity with the directive already today. This should be considered and one should pay close attention to the development in this area of law.

Conclusion

Since August 1st, 2012 information to be provided to the consumer must be dominantly placed above the order button. The order button must clearly indicate that by clicking it the consumer will face payment obligations. Violations of this obligation will result in the contract being regarded as invalid by law. This, however, contradicts the provisions of the Consumer Rights Directive (2011/83/EU) which the German legislator has intended to implement. There are further changes to be expected.



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