

# Position Paper

## Law on fair Consumer Contracts in Germany

May 2021

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### Summary

#### New technical regulations for information society services under the amended German draft “Law on Fair Consumer Contracts”

We respectfully suggest that the Commission closely investigate the German legislative draft notified under TRIS-Notification Number [2021/17/D \(Germany\)](#). The Commission should issue a detailed opinion to ensure that Germany does not enact the notified provisions without making accommodations to preserve the unity of the internal market, and to avoid needlessly putting at risk the personal data of consumers.

On March 19, 2021, Germany notified a proposed amendment to its planned “Law on Fair Consumer Contracts” (*Gesetz für faire Verbraucherverträge*) (the “**Proposed Amendment**”) as a draft technical regulation for information society services under Art. 5 (1) of [Directive \(EU\) 2015/1535](#).

In summary, the Proposed Amendment would force information society service providers that offer subscriptions to consumers in Germany to include in their websites, apps, and other online channels, a statutorily defined, specifically labelled button that leads directly to a cancellation form. This button would have to be kept always within the consumers’ easy reach, without requiring a login or other identification. Consumers would have to be enabled to fill out this form with their identifying data (e.g., name, e-mail address, contract number) and submit it with the click of another button to directly cancel their subscription(s) (the “**Cancellation Interface**”). If a provider fails to (correctly) implement the Cancellation Interface, consumers will not be bound by any minimum term periods for their subscriptions, and will be able to end their subscriptions at any time immediately upon notice. Additionally, under existing German law, failure to correctly implement the Cancellation Interface would be considered an act of unfair competition, allowing enforcement through cease-and-desist claims by competitors as well as competition and consumer associations.

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In its notified form, the Proposed Amendment is at odds with European Union law, namely in two ways:

### 1. Conflict with the e-Commerce Directive

By creating a separate, national requirement for the design and technical implementation of information society services offered to consumers in Germany, the Proposed Amendment threatens to splinter the common market for such services and conflicts with the internal market clause in Art. 3 of [Directive 2000/31/EC](#) (the “**e-Commerce Directive**”).

Art. 3 of the e-Commerce Directive establishes a “country-of-origin” principle for information society services where the respective rules concern the taking up and pursuit of the business of providing an information society service. Each Member State is, in principle, responsible to make the rules for their own service providers only, and can make rules for service providers from other EU jurisdictions only in exceptional cases. This was introduced with the goal to enable information services to be provided across borders between Member States, with each service provider being policed by their own home authorities.

The general application of the provisions added by the Proposed Amendment, i.e., the requirement to implement the Cancellation Interface, to all traders and other providers that offer subscriptions to German consumers will mean that they will also be applied to information society service providers established in other Member States. This will bring the Proposed Amendment in direct conflict with the internal market clause.

It is to be noted that the exception from the internal market clause for “*contractual obligations concerning consumer cont[r]acts*” does not apply. Even though the Cancellation Interface is introduced by inserting a new provision into the sections of the German Civil Code that deal with consumer contracts, that provision is not limited to or even focused on contractual aspects. It does not regulate consumers’ cancellation rights as such. Rather, it is notably similar in wording and effect to other technical information society service regulations such as what information is to be provided by providers (Art. 5 of the e-Commerce Directive). The effects of the Proposed Amendment, at their core, are therefore those of a requirement for the design and technical implementation of information services in the German market, backed up by the general, extra-contractual enforcement mechanisms under unfair competition laws.

### 2. Inconsistencies with the GDPR

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By effectively forcing information society service providers to open their systems for a new way for consumers to administer their contracts without first having to log in, the Proposed Amendment (a) threatens to run contrary to the principle of data minimization and (b) undermine established data security measures, in particular the login process, which usually requires a password.

Data minimization. Forcing service providers that already have established contract administration tools in their user account systems to add the additional, statutorily defined Cancellation Interface would run contrary to the principle of data minimization.

Art. 5 (1) lit. c of Regulation (EU) 2016/679 (“**GDPR**”) sets out the principles of *necessity* and *minimization* that require data controllers to not collect more personal data than necessary.

Existing user account systems provided by information society service providers today in many cases already include contract administration functionalities that also allow consumers to terminate subscriptions, and where they do not currently have this functionality such could in most cases be easily added. Such systems are commonly accessed through some form of market standard form of authentication, for example by providing username and password. No additional personal data has to be entered by the user for an individual use of such systems, including for the cancellation of a subscription.

The Cancellation Interface as it is currently planned, prohibits traders from using a simple login authentication. By contrast, it requires the consumer to enter enough personal data to otherwise identify themselves when they wish to cancel their subscription(s). In cases where the information society service provider has established a user account system, requiring this unnecessary, non-data minimized system is a step backwards from the currently established market practice.

Data security. Data protection authorities have rightly identified data security as a particularly important subject. The Proposed Amendment threatens this by forcing information society service providers to implement a circumvention of their existing, secure login systems.

Art. 32 of the GDPR requires data controllers and data processors to implement appropriate technical and organizational measures to ensure a high level of security (further defined in the GDPR). A particular risk for these measures to mitigate is the unauthorized administration of contracts and associated personal data.

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German courts have already opined on authentication systems that are similar to the one used by the Cancellation Interface – i.e., one that relies entirely on the person seeking access to know certain identifying data such as name and contact details – and found such solutions to be insufficient in light of the GDPR requirements. The core question in the case underlying the first judgment by a German court on a GDPR fine was whether a data controller had implemented sufficient measures to prevent unauthorized persons from calling the company's customer service and gaining access to customers' contracts and associated data. In this case, the data controller had deemed it to be sufficient if the caller could provide a customer's name and birthdate. The court found this to not meet the requirement to put in place appropriate measures to ensure data security as required under the GDPR. This situation is comparable to the Proposed Amendment, which requires only name and address to be provided.

Before the background of these conflicts and inconsistencies with European Union law, we respectfully suggest that the Commission takes the opportunity to comment and issues a detailed opinion on the planned technical regulations for information society services, in order to ensure that Germany does not enact the Proposed Amendment without changes. Alignment with the requirements of European Union law could – in our opinion – be achieved without diminishing the Proposed Amendment's intended pro-consumer effects. The requirement for a Cancellation Interface could be changed from its current, highly detailed and technical form into a more generalized rule for distance contracts to the effect that traders must offer consumers the option of cancelling subscriptions online. This rule should also allow that traders use their account login systems to identify consumers when they access the Cancellation Interface.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.