



Council of the
European Union

Brussels, 1 March 2019
(OR. en)

6889/19

**Interinstitutional File:
2018/0090(COD)**

**CONSOM 84
MI 203
ENT 59
JUSTCIV 67
DENLEG 32
CODEC 532**

OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
On: 1 March 2019
To: Delegations

No. prev. doc.: 6388/19 + COR
No. Cion doc.: 7876/18

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules

Delegations will find in annex the mandate given by Coreper on above proposal in view of the upcoming informal negotiations with EP.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹

Acting in accordance with the ordinary legislative procedure,

¹ OJ C , , p. .

Whereas:

- (1) Article 169(1) and point (a) of Article 169(2) of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 114 TFEU. Article 38 of the Charter of Fundamental Rights of the European Union provides that Union policies are to ensure a high level of consumer protection.
- (2) Consumer protection legislation should be applied effectively throughout the Union. Yet, the comprehensive Fitness Check of consumer and marketing law directives carried out by the Commission in 2016 and 2017 in the framework of the Regulatory Fitness and Performance (REFIT) programme concluded that the effectiveness of the Union consumer legislation is compromised by lack of awareness both among traders and consumers and by insufficient enforcement and limited consumer redress possibilities.
- (3) The Union has already taken a number of measures to improve awareness among consumers, traders and legal practitioners about consumer rights and to improve enforcement of consumer rights and consumer redress. However, there are remaining gaps, ~~most notably the absence~~ in national laws **regarding** ~~of~~ truly effective and proportionate penalties to deter and sanction **intra-Union** infringements, insufficient individual remedies for consumers harmed by breaches of national legislation transposing Directive 2005/29/EC² and shortcomings of the injunctions procedure under Directive 2009/22/EC³. Revision of the injunctions procedure should be addressed by a separate instrument amending and replacing Directive 2009/22/EC.

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22).

³ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009, p. 30).

- (4) Directives 98/6/EC⁴, 2005/29/EC and 2011/83/EU⁵ include requirements for Member States to provide for effective, proportionate and dissuasive penalties to address infringements of national provisions transposing these directives. Furthermore, Article 21 of Regulation (EU) 2017/2394⁶ on consumer protection cooperation (CPC) requires Member States to take enforcement measures, including imposition of penalties, in an effective, efficient and coordinated manner to bring about the cessation or prohibition of widespread infringements or widespread infringements with a Union dimension.
- (5) Current national rules on penalties differ significantly across the Union. In particular not all Member States ensure that effective, proportionate and dissuasive fines can be imposed on infringing traders for widespread infringements or widespread infringements with a Union dimension. ~~For reasons of consistency between the different Directives on consumer protection, penalties should be addressed in a horizontal manner by revising~~ **Therefore**, the existing rules on penalties of Directives 98/6/EC, 2005/29/EC and 2011/83/EU **should be improved** and **at the same time** ~~by introducing~~ new rules on penalties in Directive 93/13/EEC⁷ **should be introduced**.
- (5a) It should remain a matter for the Member States to choose the type of penalties to be imposed and to lay down in their national law the relevant procedures to impose penalties in the event of infringements of the Directives amended by this Directive.**
- [moved from recital 11a]*

⁴ 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 (OJ L 80, 18.3.1998, p. 27).

⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

⁶ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ L 345, 27.12.2017, p. 1).

⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

- (6) To facilitate more consistent application of penalties, in particular in intra-Union infringements, widespread infringements and widespread infringements with a Union dimension referred to in Regulation (EU) 2017/2394, common non-exhaustive **and indicative** criteria should be introduced for the application of ~~fin~~ **penalties**. These criteria should include, **for example, the nature, gravity and duration of the infringement and the cross-border nature of the infringement, namely whether the infringement has harmed consumers also in other Member States.** any redress provided by the trader to consumers for the harm caused ~~should also be taken into account~~. Repeated infringements by the same perpetrator shows a propensity to commit such infringements and is therefore a significant indication of the gravity of the conduct and, accordingly, of the need to increase the level of the penalty to achieve effective deterrence. The ~~crit~~erion of financial benefits gained, or losses avoided, due to the infringement is ~~especially relevant~~ **should be taken into account** where the national law provides for fines as penalties, **if the relevant data are available or can easily be determined** and sets the maximum fine as percentage of the trader's turnover and where the infringement concerns only one or some of the markets in which the trader is operating. **Other aggravating or mitigating factors applicable to the circumstances of the case may also be taken into account.**
- (7) ~~Furthermore, any fines imposed as penalties should take into account the annual turnover and profits of the infringing trader and any fines that have been imposed on the trader in other Member States for the same infringement in, particular, in the context of the widespread infringements of consumer law and widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement in accordance with Regulation (EU) 2017/2394.~~

(8) These common non-exhaustive **and indicative** criteria for the application of penalties may not be relevant in deciding on penalties regarding every infringement, in particular regarding non-serious infringements. Member States should also take account of other general principles of law applicable to the imposition of penalties, such as the principle of *non bis in idem*.

(8a) In accordance with Article 21 of Regulation (EU) 2017/2394 Member States' competent authorities concerned by the coordinated action are to take within their jurisdiction all necessary enforcement measures against the trader responsible for the widespread infringement or the widespread infringement with a Union dimension to bring about the cessation or prohibition of that infringement. Where appropriate, they are to impose penalties, such as fines or periodic penalty payments, on the trader responsible for the widespread infringement or the widespread infringement with a Union dimension. Enforcement measures are to be taken in an effective, efficient and coordinated manner to bring about the cessation or prohibition of the widespread infringement or the widespread infringement with a Union dimension. The competent authorities concerned by the coordinated action are to seek to take enforcement measures simultaneously in the Member States concerned by that infringement.

(9) To ensure that Member State authorities can impose effective, proportionate and dissuasive penalties in relation to widespread infringements of consumer law and to widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement in accordance with Regulation (EU) 2017/2394, fines should be introduced as an mandatory element of penalties for such infringements. In order to ensure deterrence of the fines, Member States should set in their national law the maximum fine for such infringements at a level that is at least 4% of the trader's annual turnover in the Member State or Member States concerned. **Trader in certain cases can also be a group of companies.**

(9a) As laid down in Articles 9 and 10 of Regulation 2017/2394, when imposing penalties due regard should be given, as appropriate, to the nature, gravity and duration of the infringement in question. The imposition of penalties should be proportionate and should comply with Union and national law, including with applicable procedural safeguards, and with the principles of the Charter of Fundamental Rights of the European Union. Finally, the penalties adopted should be appropriate to the nature and the overall actual or potential harm of the infringement of Union laws that protect consumers' interests. The power to impose penalties is to be exercised either directly by competent authorities under their own authority, or, where appropriate, by recourse to other competent authorities or other public authorities, or by instructing designated bodies, if applicable, or by application to courts competent to grant the necessary decision, including, where appropriate, by appeal, if the application to grant the necessary decision is not successful.

(10) Where, as a result of the coordination mechanism under Regulation (EU) 2017/2394, a single national competent authority within the meaning of that Regulation imposes a fine on the trader responsible for the widespread infringement or the widespread infringement with a Union dimension, it should be able to impose a fine of at least 4 % of the trader's annual turnover in all Member States concerned by the coordinated enforcement action.

(11) Member States should not be prevented from maintaining or introducing in their national law higher maximum turnover-based fines for widespread infringements and widespread infringements with a Union dimension of consumer law, as defined in Regulation EU 2017/2394. **It should also be possible for Member States to base such fines on trader's worldwide turnover, or to extend the rules on fines to other infringements not covered by provisions of this Directive related to Article 21 of Regulation EU 2017/2394. Moreover, in cases where no information on trader's annual turnover is available, Member States should not be prevented from maintaining or introducing other rules providing for fines.** The requirement to set the fine at a level of not less than 4 % of the trader's turnover should not apply to any additional rules of the Member States on periodic penalty payments, such as daily fines, for non-compliance with any decision, order, interim measure, trader's commitment or other measure with the aim of stopping the infringement.

(11a) Rules on penalties should be provided in Directive 93/13/EEC with a view to strengthening its deterrent effect. Member States are free to decide on the administrative or judicial procedure of application of penalties for the breaches of Directive 93/13/EEC. In particular, administrative authorities or national courts could impose penalties when establishing the unfair character of contractual clauses, including on the basis of legal proceedings initiated by an administrative authority. The penalties could also be applied by national courts or administrative authorities when the trader uses contractual terms which are expressly defined as unfair in all circumstances according to the national law as well as when the trader uses contractual term which has been found unfair by a final binding decision. Member States could decide that administrative authorities also have the right to establish the unfair character of contractual clauses. National courts or administrative authorities could also apply the penalty through the same decision by which unfairness of contractual terms is established. It is also for Member States to lay down the appropriate mechanisms of coordination of any actions at domestic level regarding individual redress and penalties.

- (12) ~~When deciding for which purpose the revenues from fines are used, Member States should take into account the ultimate objective of consumer legislation and its enforcement which is the protection of the general interest of consumers. Member States should therefore consider allocating at least part of the revenues from fines to enhance consumer protection within their jurisdictions, such as supporting consumer movement or activities aimed at empowering consumers.~~
- (13) ~~Access to individual remedies for consumers harmed by unfair commercial practices should be enhanced in the context of Directive 2005/29/EC to put the consumer into the condition he would have been without the unfair commercial practice. While that Directive was originally designed mainly to regulate the market conduct of traders based on public enforcement, experience from more than ten years of application demonstrate the shortcomings of the lack of a clear framework setting out rights to individual remedies.~~
- (14) ~~National rules on individual remedies for consumers harmed by unfair commercial practices are diverging. The current situation, where to a large extent it is left to the Member States to determine if and how remedies should be available, keeps Directive 2005/29/EC from being fully effective. Therefore, that Directive still has potential to fully reach its dual purpose, which is to contribute to the proper functioning of the Internal Market and achieve a high level of consumer protection. Despite the existing possibilities for remedies under national law, the Fitness Check did not identify significant examples of case law where victims of unfair commercial practices had claimed remedies. This contrasts with the fact that unfair commercial practices are the most frequent consumer rights related problem across Europe. It indicates that the existing possibilities for remedies do not ensure that consumers can solve problems when their rights under that Directive have been breached. Accordingly, introducing a clear framework for individual remedies would facilitate private enforcement and be complementary to the existing requirement for Member States to ensure that adequate and effective means exist to enforce compliance with that Directive. It would also be in line with the approach to individual remedies in other consumer protection Directives, such as Directive 93/13/EEC and Directive 1999/44/EC ensuring a more coherent and consistent application of the consumer acquis.~~

(15) Member States should ensure that remedies are available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair practices. A clear framework for individual remedies would facilitate private enforcement [*sentence moved from recital 14*] ~~In order to meet that objective, Member States should make both contractual and non-contractual remedies available. As a minimum, the contractual remedies provided by the Member States should include the right to contract termination. Non-contractual remedies provided under national law should, as a minimum, include the right to compensation for damages.~~ **The consumer should have access to compensation for damages and, where relevant, contract termination, in a proportionate and effective manner.** Member States ~~would~~ **should** not be prevented from maintaining or introducing rights to additional **other** remedies, **such as repair, replacement, price reduction** for consumers harmed by unfair commercial practices in order to ensure full removal of the effects of such practices. **Member States should not be prevented from determining conditions for the application and effects of remedies for consumers. When applying the remedies, the gravity and nature of the unfair commercial practice, damages suffered by the consumer and other relevant circumstances, such as the trader's misconduct or the infringement of the contract, could be taken into account, where appropriate.**

(15a) The Fitness Check of consumer and marketing law directives and the parallel evaluation of Directive 2011/83/EU also identified a number of areas where the existing consumer protection rules should be modernised. In the context of continuous development of digital tools constant adjustment of consumer protection legislation is necessary. [*moved from recital 16 and modernised*]

(15b) Higher ranking or any prominent placement of commercial offers within online search results made by the providers of online search functionality, such as online search engines or online marketplaces, has an important impact on consumers.

(15c) Ranking refers to the relative prominence of the offers of traders or relevance given to search results as presented, organised or communicated by providers of online search functionality resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof.

(15d) Transparency requirements with regard to the main parameters of ranking are also regulated by [P2B Regulation] on promoting fairness and transparency for business users of online intermediation services. The transparency requirements under [P2B Regulation] covers a broader range of online intermediaries, including online marketplaces, but they only apply between traders and online intermediaries. Similar requirements should therefore be introduced in Directive 2005/29/EC to ensure adequate transparency towards the consumers, except in the case of providers of online search engines which are already required by the [P2B Regulation] to set out the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters, by providing an easily and publicly available description, drafted in plain and intelligible language on the online search engines of those providers. [to be moved after recital 15e]

(15e) In this regard, no. 11 of Annex I to Directive 2005/29/EC that prohibits hidden advertising in editorial content in media (advertorial) should be adjusted in order to make it clear that the same prohibition applies also where a trader provides information to a consumer in the form of search results in response to the consumer's online search query without disclosing the paid nature of search results (paid placement or paid inclusion). Specifically, when a trader has directly or indirectly paid the provider of the online search functionality for the promotion of a product, including higher ranking or prominent placement, within the search results, the provider of the online search functionality should inform consumers thereof in a concise, easy and intelligible form. Indirect payment could be in the form of the acceptance by a trader of additional obligations towards the provider of the online search functionality of any kind which have higher ranking or a prominent placement as its practical effect, such as the use of any premium features or ancillary services offered by the provider of the online search functionality. At the same time, the indirect payment could consist of increased commission per transaction as well as different compensation schemes that lead to higher ranking or a prominent placement. Online search functionality can be provided by different types of online traders, including intermediaries, such as online market places, search engines and comparison websites. *[moved from recital 40 and amended]*

- (16) The Fitness Check of consumer and marketing law directives and the parallel evaluation of Directive 2011/83/EU also identified a number of areas where the existing consumer protection rules should be modernised and disproportionate burden on traders reduced. **Traders enabling consumers to search for products offered by different traders or by consumers or for other traders should inform consumers about the default main parameters determining ranking of offers presented to the consumer as a result of the search query and their relative importance as opposed to other parameters. This information should be succinct and made easily, prominently and directly available. Parameters determining the ranking mean any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking.** *[moved from recital 19a on ranking parameters]*
- (17) When products are offered to consumers in online marketplaces, both the online marketplace and the third party supplier are involved in the provision of the pre-contractual information required by Directive 2011/83/EU. As a result, consumers using the online marketplace may not clearly understand who their contractual partners are and how their rights and obligations are affected.

- (18) Online marketplaces should be defined for the purposes of Directive 2011/83/EU in a similar manner as in Regulation (EU) 524/2013⁸ and Directive 2016/1148/EU⁹. However, the definition should be updated and rendered more technologically neutral in order to cover new technologies. It is therefore appropriate to refer, instead of a 'website', to the **software, including a website, part of a website or an application that is operated by or on behalf of the trader, in accordance with** the notion of an 'online interface' as provided by **Regulation (EU) 2017/2394** and Regulation (EU) 2018/302¹⁰.
- (19) Specific transparency requirements for online marketplaces should therefore be provided in Directive 2011/83/EU to inform consumers using online marketplaces about the main parameters determining ranking of offers, and whether they enter into a contract with a trader or a non-trader (such as another consumer). *[rest of recital 19 moved to recitals 19a and 19b]*
- (19a)** ~~The obligation to provide information about the main parameters determining ranking of search results is without prejudice to any trade secrets regarding the underlying algorithms.~~ **The information requirement regarding the main parameters of ranking is without prejudice to Directive (EU) 2016/943¹¹. Traders should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms. Traders should provide a general description of the main ranking parameters that** ~~This information should~~ **explains the main default parameters used by the marketplace trader and their relative importance as opposed to other parameters, however it** ~~but~~ does not have to be presented in a customized manner for each individual search query. *[to be moved after recital 16]*

⁸ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165, 18.6.2013, p. 1).

⁹ Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).

¹⁰ Regulation (EU) 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 and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60 I, 2.3.2018, p. 1).

¹¹ 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

(19b) Online marketplaces should inform the consumers whether the third party offering goods, services or digital content is a trader or non-trader, on the basis of a declaration by the third party to the online marketplace. When the third party offering the goods, services or digital content declares its status as non-trader, online marketplaces should provide a short statement that EU consumer protection legislation does not apply to the contract concluded. Furthermore, consumers should be informed how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the on-line market place whether consumer protection law applies and which trader is responsible for the performance of the contract and for ensuring consumer rights when these rights apply. This **The** information should be provided in a clear and comprehensible manner and not only through a reference in the standard Terms and Conditions or similar contractual document. The information requirements for online marketplaces should be proportionate and need to strike a balance between a high level of consumer protection and the competitiveness of online marketplaces. Online marketplaces should not be required to list specific consumer rights when informing consumers about their applicability or non-applicability. **This is without prejudice to the consumer information requirements provided in Directive 2011/83/EU, in particular Article 6(1).** The information to be provided about the responsibility for ensuring consumer rights depends on the contractual arrangements between the online marketplace and the relevant third party traders. Online marketplace may refer to the third party trader as being solely responsible for ensuring consumer rights or describe its specific responsibilities where it assumes the responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal.

(20) In accordance with Article 15(1) of Directive 2000/31/EC¹², online marketplaces should not be required to verify the legal status of third party suppliers. Instead, the online marketplace should require third party suppliers of products on the online marketplace to indicate their status as traders or non-traders for the purposes of consumer law and to provide this information to the online marketplace.

(20a) Taking into account the rapid technological developments concerning online marketplaces and the need to ensure a higher level of consumer protection, Member States should be able to adopt or maintain specific additional measures for that purpose. Such provisions should be proportionate, non-discriminatory and without prejudice to Directive 2003/31/EC.

¹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

- (21) ~~Digital content and digital services are often supplied online under contracts where the consumer does not pay a price but provides personal data to the trader. **The definitions of digital content and digital services in Directive 2011/83/EU should be aligned to those in the [Digital Content Directive]. Digital content covered by the [Digital Content Directive] covers single act of supply, a series of individual acts of supply, or continuous supply over a period of time. The element of continuous supply should not necessarily require a long-term supply. Cases such as web-streaming of video clips should be considered continuous supply over a period of time, regardless of the actual duration of the audio-visual file. It may therefore be difficult to distinguish between certain types of digital content and digital services, when**~~ Digital services are characterised by **the** continuous involvement of **supply by** the trader over the duration of the contract to enable the consumer to make use of the service, for instance, access to, creation, processing, storing or sharing of data in digital form. Examples of digital services are subscription contracts to content platforms, cloud storage, webmail, social media and cloud applications. The continuous involvement of the service provider justifies the application of the rules on the right of withdrawal provided in Directive 2011/83/EU that effectively allow the consumer to test the service and decide, during the 14-day period from the conclusion of the contract, whether to keep it or not. ~~In contrast,~~ **Contracts for the supply of digital content which is not supplied on a tangible medium, are characterised by one-off a single act of action by the trader to supply to the consumer of a specific piece or pieces of digital content, such as specific music or video files. They remain subject to the exception from the right of withdrawal in Article 16(m), which provides that**. This one-off nature of the provision of digital content is at the basis of the exception from the right of withdrawal pursuant to Article 16(m) of Directive 2011/83/EU, whereby the consumer loses the right of withdrawal when the performance of the contract is started, such as download or streaming of the specific content, **subject to consumer's prior express consent to begin the performance during the right of withdrawal period and acknowledgement that he thereby lost his right. In case of doubt, as to whether the contract is a service contract or contract for digital content which is not supplied on a tangible medium, the right of withdrawal rules for services should be applied.**

- (22) **Digital content and digital services are often supplied online under contracts where the consumer does not pay a price but provides personal data to the trader.** Directive 2011/83/EU already applies to contracts for the supply of digital content which is not supplied on a tangible medium (i.e. supply of online digital content) regardless of whether the consumer pays a price in money or provides personal data. In contrast, Directive 2011/83/EU only applies to service contracts, including contracts for digital services, under which the consumer pays or undertakes to pay a price. Consequently, that Directive does not apply to contracts for digital services under which the consumer provides personal data to the trader without paying a price. Given their similarities and the interchangeability of paid digital services and digital services provided in exchange for personal data, they should be subject to the same rules under Directive 2011/83/EU.
- (23) Consistency should be ensured between the scope of application of Directive 2011/83/EU and the [Digital Content Directive], which applies to contracts for the supply of digital content of digital services under which the consumer provides personal data to the trader.
- (24) Therefore, the scope of Directive 2011/83/EU should be extended to cover also contracts under which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data. Similar to contracts for the supply of digital content which is not supplied on a tangible medium, the Directive should apply whenever the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content or digital service, and the trader does not process this data for any other purpose. Any processing of personal data should comply with Regulation (EU) 2016/679.

- (25) Where digital content and digital services are not supplied in exchange for a price, Directive 2011/83/EU should also not apply to situations where the trader collects personal data exclusively to maintain in conformity digital content or a digital service or for the sole purpose of meeting legal requirements. Such situations could include cases where the registration of the consumer is required by applicable laws for security and identification purposes, or cases where the developer of open-source software only collects data from users to ensure the compatibility and interoperability of open-source software.
- (26) Directive 2011/83/EU should also not apply to situations where the trader only collects metadata, such as ~~the IP address~~ **information concerning the consumer's device or the browsing history or other information collected and transmitted for instance by cookies,** except where this situation is considered a contract under national law. It should also not apply to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. However, Member States should remain free to extend the application of the rules of Directive 2011/83/EU to such situations or to otherwise regulate such situations which are excluded from the scope of that Directive.
- (26a) The notion of functionality should refer to the ways in which digital content or a digital service can be used. For instance, the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding may have an impact on the possibility of the digital content or digital service to perform all its functions having regard to its purpose. The notion of interoperability describes whether and to what extent digital content or a digital service is able to function with hardware or software different from the ones with which digital content or services of the same type are normally used. The successful functioning would include, for instance, the ability of the digital content or digital service to exchange information with such other software or hardware and to use the information exchanged. The notion of compatibility is defined in [Digital Content Directive].**

- (27) Article 7(3) and Article 8(8) of Directive 2011/83/EU require traders, for off-premises and distance contracts respectively, to obtain the consumer's prior express consent to begin performance before the expiry of the right of withdrawal period. Article 14(4)(a) provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the services provided. The requirement to obtain consumer's express consent is accordingly only relevant for services, including digital services, which are provided against the payment of the price. It is therefore necessary to amend Article 7(3) and Article 8(8) to the effect that the requirement for traders to obtain the consumer's prior consent only applies to service contracts that place the consumer under an obligation to pay.
- (28) Article 16(m) of Directive 2011/83/EU provides for an exception to the right of withdrawal in respect of digital content that is not supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses the right of withdrawal. Article 14(4)(b) of Directive 2011/83/EU provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment is accordingly only relevant for digital content, which is provided against the payment of the price. It is therefore necessary to amend Article 16(m) to the effect that the requirement for traders to obtain the consumer's prior consent and acknowledgment only applies to contracts that place the consumer under an obligation to pay.
- (29) Article 7(4) of Directive 2005/29/EC sets out information requirements for the 'invitation to purchase' a product at a specific price. These information requirements apply already at the advertising stage, whilst Directive 2011/83/EU imposes the same and other, more detailed information requirements at the later pre-contractual stage (i.e. just before the consumer enters into a contract). Consequently, traders may be required to provide the same information in advertising (e.g. an online ad on a media website) and at the pre-contractual stage (e.g. on the pages of their online web-shops).

- (30) The information requirements under Article 7(4) of Directive 2005/29/EC include informing the consumer about the trader's complaint handling policy. The Fitness Check findings show that this information is most relevant at the pre-contractual stage, which is governed by Directive 2011/83/EU. The requirement to provide this information in invitations to purchase at the advertising stage under Directive 2005/29/EC should therefore be deleted.
- (31) Article 6(1)(h) of Directive 2011/83/EU requires traders to provide consumers with pre-contractual information about the right of withdrawal, including the model withdrawal form set out in Annex I(B) of the Directive. Article 8(4) of Directive 2011/83/EU provides for simpler pre-contractual information requirements if the contract is concluded through a means of distance communication which allows limited space or time to display the information, such as over the telephone, **via voice operated shopping assistants** or by SMS. The mandatory pre-contractual information requirements to be provided on **or through** that particular means of distance communication include information regarding the right of withdrawal as referred to in point (h) of Article 6(1). Accordingly, they include also the provision of the model withdrawal form set out in Annex I(B) of the Directive. However, the provision of the withdrawal form is impossible when contract is concluded by means such as telephone **or voice operated shopping assistant** and it may not be technically feasible in a user-friendly way on other means of distance communication covered by Article 8(4). It is therefore appropriate to exclude the provision of the model withdrawal form from the information that traders have to provide in any case on **or through** the particular means of distance communication used for the conclusion of the contract under Article 8(4) of Directive 2011/83/EU.

- (32) Article 16(a) of Directive 2011/83/EU provides for an exception from the right of withdrawal regarding service contracts that have been fully performed if the performance has begun with the consumer's prior express consent and with the acknowledgement that he will lose the right of withdrawal once the contract has been fully performed by the trader. In contrast, Article 7(3) and 8(78) of Directive 2011/83/EU, which deal with the trader's obligations in situations where the performance of the contract is begun before the expiry of the right of withdrawal period, only require traders to obtain consumer's prior express consent but not acknowledgment that the right of withdrawal will be lost when the performance is completed. To ensure consistency between the above-mentioned legal provisions, it is necessary to **add an obligation in Articles 7(3) and 8(8) of Directive 2011/83/EU for the trader also to obtain the acknowledgement from the consumer that the right of withdrawal will be lost when the performance is completed** ~~remove, in~~ Article 16(a), the reference to acknowledgment that the right of withdrawal will be lost once the contract has been fully performed. **In addition, the wording of Article 16(a) should be adjusted to the changes to Article 7(3) and Article 8(8) whereby the requirement for traders to obtain the consumer's prior consent only applies to service contracts that place the consumer under an obligation to pay. However, Member States should be given the option not to apply the requirement to obtain the acknowledgment from the consumer that the right of withdrawal will be lost when the performance is completed to service contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out repairs. Point (c) of Article 16 of Directive 2011/83/EU provides for an exception from the right of withdrawal in case of the supply of goods made to the consumer's specifications or clearly personalized. This exception covers, for example, the manufacturing and installation of customized furniture at the consumer's home when provided under a single sales contract.**
- (33) ~~Directive 2011/83/EU provides fully harmonised rules regarding the right of withdrawal from distance and off-premises contracts. In this context, two concrete obligations have been shown to constitute disproportionate burdens on traders and should be deleted.~~

- (34) ~~The first relates to the consumer right to withdraw from sales contracts concluded at a distance or off premises even after using goods more than necessary to establish their nature, characteristics and functioning. According to Article 14(2) of Directive 2011/83/EU, a consumer is still able to withdraw from the online/off premises purchase even if he or she has used the good more than allowed; however, in such a case, the consumer can be held liable for any diminished value of the good.~~
- (35) ~~The obligation to accept the return of such goods creates difficulties for traders who are required to assess the ‘diminished value’ of the returned goods and to resell them as second-hand goods or to discard them. It distorts the balance between a high level of consumer protection and the competitiveness of enterprises pursued by Directive 2011/83/EU. The right for consumers to return goods in such situations should therefore be deleted. Annex I of Directive 2011/83/EU ‘Information concerning the exercise of the right of withdrawal’ should also be adjusted in accordance with this amendment.~~
- (36) ~~The second obligation concerns Article 13 of Directive 2011/83/EU, according to which traders can withhold the reimbursement until they have received the goods back, or until the consumer has supplied evidence of having sent them back, whichever is the earliest. The latter option may, in some circumstances, effectively require traders to reimburse consumers before having received back the returned goods and having had the possibility to inspect them. It distorts the balance between a high level of consumer protection and the competitiveness of enterprises pursued by Directive 2011/83/EU. Therefore, the obligation for traders to reimburse the consumer on the mere basis of the proof that the goods have been sent back to the trader should be deleted. Annex I of Directive 2011/83/EU ‘Information concerning the exercise of the right of withdrawal’ should also be adjusted in accordance with this amendment.~~

- (37) Article 14(4) of Directive 2011/83/EU stipulates the conditions under which, in the event of exercising the right of withdrawal, the consumer does not bear the cost for the performance of services, supply of public utilities and supply of digital content which is not supplied on a tangible medium. When any of those conditions is met, the consumer does not have to pay the price of the service, public utilities or digital content received before the exercise of the right of withdrawal. As regards digital content, one of these non-cumulative conditions **under Article 14(4)(b)(iii)** is a failure to provide the contract confirmation including confirmation of the consumer's prior express consent to begin the performance of the contract before the expiry of the right of withdrawal period and acknowledgement that the right of withdrawal is lost as a result. **However, this condition is not included among the conditions for** relevant in the context of the exercise of the right of withdrawal since the consumer has been duly informed and has accepted the loss of this **the right of withdrawal in Article 16(m), creating uncertainty as to the possibility for consumer to invoke Article 14(4)(b)(iii) when the other two conditions provided in Article 14(4)(b) are met and the right of withdrawal is lost according to Article 16(m) as a result. The condition provided in Article 14(4)(b)(iii) should therefore be added to Article 16(m) should therefore to enable the consumer to exercise the right of withdrawal when it is not met and accordingly claim the rights provided in Article 14(4)** be deleted from Article 14(4)(b) to ensure also consistency with Article 16(m) which defines an exception from the right of withdrawal in case of digital content.
- (38) Considering technological developments, it is necessary to remove the reference to fax number from the list of the means of communication in Article 6(1)(c) of Directive 2011/83/EU since fax is rarely used and largely obsolete. Furthermore, traders ~~should be able to~~ **could** provide, as alternative to an e-mail address other means of online communication with consumers, for example, online forms and chats, provided that such alternative means enable the consumer to retain the content of the **written** communication on a durable medium in a similar way as e-mail. Annex I of the Directive 'Information concerning the exercise of the right of withdrawal' should also be adjusted in accordance with this amendment.

- (39) ~~A number of additional amendments should be introduced in the instruments amended by this Directive to clarify the application of specific rules.~~
- (40) ~~No 11 of Annex I to Directive 2005/29/EC that prohibits hidden advertising in editorial content in media should be adjusted in order to make it clear that the same prohibition applies also where a trader provides information to a consumer in the form of search results in response to the consumer's online search query. [moved to recital 15b]~~
- (41) Article 16 of the Charter of Fundamental Rights of the EU guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. However, marketing across Member States of ~~products~~ **goods** as being identical when, in reality, they have a significantly **materially** different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise.
- (42) Such a practice can therefore be qualified as contrary to Directive 2005/29/EC based on a case by case assessment of relevant elements. In order to facilitate the application of existing law by Member States' consumer and food authorities, guidance on the application of current EU rules to situations of dual quality of food ~~products~~ was provided in the Commission Notice of 26.9.2017 'on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food'.¹³ In this context, the Commission's Joint Research Centre **has presented** ~~is currently developing~~ a common approach to the comparative testing of food ~~products~~.¹⁴

¹³ C(2017)6532.

¹⁴

https://ec.europa.eu/jrc/sites/jrcsh/files/eu_harmonised_testing_methodology_framework_for_selecting_and_testing_of_food_products_to_assess_quality_related_characteristics.pdf

(43) However, the enforcement experience has shown that it may be unclear to consumers, traders and national competent authorities which commercial practices could be contrary to the Directive 2005/29/EC in the absence of an explicit provision. Therefore, Directive 2005/29/EC should be amended to ensure legal certainty both for traders and enforcement authorities by addressing explicitly the marketing of a ~~product~~ **good** as being identical to the same ~~product~~ **good** marketed in ~~several~~ other Member States, where ~~those products~~ **that good** ~~have~~ **has** significantly **materially** different composition or characteristics. Competent authorities should assess and address on a case by case basis such practices according to the provisions of the Directive. In undertaking its assessment the competent authority should take into account whether such differentiation is easily identifiable by consumers, a trader's right to adapt ~~products~~ **goods** of the same brand for different geographical markets due to legitimate **and objective** factors, such as **national legislation** availability or seasonality of raw materials, ~~defined consumer preferences or~~ or voluntary strategies aimed at improving access to healthy and nutritious food as well as the traders' right to offer ~~products~~ **goods** of the same brand in packages of different weight or volume in different geographical markets.

(44) While off-premises sales constitute a legitimate and well-established sales channel, like sales at a trader's business premises and distance-selling, some particularly aggressive or misleading ~~marketing~~ **commercial** practices in the context of visits to the consumer's home ~~without the consumer's prior agreement~~ or during **events in a place other than the trader's business premises as defined in Article 2(9) of Directive 2011/83/EU or commercial excursions as referred to in Article 2(8) of Directive 2011/83/EU** can put consumers under pressure to make purchases of goods **or services** they would not otherwise buy and/or purchases at excessive prices, often involving immediate payment. Such practices often target elderly or other vulnerable consumers. Some Member States consider those practices undesirable and deem it necessary to restrict certain forms and aspects of off-premises sales within the meaning of Directive 2011/83/EU, such as aggressive and misleading marketing or selling of a product in the context of ~~unsolicited~~ visits to a consumer's home, **events at places other than the trader's business premises** or ~~commercial~~ excursions. **Where such restrictions are taken** on grounds **other than consumer protection, such as** ~~of~~ public ~~policy~~ **interest** or the respect for consumers' private life protected by Article 7 of the Charter of Fundamental Rights of the EU, **they fall outside the scope of Directive 2005/29/EC.**

(44a) In accordance with the principle of subsidiarity and in order to facilitate enforcement, it should therefore be clarified that Directive 2005/29/EC is without prejudice to Member States' freedom to ~~make arrangements without the need for a case-by-case assessment of the specific practice,~~ **enact national provisions to further** protect the legitimate interests of consumers **against unfair commercial practices in the context of** ~~with regard to~~ ~~unsolicited~~ visits at their private home by a trader in order to offer or sell products, **without express request by the consumer, events at places other than the trader's business premises** or ~~in relation to commercial~~ excursions organised by a trader with the aim or effect of promoting or selling products to consumers where such ~~arrangements~~ **provisions** are justified on grounds **of consumer protection** ~~public policy or the protection of private life.~~ **Examples of express request by the consumer could include requests on paper or another durable medium or any means that allow the trader to prove the express request. Examples of commercial events at places other than the trader's business premises include product presentations at places such as hotels and restaurants.** Any such provisions should be proportionate and not discriminatory **and should not prohibit these sales channels as such.** **National provisions enacted by Member States could, for example, define time of the day when visits to consumers' homes without their express request are not allowed or prohibit such visits when the consumer has visibly indicated that such visits are not acceptable, set a maximum value for the contracts to be concluded during such visits or prescribe the payment procedure and more protective rules regarding the right of withdrawal from the contract. Such provisions could accordingly lay down more protective rules in the areas harmonized by Directive 2011/83/EU. The latter should therefore be amended to clarify that it is without prejudice to such national measures when they ensure a higher level of consumer protection than that provided in Directive 2011/83/EU.** Member States should be required to notify any national provisions adopted in this regard to the Commission so that the Commission can make this information available to all interested parties and monitor the proportionate nature and legality of those measures.

(44b) This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract in cases such as lack of consent or unauthorised commercial activity.

(45) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents¹⁵, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(46) Since the objectives of this Directive of better enforcement and modernisation of the consumer protection legislation cannot be sufficiently achieved by the Member States but can rather, by reason of the Union-wide character of the problem, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

HAVE ADOPTED THIS DIRECTIVE:

¹⁵ OJ C 369, 17.12.2011, p. 14.

Article 1
Amendments to Directive 2005/29/EC

Directive 2005/29/EC is amended as follows:

(0) Article 2 is amended as follows:

(aa) Point (c) is replaced by the following:

(c) 'product' means any good or service including immovable properties, digital service and digital content, as well as rights and obligations;

(a) The following point (m) is inserted:

(m) 'ranking' means the relative prominence given to products or traders, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication;

(1) Article 3 is amended as follows:

(a) Paragraph 5 is replaced by the following:

5. This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading ~~marketing or selling~~ **commercial** practices in the context of:

- ~~unsolicited~~ **a** visits by a trader to a consumer's home **where the visit does not take place at the express request of the consumer, or**
- **events in a place other than the trader's business premises** or with regard to ~~commercial~~ excursions organised by a trader **to which consumers are invited** with the aim or effect of promoting or selling products to consumers.

~~provided that~~ Such provisions are **shall be proportionate, non-discriminatory and** justified on grounds of **consumer protection** ~~public policy or the protection of the respect for private life.~~

(b) Paragraph 6 is replaced by the following:

6. Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5 as well as of any subsequent changes. The Commission shall make this information easily accessible to consumers and traders on a dedicated website.

(2) The following point (c) is inserted in paragraph 2 of Article 6:

(c) any marketing of a ~~product~~ **good, in one Member State,** as being identical to the same ~~product~~ **good** marketed in ~~several~~ other Member States, while ~~those~~ **that products good** ~~have~~ **has** significantly **materially** different composition or characteristics, **unless justified by legitimate and objective factors;**

(3) Article 7 is amended as follows:

(a) Point (d) of Article 7(4) is replaced by the following:

(d) the arrangements for payment, delivery and performance, if they depart from the requirements of professional diligence;

(b) The following paragraph is inserted:

4b. When providing consumers with the possibility to search for products offered by different traders or by consumers or to search for different traders on the basis of a query in the form of a keyword, phrase or other input, general information on the main parameters determining ranking of products or traders presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters shall be regarded as material. This paragraph does not apply to providers of online search engines as defined in [P2B Regulation];

(4) The following Article 11a is inserted:

‘Article 11a

Redress

1. ~~In addition to the requirement to ensure adequate and effective means to enforce compliance in Article 11, Member States shall ensure that contractual and non-contractual remedies are also available for consumers harmed by unfair commercial practices in order to eliminate all the effects of those unfair commercial practices in accordance with their national law.~~
1a. Consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damages suffered by the consumer and, where relevant, the termination of contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, damages suffered by the consumer and other relevant circumstances.
2. ~~Contractual remedies shall include, as a minimum, the possibility for the consumer to unilaterally terminate the contract.~~
3. ~~Non-contractual remedies shall include, as a minimum, the possibility of compensation for damages suffered by the consumer.~~
3a. Those remedies shall be without prejudice to the application of other remedies available to consumers under EU or national law.

(5) Article 13 is replaced by the following:

‘Article 13

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall ensure that, ~~when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall, give due regard to the~~ following **non-exhaustive and indicative** criteria **are taken into account for the imposition of penalties**, where **appropriate** relevant:
 - (a) the nature, gravity and duration ~~temporal effects~~ of the infringement;
 - (b) ~~the number of consumers affected, including those in other Member State(s);~~

- (c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- ~~(d) where appropriate, the intentional or negligent character of the infringement;~~
- (e) any previous infringements by the trader;
- (f) the financial benefits gained or losses avoided by the trader due to the infringement, **if the relevant data are available or can easily be determined**;
- (g) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. ~~Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.~~
4. Member States shall ensure that **when penalties are to be imposed in accordance with Article 21** ~~the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934~~**2394**, **they** include **either** the possibility to impose fines **through administrative procedures or to initiate legal proceedings for the imposition of fines, or both**, the maximum amount of which shall be at least 4 % of the trader's annual turnover in the Member State or Member States concerned. **Without prejudice to that Regulation, for national constitutional reasons, Member States may restrict the imposition of fines to:**
- (a) infringements of Articles 6, 7, 8, 9 and of Annex I; and
 - (b) a trader's continued use of a commercial practice that has been deemed unfair by the competent national authority or court when the infringement is not covered by point (a).
- 4a. For cases when a fine is to be imposed in accordance with paragraph 4 and information on trader's annual turnover is not available, Member States may maintain or introduce other effective, proportionate and dissuasive rules providing for fines.**
5. ~~When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.~~
6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.²

(6) No. 11 of Annex I is replaced by the following **amended as follows**:

(a) No. 11 is replaced by the following:

11. Using editorial content in the media, or providing information to a consumer's online search query, to promote a product where a trader has **directly or indirectly** paid, for the promotion, **in particular by higher ranking or prominent placement**, without making that clear in the content or search results or by images or sounds clearly identifiable by the consumer (~~advertorial, paid placement or paid inclusion~~). This is without prejudice to Directive 2010/13/EU¹⁶.

Article 2

Amendments to Directive 2011/83/EU

Directive 2011/83/EU is amended as follows:

(1) Article 2 is amended as follows:

(0) Point (3) is replaced by the following:

(3) 'goods' means goods as defined by point (5) of Article 2 in Directive 2019/... on Sales of Goods¹⁷;

(a) The following point (4a) is inserted:

⁄(4a) 'personal data' means personal data as defined in Article 4(1) of Regulation (EU) 2016/679;²

¹⁶ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

¹⁷ In the proposal of Directive on Sales of Goods (2015/0288 (COD)), (e) "goods" means:
(i) any tangible movable item: water, gas and electricity are to be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity;
(ii) any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions ("goods with digital elements").

(aa) Point (5) is replaced by the following:

(5) ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer , including any contract having as its object both goods and services;

(b) Point (6) is replaced by the following:

~~‘(6) ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service, **including a digital service** to the consumer and the consumer pays or undertakes to pay the price thereof. Reference to ‘services’ also includes ‘digital services’ and reference to ‘service contract’ also includes ‘digital service contract’;~~

(c) Point (11) is replaced by the following:

~~‘(11) ‘digital content’ means data which is produced and supplied in digital form, including video files, audio files, applications, digital games and any other software’;~~

(d) The following points are added:

~~‘(16) ‘contract for the supply of digital content which is not supplied on tangible medium’ means a contract under which the trader supplies or undertakes to supply specific digital content to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts or where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital content, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose.~~

- (17) ‘digital service’ means (a) a service ~~allowing~~ **that allows** the consumer the creation, ~~processing or storage of~~, **to create, process, store** or access to, data in digital form; or (b) a service ~~allowing~~ **that allows** the sharing of or any other interaction with data in digital form uploaded or created by the consumer ~~and~~ **or** other users of that service, ~~including video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.~~
- (18) ~~‘digital service contract’ means a contract under which a trader supplies or undertakes to supply a digital service to the consumer and the consumer pays or undertakes to pay the price thereof. This also includes contracts where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital service, or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose;~~
- (19) ‘online marketplace’ means a service ~~provider~~ which allows consumers to conclude online **distance** contracts with **other** traders ~~and~~ **or** consumers **using software, including a website, part of a website or an application that is operated by or on behalf of the trader** on the online marketplace’s online interface;
- (19a) ‘provider of online marketplace’ means any service provider which provides online marketplace to consumers;**
- (20) ~~‘online interface’ means online interface as defined in point (16) of Article 2 of Regulation (EU) 2018/302.’~~

(21) ‘compatibility’ means the ability of the digital content or digital service to function with hardware or software with which digital content or digital services of the same type are normally used, without the need to convert the digital content or digital service;

(22) ‘functionality’ means the ability of the digital content or digital service to perform its functions having regard to its purpose;

(23) ‘interoperability’ means the ability of the digital content or digital service to function with a hardware or software different from the ones with which digital content or digital services of the same type are normally used;

(1a) Paragraph 1 of Article 3 is replaced by the following:

1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer where the consumer pays or undertakes to pay the price thereof. It shall ~~also~~ apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.

(1b) The following paragraph 1a is added in Article 3 as follows:

1a. This Directive shall also apply where the trader supplies or undertakes to supply digital content which is not supplied on tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content which is not supplied on tangible medium or digital service in accordance with this Directive or for the trader to comply with legal requirements to which the trader is subject, and the trader does not process this data for any other purpose.

(1bb) The following point (n) is inserted in paragraph 3 of Article 3:

(n) for any goods sold by way of execution or otherwise by authority of law.

(1c) The following paragraph 7 is inserted in Article 3:

7. This Directive does not prevent Member States from adopting provisions to provide for a higher level of consumer protection in the context of :

- **a visit by a trader to a consumer's home where the visit does not take place at the express request of the consumer, or**
- **events in a place other than the trader's business premises or excursions organised by a trader to which consumers are invited with the aim or effect of promoting or selling products to consumers.**

Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

(2) Paragraph 1 of Article 5 **is amended as follows** points (g) and (h) are replaced by the following:

(a) Point (e) is replaced by the following:

(e) in addition to a reminder of the existence of the legal guarantee of conformity for goods, digital content and digital services, the existence and the conditions of after-sales services and commercial guarantees, where applicable.

(b) Points (g) and (h) are replaced by the following:

⁂(g) where applicable, the functionality, including applicable technical protection measures, of **goods with digital elements**, digital content and digital services.

(h) where applicable, any relevant **compatibility and interoperability of goods with digital elements**, digital content and digital services ~~with hardware and software~~ that the trader is aware of or can reasonably be expected to have been aware of.²

(3) In Paragraph 1 of Article 6 **is amended as follows** points (c), (r) and (s) are replaced by the following:

(a) Point (c) is replaced by the following:

“(c) the geographical address at which the trader is established as well as the trader’s telephone number **and** e-mail address. **In addition, the trader can provide** ~~or~~ other means of online communication which guarantee that the consumer can keep ~~the~~ **any written** correspondence with the trader on a durable medium. **All these means of communication provided by the trader shall**, ~~to~~ enable the consumer to contact the trader quickly and communicate with him efficiently. Where applicable, the trader shall also provide the geographical address and identity of the trader on whose behalf he is acting.

(b) Point (l) is replaced by the following:

(l) a reminder of the existence of a legal guarantee of conformity for goods, digital content and digital services.

(c) Points (r) and (s) are replaced by the following:

- (r) where applicable, the functionality, including applicable technical protection measures, of **goods with digital elements**, digital content and digital services.
- (s) where applicable, any relevant **compatibility and** interoperability of **goods with digital elements**, digital content and digital services ~~with hardware and software~~ that the trader is aware of or can reasonably be expected to have been aware of.²

(4) The following Article 6a is inserted:

‘Article 6a

Additional **specific** information requirements for contracts concluded on online marketplaces

- 1.** Before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the **provider of** online marketplace shall ~~in addition~~ provide the following information **in a clear and comprehensible manner and in a way appropriate to the means of distance communication:**
 - (a) general information on** ~~(a)~~ the main parameters determining ranking of offers presented to the consumer as result of ~~his~~ **the** search query on the online marketplace **and the relative importance of those main parameters as opposed to other parameters; this information shall be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented;**
 - (b) whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the online marketplace;
 - (c) ~~whether consumer rights stemming from Union consumer legislation apply or not to the contract concluded~~ **that EU consumer protection legislation does not apply to the contracts where the third party offering the goods, services or digital content is not a trader** and

- (d) ~~where the contract is concluded with~~ **where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace.** This requirement ~~information shall be~~ is without prejudice to the responsibility that the online marketplace **or trader** may have ~~or may assume with regard to specific elements of~~ **in relation** to the contract **under other EU or national law.**

1a. Without prejudice to Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, this Article does not prevent Member States from imposing additional information requirements for the online marketplaces. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

(5) Paragraph 3 in Article 7 is replaced by the following:

- ‘3. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer makes such an express request on a durable medium. **The trader shall also request the consumer to acknowledge that once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.**²

(6) Article 8 is amended as follows:

(a) Paragraph 4 is replaced by the following:

4. If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on **or through** that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to, respectively, in points (a), (b), (e), (h) and (o) of Article 6(1) except the model withdrawal form set out in Annex I(B) referred to in point (h). The other information referred to in Article 6(1), **including the withdrawal form**, shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.²

(b) Paragraph 8 is replaced by the following:

8. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make an express request. **The trader shall also request the consumer to acknowledge that once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.**²

(7) Article 13 is amended as follows:

(a) Paragraph 3 is replaced by the following:

~~3. Unless the trader has offered to collect the goods himself, with regard to sales contracts, the trader may withhold the reimbursement until he has received the goods back.²~~

(b) The following paragraphs are added:

~~4. In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679.²~~

5. ~~In respect of any digital content to the extent that it does not constitute personal data, which was uploaded or created by the consumer when using the digital content or digital service supplied by the trader the trader shall comply with the obligations and can exercise the rights provided under [Digital Content Directive].~~

The trader shall refrain from using any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:

(a) has no utility outside the context of the digital content or digital service supplied by the trader;

(b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader,

(c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts, or

(d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.

- 6. Except in the situations referred to in points (a), (b) or (c) of paragraph 5, the trader shall, at the request of the consumer, make available to the consumer any content that is not personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader.**
- 7. The consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.**
- 8. In the event of withdrawal from the contract, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service no longer accessible to the consumer or disabling the user account of the consumer, without prejudice to paragraph 6.**

(8) Article 14 is amended as follows:

(1) **The following** paragraph 2a is replaced by the following **added**:

~~‘2a. After the termination of~~ **In the event of withdrawal from** the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.’²

(2) Paragraph 4(b) is amended as follows:

(a) ~~Point (ii) is amended as follows:~~

~~‘(ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent’;~~

(b) ~~Point (iii) is deleted.~~

(9) Article 16 is amended as follows:

(a) Point (a) is replaced by the following:

“(a) service contracts after the service has been fully performed **and, if the contract places the consumer under an obligation to pay** if the performance has begun with the consumer’s prior express consent, **and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader**”;

(b) Point (m) is replaced by the following:

“(m) contracts for the supply of digital content which is not supplied on tangible medium if the performance has begun and, if the contract places the consumer under an obligation to pay, where ~~the consumer has provided prior express consent to begin the performance during the right of withdrawal period and acknowledged that he thereby loses his right of withdrawal.~~”;

(i) the consumer has provided prior express consent to begin the performance during the right of withdrawal period;

(ii) the consumer has provided acknowledgement that he thereby loses his right of withdrawal; and

(iii) the trader has provided confirmation in accordance with Article 7(2) or Article 8(7).

(c) A new paragraph is inserted as follows:

(1a) ~~the supply of goods that the consumer has handled, during the right of withdrawal period, other than what is necessary to establish the nature, characteristics and functioning of the goods.~~ **Member States may provide that the consumer loses the right of withdrawal in case of service contracts after the service has been fully performed and where the consumer has specifically requested a visit from the trader for the purpose of carrying out repairs, if the performance has begun with the consumer’s prior express consent, if the contract places the consumer under an obligation to pay.**

(10) Article 24 is replaced by the following:

‘Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall ensure that, ~~when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall, give due regard to the following~~ **non-exhaustive and indicative** criteria **are taken into account for the imposition of penalties**, where **appropriate** relevant:
 - (a) the nature, gravity and duration ~~or temporal effects~~ of the infringement;
 - (b) ~~the number of consumers affected, including those in other Member State(s);~~
 - (c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
 - (d) ~~where appropriate, the intentional or negligent character of the infringement;~~
 - (e) any previous infringements by the trader;
 - (f) the financial benefits gained or losses avoided by the trader due to the infringement, **if the relevant data are available or can easily be determined**;
 - (g) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. ~~Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.~~
4. Member States shall ensure that **when penalties are to be imposed in accordance with Article 21** ~~the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934~~**2394**, **they** include **either** the possibility to impose fines **through administrative procedures or to initiate legal proceedings for the imposition of fines, or both**, the maximum amount of which shall be at least 4 % of the trader's annual turnover in the Member State or Member States concerned.
 - 4a. **For cases when a fine is to be imposed in accordance with paragraph 4 and information on trader's annual turnover is not available, Member States may maintain or introduce other effective, proportionate and dissuasive rules providing for fines.**
5. ~~When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.~~
6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.²

(10a) Paragraph 1 of Article 29 is replaced by the following:

‘1. Where a Member State makes use of any of the regulatory choices referred to in Article 3(4), Article 3(7), Article 6(7), Article 6(8), Article 7(4), Article 8(6), Article 9(3) and Article 16(1a), it shall inform the Commission thereof [by the date of transposition provided in Article 5], as well as of any subsequent changes.

(11) Annex I is amended as follows:

(1) Point A is amended as follows:

(a) The third paragraph of point A under "Right of withdrawal" is replaced by the following:

“To exercise the right of withdrawal, you must inform us [2] of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post or e-mail). You may use the attached model withdrawal form, but it is not obligatory. [3]”

(b) Point 2 under "Instructions for completion" is replaced by the following:

“[2.] Insert your name, geographical address, ~~and~~ your telephone number ~~or~~ **and** e-mail address.”

~~(c) Point 4 under "Instructions for completion" is replaced by the following:~~

~~“[4.] In the case of sales contracts in which you have not offered to collect the goods in the event of withdrawal insert the following: ‘We may withhold reimbursement until we have received the goods back.’”~~

~~(d) Subpoint (e) of point 5 under "Instructions for completion" is deleted.~~

(2) In point B the first indent is replaced by the following:

“To [here the trader’s name, geographical address and, ~~where available,~~ his e-mail address are to be inserted by the trader].”

Article 3
Amendments to Directive 93/13/EEC

Directive 93/13/EEC is amended as follows:

The following Article 8b is inserted:

‘Article 8b

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
 - 1a. Member States may restrict such penalties to situations where the contractual terms are expressly defined as unfair in all circumstances in national law or where a seller or supplier continues to use contractual terms that have been established as unfair in a final decision taken in accordance with Article 7(2).**
2. Member States shall ensure that, ~~when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the~~ following **non-exhaustive and indicative** criteria **are taken into account for the imposition of penalties**, where relevant **appropriate**:
 - (a) the nature, gravity and duration ~~or temporal effects~~ of the infringement;
 - (b) ~~the number of consumers affected, including those in other Member State(s);~~
 - (c) any action taken by the trader **seller or supplier** to mitigate or remedy the damage suffered by consumers;

- (d) ~~where appropriate, the intentional or negligent character of the infringement;~~
 - (e) any previous infringements by the ~~trader~~ **seller or supplier**;
 - (f) the financial benefits gained or losses avoided by the ~~trader~~ **seller or supplier** due to the infringement, **if the relevant data are available or can easily be determined**;
 - (g) any other aggravating or mitigating factor applicable to the circumstances of the case.
3. ~~Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.~~
4. **Without prejudice to paragraph 1a,** Member States shall ensure that **when penalties are to be imposed in accordance with Article 21** ~~the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934~~**2394,** **they** include **either** the possibility to impose fines **through administrative procedures or to initiate legal proceedings for the imposition of fines, or both,** the maximum amount of which shall be at least 4 % of the ~~trader's~~ **seller's or supplier's** annual turnover in the Member State or Member States concerned.
- 4a. For cases when a fine is to be imposed in accordance with paragraph 4 and information on trader's annual turnover is not available, Member States may maintain or introduce other effective, proportionate and dissuasive rules providing for fines.**

5. ~~When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.~~
6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.²

Article 4
Amendments to Directive 98/6/EC

Directive 98/6/EC is amended as follows:

Article 8 is replaced by the following:

‘Article 8

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall ensure that, ~~when deciding on whether to impose a penalty and on its level, the administrative authorities or courts shall give due regard to the~~ following **non-exhaustive and indicative** criteria **are taken into account for the imposition of penalties**, where relevant ~~appropriate~~:
 - (a) the nature, gravity and duration ~~or temporal effects~~ of the infringement;
 - (b) ~~the number of consumers affected, including those in other Member State(s);~~
 - (c) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
 - (d) ~~where appropriate, the intentional or negligent character of the infringement;~~
 - (e) any previous infringements by the trader;
 - (f) the financial benefits gained or losses avoided by the trader due to the infringement, **if the relevant data are available or can easily be determined**;
 - (g) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. ~~Where the penalty to be imposed is a fine, the infringing trader's annual turnover and net profits as well as any fines imposed for the same or other infringements of this Directive in other Member States shall also be taken into account in the determination of its amount.~~
4. ~~Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4 % of the trader's annual turnover in the Member State or Member States concerned.~~
5. ~~When deciding about the allocation of revenues from fines Member States shall take into account the general interest of consumers.~~
6. Member States shall notify their rules on penalties to the Commission by [date for the transposition of the Directive] and shall notify it without delay of any subsequent amendment affecting them.'

Article 5

Transposition

1. Member States shall adopt and publish, by ~~18~~**24** months after adoption at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 6 months after transposition deadline.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 6
Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Article 7
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
