Federal Ministry of Justice and Consumer Protection

Amendment proposal

on the draft Act of the Federal Government

- document 19/26915 -

**Draft law on fair consumer contracts**

It is proposed that the Bundestag (Parliament) should decide

to adopt the draft Act in document 19/26915 with the following provisos, otherwise unchanged:

* 1. The following footnote is added to the heading:

\* Notified in accordance with Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (AB1.L 241 of 17 September 2015, P. 1).

* 1. Article 1 is amended as follows:
     1. The following points 4 to 6 are inserted after point 3:

‘4. In § 312(7), sentence 1, the words “§ 312 l” are replaced by “§ 312 m”.

5. After § 312j, the following § 312k is inserted:

‘§ 312k

Termination of consumer contracts in electronic commerce

* + 1. Where a website enables consumers to conclude an electronic commerce contract which is aimed at establishing a permanent debt relationship and obliging a company to perform a service in return, then the company shall meet the obligations laid down in that provision. This shall not apply to
       1. contracts whose termination is only provided for in a more stringent form than the text form; and
       2. in relation to websites relating to financial services or for contracts relating to financial services.
    2. The company must ensure that the consumer on the website is able to make a declaration of the ordinary or extraordinary termination of a contract concluded on the website in accordance with the sentence of Paragraph 1, Sentence 1 via a termination button. The termination button must be easily readable with nothing other than the words “cancel contracts here” or be labelled with an appropriate unambiguous wording. It must lead the consumer directly to a confirmation page which
       1. prompts the consumer and allows him to provide information
          1. regarding the nature of the termination and, in the case of extraordinary termination, the ground of termination,
          2. regarding its unambiguous identifiability,
          3. regarding the unambiguous designation of the Treaty,
          4. at the time when the termination is to terminate the contractual relationship,
          5. for the rapid electronic transmission of the confirmation of termination to him and
       2. contains a confirmation button through which the consumer can submit the notice of termination and which is easily legible with nothing other than the words “cancel now” or marked with an appropriate unambiguous wording.

The user interfaces and the confirmation page must be permanently available and immediately and easily accessible.

* + 1. The consumer must be able to store, on a durable medium, their declaration of termination submitted by pressing the confirmation button with the date and time of the delivery in such a way that it can be seen that the declaration of termination has been submitted by pressing the confirmation button.
    2. The company shall immediately confirm to the consumer the content and the date and time of receipt of the notice of termination, as well as the date at which the contract is to be terminated by the termination, in written form by electronic means. It is presumed that a notice of termination submitted by pressing the confirmation button has been sent to the company immediately after their submission.
    3. If the consumer does not indicate a time at which the termination is intended to terminate the contractual relationship when submitting the notice of termination, then the termination will be effected in doubt at the earliest possible time.
    4. If the buttons and the confirmation page are not made available in accordance with Paragraphs 1 and 2, then a consumer can terminate a contract for whose termination the buttons and the confirmation page must be made available at any time and without observance of a notice period. This does not affect the consumer’s ability to terminate exceptionally.”

6. The previous §§ 312k and 312 l will be §§ 312 l and 312 m.’

* + 1. The previous Number 4 becomes Number 7.
  1. Article 2 is worded as follows:

‘Article 2

Amendment of the Introductory Act to the Civil Code

The Introductory Act to the Civil Code in the version published on 21 September 1994 (Federal Law Gazette I p. 2494, 1997; I p. 1061), as last amended by Article 10 of the Act of 22 December 2020 (Federal Law Gazette I p. 3328) is amended, will be amended as follows:

* + - 1. Article 229 shall be replaced by the following §... [introduce: next free counting designation when promulgated] added:

‘§... [incorporate: next free counting designation when promulgated]

Transitional provision to the law on fair consumer contracts

To a debt which precedes the... [setting: The date of entry into force in accordance with the sentence of Article 5(3) of this Law] shall apply to the provisions of the Civil Code as amended until that date.”

* + - 1. In Article 246e(1)(2), Number 10, the words “§ 312k” shall be replaced by “§ 312 l”.
  1. The following sentence is inserted after Article 5 Sentence 1:

‘Articles 1(4) to (6) and Article 2(2) shall enter into force on 1 July 2022.’

Explanatory statement

**Re (1)**

The supplement is necessary because the provision provided for in Number 2(a) (Article 1(5)) is subject to notification under Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules for information society services.

**Re (2)**

Number 2 contains amendments to Article 1 of the draft law, which provides for amendments to the Civil Code (BGB).

**Re (a)**

Letter a contains the amendments to the BGB necessary by the insertion of § 312k BGB in the draft version.

**Re Article 1 point 4**

It is a consequential amendment which is conditioned by the insertion of a new § 312k BGB in the draft version. § 312k of the German Civil Code is expected to be implemented with an earlier date of entry into force by a draft law amending the Civil Code and the Introductory Act on the Civil Code in implementation of the EU Directive for Better Enforcement and Modernisation of the Union’s Consumer Protection legislation and repealing the Ordinance on the Transfer of Responsibility for the Implementation of Regulation (EC) No 2006/2004 to the Federal Ministry of Justice and Consumer Protection (Federal Council Printing Case 61/21, hereinafter: Draft Act on the Implementation of the Modernisation Directive).

**Re Article 1 point 5**

Article 1(5) introduces a new § 312k BGB into the German Civil Code.

Terminating contracts concluded in electronic commerce often poses particular challenges for consumers. In comparison to the simple conclusion of the respective contract, its termination is partly not possible directly via a website or is often complicated by website design.

The obligations of the company proposed in § 312k BGB in the draft version are intended to enable consumers to make declarations of termination in electronic commerce in a comparable simple way, taking into account the specificities of termination declarations, in a comparable way as declarations for the conclusion of corresponding contracts.

§ 312k(1) of the German Civil Code (BGB) in the draft text determines the scope of the provision. § 312k Paragraph 2 of the German Civil Code (BGB) in the draft outlines the company’s obligation to maintain a termination button and makes further specifications for the design of the technical means to be made available by the company to submit the notice of termination. § 312k Paragraph 3 of the German Civil Code (BGB) in the draft regulation regulates the possibilities of the consumer to store the declaration of termination they have submitted. § 312k(4) of the German Civil Code (BGB) in the draft text provides for an obligation for the company to confirm receipt of the notice of termination, as well as a presumption regarding access to the notice of termination. § 312k Paragraph 5BGB in the draft contains a provision of doubt regarding the termination date. § 312k Paragraph 6 BGB in the draft version stipulates that if a company does not fulfil the obligations laid down in § 312k Paragraphs 1 and 2 BGB in the draft version, then a contract can be terminated at any time and without observance of a notice period.

**Regarding § 312k Paragraph 1 BGB-E:**

§ 312k Paragraph 1 BGB in the draft version contains the requirements for the company’s obligations under § 312k BGB in the draft version as well as a number of exceptions.

The obligation under § 312k Paragraph 1 of the German Civil Code (BGB) in the draft version applies to the company whenever consumers are enabled to conclude contracts as defined in § 312k Paragraph 1 sentence 1 of the German Civil Code (BGB) in the draft version.

§ 312k Paragraph 1 sentence 1 BGB in the draft version uses the wording “contract in electronic commerce”, which is legally defined in § 312i Paragraph 1 sentence 1 of the German Civil Code.

The conclusion of these contracts must be made possible in the draft version via a “website” in accordance with § 312k(1), Sentence 1 BGB. For the interpretation of the term “website”, the case law on the identical term can be used in Section 312j(1) of the German Civil Code.

In order to justify the company’s obligation under § 312k BGB in the draft version, it makes no difference whether the conclusion of the contract via a website is operated by the company itself or – for example in the case of intermediary platforms – via a website operated by a third party. In both cases, the company must ensure that the consumer can submit a termination in accordance with the requirements of § 312k BGB in the draft version. If the conclusion of the contract on a website which is not operated by the company itself is possible, then the company must therefore contractually oblige the third party as the operator of the third party’s website.

The obligation of the company in accordance with § 312k Paragraph 1 sentence 1 BGB in the draft version is limited to contracts between companies and consumers to establish permanent debt relationships, which oblige the company to perform a remuneration. The limitation to permanent debt is made from the point of view of consumer protection because they have a special need to facilitate the possibility of termination. Long-term debt relationships can often prove to be “cost traps” due to the long-term commitment to consumers. On the other hand, the termination of other obligations as permanent debts may in certain cases have legal consequences for the consumer which, from the consumer’s point of view, appear to be unexpected (e.g. the continuing obligation to pay the purchaser in the case of the right of termination pursuant to § 648 BGB). In particular, these legal consequences would make a standardised fulfilment of the company’s obligation to provide information in accordance with § 312k(2), sentence 3, point 2 of the German Civil Code considerably more difficult in the draft version. Therefore, contracts other than those relating to permanent debt due to the specific consequences of termination in individual cases should not be covered by § 312k BGB in the draft version.

According to § 312k Paragraph 1, sentence 2, point 1 of the German Civil Code (BGB) in the draft version, § 312k BGB is not applicable in the draft version if a termination of the contract in question on the basis of legal formal requirements is to be submitted exclusively in a stricter form than the text form. This therefore also includes the formal requirement of the – in comparison to the text form stricter – electronic form according to § 126a of the German Civil Code or the written form. This also excludes declarations of termination to be issued in a notarial certified form.

§ 312k BGB in the draft text is intended to extend the consumer’s options for termination, but not to restrict or exclude the submission of notices of termination by other means. In particular, an agreement by means of pre-formulated contractual conditions remains ineffective in accordance with § 309 point 13(c) of the German Civil Code (BGB) only by means of the button to be made available in the draft version by means of the button to be provided in accordance with § 312k BGB.

§ 312k Paragraph 1 sentence 2 point 2 BGB in the draft version provides that companies are exempt from the obligations of § 312k BGB in the draft version if either the website concerns financial services or the contracts concerned are contracts for financial services. The model for this provision is § 312j Paragraph 5 sentence 2 BGB; the term “financial services” is legally defined in § 312(5), sentence 1, BGB.

**Regarding § 312k Paragraph 2 BGB-E:**

§ 312k Paragraph 2 of the German Civil Code (BGB) in the draft specifies the obligation of the company and provides for a two-step procedure for submitting the notice of termination.

§ 312k Paragraph 2 sentence 1 of the German Civil Code (BGB) in the draft version limits the company’s obligation in the draft version to ordinary and extraordinary terminations in accordance with § 312k BGB. Warranty notices and other rights to terminate permanent debt relationships (including withdrawal and termination of the contract due to a failure to provide, a defect or adverse modification of digital products in accordance with the draft law implementing the directive on certain contractual aspects of the provision of digital content and digital services – Federal Council printed matter 60/21) are not covered by this regulation.

Terminations of contracts establishing legal rights are not covered by the scope of application because they are not concluded in electronic commerce. Although mortgages or services may be formally terminated, they do not constitute electronic commerce contracts between companies and consumers.

In order to justify the company’s obligation, it does not depend on whether the contract to be announced has also been concluded in electronic commerce. Rather, it is crucial whether the company makes it possible to conclude electronic commerce at the time of termination of a contract.

The company’s obligation is independent of the extent to which the consumer is actually entitled to a right of termination in individual cases. The button is only intended to create another possibility to declare a termination by the consumer. The material authorisation of the consumer to terminate is not a requirement for the use of the button according to § 312k BGB in the draft version.

According to § 312k Paragraph 2 sentence 2 of the German Civil Code (BGB) in the draft version, the company must first provide a button marked with the words “cancel contracts here” which leads the consumer to another page called the “confirmation page”. Indications other than “cancelling contracts” are only permitted when they are equally clear. It should be noted that, if necessary, it must also be made clear from a different indication that the termination button is not yet declared, but only the termination process is initiated. In any case, the wording is intended to make it clear to consumers that, when pressing the button, they can provide further information before the declaration of termination can be submitted.

In order for a contract to be terminated by a notice of termination, it must be designed in such a way that the recipient can recognise who declares the termination and which contract is to be terminated. The confirmation page must therefore request the consumer to enter the necessary information in the draft version in accordance with § 312k(2) sentence 3 point 1(a) to (e) BGB and enable him to do so. For this purpose, the consumer should first be able to indicate the nature of the termination and, in the case of extraordinary termination, the underlying reason for termination (letter a). Furthermore, the consumer must be able to provide the information necessary for his/her identification (letter b) and for the unambiguous description of the contract (letter c). Typically, the name and address may be necessary to identify. To designate the contract, the company can query customer, order or contract numbers. In accordance with letter d, the consumer should also be allowed to indicate the date on which the termination is to take effect. However, this may not be required as an obligation, without which the termination cannot be explained via the website. This already follows from § 312k Paragraph 5 of the German Civil Code (BGB) in the draft, according to which the notice of termination becomes effective in doubt at the earliest possible time when no termination date is stated. In this respect, the indication “as soon as possible” – or a similar wording, which expresses the corresponding wish for termination at the earliest possible time – should be made possible alongside the possibility of entering a specific date. In addition, according to letter e, the consumer must be able to provide the company with information which enables the company to send the confirmation of termination in accordance with § 312k(4), sentence 1 of the German Civil Code, in the draft version to the consumer (usually the e-mail address).

§ 312k Paragraph 2 sentence 3 number 1 of the German Civil Code (BGB) in the draft therefore ensures that the consumer can provide the information necessary to specify their declaration of termination sufficiently accurately, in particular with regard to the contract to be terminated. The restriction of the information to be requested is intended to prevent the design of the confirmation page, in which the company asks for further data not readily available to the consumer and also not required for the unquestionable assignment, making it difficult to terminate simple and uncomplicated. At the same time, the consultation should comply with the principle of data economy as set out in Article 5(1)(c) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data, on the free movement of such data, and repealing Directive 95/46/EC.

According to § 312k Paragraph 2 sentence 3 point 2 BGB in the draft version, a button called the “confirmation button” must be found on the confirmation page, with which the consumer can submit the declaration of termination. This confirmation button must be labelled with the words “cancel now”. Other indications are only permitted when they are equally unambiguous.

The two buttons and the confirmation page must be “permanently available and directly and easily accessible” in the draft version in accordance with § 312k(2) sentence 4 of the German Civil Code. As far as the requirement “permanently available” is concerned, this regulation is based on the corresponding requirement in § 5 (1) of the Telemedia Act. Consumers must therefore be able to access the two buttons and the confirmation page at any time and without first having to register on the website for this purpose. On the other hand, a temporary technical inaccessibility due to maintenance work is harmless (see the judgement of the Higher Regional Court Düsseldorf of 4 November 2008, file number: I-20 U 125/08). The requirement “directly and easily accessible” is based on Article 246d(2)(2) of the Introductory Act on the Civil Code (EGBGB), as amended by the draft law implementing the Modernisation Directive; reference is made to the corresponding explanations there (Federal Council printed matter 61/21, page 37 f.).

**Regarding § 312k paragraph 3 BGB-E:**

§ 312k(3) of the German Civil Code (BGB) in the draft text is intended to ensure that the consumer can already document the submission of the notice of termination. This can be implemented, for example, by a downloadable summary of the content of the termination declaration submitted by means of the termination button, which documents in particular the date and time of the button being pressed. This documentation safeguards the possibility of storing the consumer’s declaration as provided for by § 126b sentence 2 point 1 BGB.

**Regarding § 312k paragraph 4 BGB-E:**

The company’s obligation to confirm in accordance with § 312k paragraph 4 sentence 1 BGB in the draft version concerns access to the declaration of termination by the company. Immediate confirmation in text form can be automated in electronic commerce.

The contradictory presumption in § 312k(4) sentence 2 of the German Civil Code (BGB) in the draft text is intended to facilitate the consumer who has no insight into the technical processes involved in the transmission of the notice of termination, the evidence regarding access to the notice of termination by the company.

**Regarding § 312k paragraph 5 BGB-E:**

§ 312k paragraph 5 of the German Civil Code (BGB) in the draft is intended to ensure that the termination is effective in the absence of any other information from the consumer at the earliest possible time of notice. However, consumers and companies can also ensure that there are no doubts about this by means of corresponding declarations or by querying the time of termination.

**Regarding § 312k paragraph 6 BGB-E:**

§ 312k paragraph 6 of the draft text contains a sanction standard in the case. If the buttons and the confirmation page are not made available in accordance with paragraphs 1 and 2, then a consumer can terminate a contract for whose termination these buttons must be made available at any time and without observance of a notice period. Companies which do not take the precautions referred to in § 312k paragraphs 1 and 2 BGB in the draft version must be subject to a corresponding termination of the contractual relationship by the consumer against them. A milder form of sanction does not appear to be effective in the same way. If, in the case of § 312j Paragraph 3 BGB, the company has an incentive to provide the button described there to confirm the conclusion of the contract, since otherwise a contract with the consumer does not come into effect under § 312j Paragraph 4 BGB, then such an incentive is missing in the reverse situation of termination of the contract here. Therefore, the company, who deprives the consumer of the simple and uncomplicated possibility of termination provided by law, should be sanctioned by the possibility of the consumer to terminate the contract at any time and without observing a notice period. Short-term, technical interruptions due to maintenance work are harmless in view of the explanations in the explanatory memorandum to § 312k Paragraph 2 sentence 4 BGB in the draft version.

For the existence of the prerequisites of § 312k Paragraph 6 sentence 1 of the German Civil Code (BGB) in the draft version, the consumer is obliged to provide information and proof.

§ 312k Paragraph 6 sentence 2 of the German Civil Code (BGB) clarifies that the possibility of the consumer to terminate the contract remains unaffected.

**Regarding Article 1 Number 6**

By inserting § 312k BGB in the draft version, as a follow-up amendment, § 312k BGB to § 312 l BGB, as described in the Explanatory Memorandum to Article 1(4), this is expected to be inserted at the time of entry into force of the proposed regulation. § 312 l BGB, which is also expected to be inserted with the draft law on the implementation of the modernisation directive, therefore becomes § 312 m of the German Civil Code.

**Regarding letter (b)**

Letter (b) contains a subsequent amendment regarding the numbering of the articles in the draft law.

**Regarding number 3**

Number 3 introduces a subsequent amendment to the ETUC by recasting Article 2 in the draft law.

The draft law implementing the Modernisation Directive is expected to introduce a new Article 246e into the EGBGB, which in Paragraph 2, point 10 of the draft text there contains a reference to § 312k BGB, as described in the explanatory memorandum to point 1(a) (Article 1, point 4). This reference must be adapted.

**Regarding number 4**

The implementation of the requirements for fulfilling the obligation according to § 312k BGB in the draft version will in some cases mean a considerable organisational and temporal effort for companies. Against this background, companies should not be obliged to do so until 1 July 2022.