
Journal of European Consumer and Market Law

EuCML 2/2022 · Volume 11
11 April 2022 · Pages 41–76

Board of Editors: Prof. Dr. Christoph Busch, University of Osnabrück – Prof. Dr. Alberto de Franceschi, Università degli Studi di Ferrara – Dr. Mateja Durovic, King’s College London – Prof. Dr. Catalina Goanta, Utrecht University – Dr. Mateusz Grochowski, Max Planck Institute for Private Law, Hamburg – Prof. Dr. Joasia Luzak, University of Exeter – Prof. Dr. Vanessa Mak, Leiden University – Prof. Dr. Jorge Morais Carvalho, Universidade Nova de Lisboa – Dr. Kristin Nemeth, University of Innsbruck – Prof. Dr. Rupprecht Podszun, Heinrich Heine University Düsseldorf – Prof. Dr. Sofia Ranchordas, University of Groningen – Prof. Dr. Christine Riefa, University of Reading

EMail: editors@eucml.eu

Editorial

Updating EU Consumer Law for the Digital Subscription Economy

On 1 March 2022, the first part of the German “Fair Consumer Contracts Act” came into force.¹ One of the most important changes it brings concerns auto-renewal of subscription contracts. Under the new rules, automatic renewal of subscriptions will only be possible if the contract is extended for an indefinite period, i. e. without a further minimum term. Furthermore, consumers must be given the right to terminate the contract at any time with one month’s notice. In addition, clauses stipulating notice periods of more than one month before the end of the initial contract term will be invalid. Before the reform, auto-renewal clauses could extend the contract for a new term of one year and the notice period before the end of the initial period could be three months.

A second part of the reform, which will enter into force on 1 July 2022, requires businesses to implement a “cancellation button” on their websites that allows consumers to easily terminate their subscriptions. The new cancellation button is in some ways the opposite of the well-known “order confirmation button”.² The underlying idea is that businesses must make it as easy for consumers to exit a subscription contract as enter it.

The cancellation button comes with detailed technical requirements concerning the design of the website and the cancellation process. This legislative approach follows the recent trend towards “design duties” in consumer law that spell out detailed specifications for the design of user interfaces. One may criticize this as a new type of techno-legal micro-management. But it rightly acknowledges the importance of legal design and the fact that in a digital environment “law” needs to be translated into “code”. I would not be surprised if we saw more of that in the future. Maybe the cancellation button will rather sooner than later be joined by a “withdrawal button” that enables consumers to exercise their withdrawal rights with a simple click.

The new German rules on subscription contracts are part of a wave of recent consumer law reforms and enforcement actions on both sides of the Atlantic that aim at ensuring that consumers are not tied to subscriptions for too long due to unwanted contract extensions. In the US, the Federal Trade Commission recently announced that they are ramping up enforcement efforts against companies that “trick or trap consumers into subscriptions”.³ In addition, State legislators from California to Delaware have recently updated their auto-renewal laws.⁴ Similarly, in July 2021, the UK government

1 Gesetz für faire Verbraucherverträge (10 August 2021), Bundesgesetzblatt 2021 I 3433.

2 Art. 8(2) Consumer Rights Directive 2011/83/EU.

3 FTC, *FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions* (28 October 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap>.

4 California Assembly Bill No. 390 (4 October 2021); Delaware Senate Bill No. 93 (4 August 2021).

launched a consultation on reform proposals for competition and consumer policy that would impose stricter rules for subscription contracts.⁵

These reform initiatives are a regulatory response to the rise of the digital subscription economy. Certainly, subscriptions are not a totally new concept. Book-of-the-month clubs have been around for decades. But the past few years have seen subscription-based business models spreading across a broad range of industries from streaming services and fitness apps to meal box kits and online dating.⁶ Some even predict that car subscription services will disrupt the traditional business model of the auto industry. Subscription models are wildly popular also among venture capitalists as they provide startups with recurring revenue and deep data about consumption patterns.

For consumers, however, the shift from one-off purchases to subscriptions comes with new risks. Companies often lure consumers with “free trials” implying that there are no strings attached. In reality, consumers end up being caught in a cycle of recurring charges. In particular, “power subscribers” with ten or more subscriptions easily lose track of monthly payments for dormant subscriptions. Moreover, when consumers try to cancel their subscription online, businesses often use trick questions, confusing screens, and other dark patterns that make it difficult to unsubscribe from a service.⁷

The existing EU consumer law already provides several regulatory tools for addressing the risks related to subscription contracts. In particular, the Unfair Commercial Practices Directive offers flexible tools for misleading “free trials” and deceptive practices aimed at keeping consumers tied to their subscriptions.⁸ However, a closer look at the recent regulatory proposals in the US and the UK reveals that there might still be room for improvement at the EU level. In this perspective, a reform of EU consumer law with respect to subscription contracts could focus on three areas: (1) clear choices at the pre-contract stage, (2) reminders about auto-renewals and long-term inactive subscriptions, and (3) simple and straightforward online cancellation mechanisms.

For the pre-contract stage, businesses could be required to offer consumers a genuine choice to take the subscription for a fixed period without automatic renewal. Roll-over contracts that are automatically extended would require an active opt-in by the consumer. Furthermore, businesses could be obliged to send consumers a reminder on how to cancel before free trials and introductory offers end or when subscriptions auto-renew to a new term. Similarly, as suggested in the UK reform proposals, businesses could be obliged to inform consumers about inactive subscriptions. However, such notices will only be effective, if they are combined with further technical tools that facilitate the cancellation process. Taking inspiration from the new Californian auto-renewal regulations, reminders sent via e-mail could include a link that directs consumers to a website where they can cancel their subscription with a minimum number of clicks.

As these examples illustrate, protecting consumers in the digital subscription economy requires a combination of consumer enabling laws and technical tools that facilitate the exercise of consumer rights. Developing such solutions is the aim of the *Osnabrück Subscription Observatory*, a new hub of expertise for stakeholders, researchers, and policymakers that will monitor the development of business models, policy debates and regulatory initiatives in the subscription economy. The Observatory will bring together social scientists and legal scholars with the aim of exploring, in a comparative perspective, different regulatory approaches and the impact of behavioural insights on consumer policy regarding subscriptions contracts.⁹ As always, readers of EuCML will be among the first to learn about new developments and findings of the Observatory.

Christoph Busch*

5 UK Department for Business, Energy & Industrial Strategy, *Reforming Competition and Consumer Policy* (20 July 2021), <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy>.

6 Heather Long and Andrew Van Dam, *Everything's becoming a subscription, and the pandemic is partly to blame*, Washington Post (1 June 2021), <https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/>.

7 See, e.g., M. R. Leiser and Mireille M. Caruana, *Dark Patterns: Light to be Found in Europe's Consumer Protection Regime*, 10 Journal of European Consumer and Market Law 237 (2021); Jamie Luguri and Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 Journal of Legal Analysis 43 (2021).

8 See the recently updated Guidance on the interpretation and application of Directive 2005/29/EC, OJ C 526/1 (29 December 2021), 58-59.

9 The Observatory, which is part of a two-year research project funded by the German Ministry for the Environment and Consumer Protection, is co-ordinated by Prof. Dr. Christoph Busch (European Legal Studies Institute, Osnabrück University) and Prof. Dr. Kathrin Loer (Faculty of Business Management and Social Sciences, Osnabrück University of Applied Sciences). Further information is available at www.subscription-observatory.org.

* Prof. Dr. Christoph Busch is Director of the European Legal Studies Institute, Osnabrück University, and Visiting Fellow at the Information Society Project, Yale Law School. He is a member of the European Commission's Consumer Policy Advisory Group and an editor of EuCML. E-mail: christoph.busch@uos.de.