Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance)

DIRECTIVE (EU) 2019/2161 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 November 2019

amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union 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 Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

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 ('the Charter') provides that Union policies are to ensure a high level of consumer protection.

(2) Consumer protection law should be applied effectively throughout the Union. Yet, the comprehensive Fitness Check of consumer and marketing law 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 Union consumer protection law is compromised by a lack of awareness among both traders and consumers and that existing means of redress could be taken advantage of more often.

(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 in national law regarding truly effective and proportionate penalties to deter and sanction intra-Union infringements, insufficient individual remedies for consumers

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harmed by breaches of national legislation transposing Directive 2005/29/EC of the European Parliament and of the Council[3] and shortcomings with regard to the injunction procedure under Directive 2009/22/EC of the European Parliament and of the Council[4]. Revision of the injunction procedure should be addressed by a separate instrument amending and replacing Directive 2009/22/EC.

(4) Directives 98/6/EC[5], 2005/29/EC and 2011/83/EU[6] of the European Parliament and of the Council include requirements for Member States to provide for effective, proportionate and dissuasive penalties to address infringements of national provisions transposing those Directives. Furthermore, Article 21 of Regulation (EU) 2017/2394 of the European Parliament and of the Council[7] 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 traders responsible for widespread infringements or widespread infringements with a Union dimension. 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, new rules on penalties in Council Directive 93/13/EEC[8] should be introduced.

(6) It should remain a matter for the Member States to choose the types of penalty to be imposed and to lay down in their national law the relevant procedures for the imposition of penalties in the event of infringements of Directives 93/13/EEC, 98/6/EC, 2005/29/EC and 2011/83/EU as amended by this Directive.

(7) To facilitate more consistent application of penalties, in particular in the case of intra-Union infringements, widespread infringements and widespread infringements with a Union dimension as defined in Regulation (EU) 2017/2394, common non-exhaustive and indicative criteria for the application of penalties should be included in Directives 93/13/EEC, 98/6/EC, 2005/29/EC and 2011/83/EU. These criteria should include, for example, the nature, gravity, scale and duration of the infringement, and any redress provided by the trader to consumers for the harm caused. Repeated infringement 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 financial benefits gained, or losses avoided, due to the infringement should be taken into account, if the relevant data are available. Other aggravating or mitigating factors applicable to the circumstances of the case can also be taken into account.

(8) Those common non-exhaustive and indicative criteria for the application of penalties might 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*.

(9) 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.

(10) To ensure that Member States' authorities can impose effective, proportionate and dissuasive penalties in relation to widespread infringements and to widespread infringements with a Union dimension that are subject to coordinated investigation and enforcement measures in accordance with Regulation (EU) 2017/2394, fines should be introduced as an element of penalties for such infringements. In order to ensure that the fines have a deterrent effect, 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. In certain cases, a trader can also be a group of companies.

(11) As laid down in Articles 9 and 10 of Regulation (EU) 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. Finally, the penalties imposed 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.

(12) Where, as a result of the coordinated action under Regulation (EU) 2017/2394, a single 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.

(13) 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. It should also be possible for Member States to base such fines on the 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. The requirement to set the fine at a level of not less than 4 % of the trader's annual turnover should not apply to

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any additional Member State rules 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 bringing to an end the infringement.

(14) Rules on penalties should be included 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 for the application of penalties for infringements of that Directive. In particular, administrative authorities or national courts could impose penalties when establishing the unfair character of contractual terms, including on the basis of legal proceedings initiated by an administrative authority. The penalties could also be imposed by administrative authorities or national courts when the seller or supplier uses contractual terms which are expressly defined as unfair in all circumstances in national law as well as when the seller or supplier uses contractual terms which have been found to be unfair by a final binding decision. Member States could decide that administrative authorities also have the right to establish the unfair character of contractual terms. Administrative authorities or national courts could also impose a penalty through the same decision by which unfairness of contractual terms is established. Member States could lay down the appropriate coordination mechanisms for actions at national level regarding individual redress and penalties.

(15) When allocating revenues from fines, Member States should consider enhancing the protection of the general interest of consumers as well as other protected public interests.

(16) 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. The consumer should have access to compensation for damage and, where relevant, a price reduction or termination of the contract, in a proportionate and effective manner. Member States should not be prevented from maintaining or introducing rights to other remedies such as repair or replacement 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, damage 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.

(17) The Fitness Check of consumer and marketing law and the parallel evaluation of Directive 2011/83/EU also identified a number of areas where the existing Union consumer protection rules should be modernised. In view of the continuous development of digital tools, adjustment of Union consumer protection law is necessary.

(18) Higher ranking or any prominent placement of commercial offers within online search results by the providers of online search functionality has an important impact on consumers.

(19) Ranking refers to the relative prominence of the offers of traders or the relevance given to search results as presented, organised or communicated by providers of online search

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functionality, including resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof.

(20) In this regard, Annex I to Directive 2005/29/EC should be amended in order to make it clear that practices where a trader provides information to a consumer in the form of search results in response to the consumer's online search query without clearly disclosing any paid advertising or payment specifically for achieving higher ranking of products within the search results should be prohibited. When a trader has directly or indirectly paid the provider of the online search functionality for a higher ranking of a product within the search results, the provider of the online search functionality should inform consumers of that fact in a concise, easily accessible 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 as its specific effect. The indirect payment could consist of increased commission per transaction as well as different compensation schemes that specifically lead to higher ranking. Payments for general services, such as listing fees or membership subscriptions, which address a broad range of functionalities offered by the provider of the online search functionality to the trader, should not be considered to be a payment for specifically achieving higher ranking of products, provided that such payments are not dedicated to achieving higher ranking. Online search functionality can be provided by different types of online trader, including intermediaries, such as online marketplaces, search engines and comparison websites.

(21) Transparency requirements with regard to the main parameters determining ranking are also regulated by Regulation (EU) 2019/1150 of the European Parliament and of the Council[(9)]. The transparency requirements under that Regulation cover a broad range of online intermediaries, including online marketplaces, but they only apply between traders and online intermediaries. Similar transparency 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 that 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.

(22) Traders enabling consumers to search for goods and services, such as travel, accommodation and leisure activities, offered by different traders or by consumers should inform consumers about the default main parameters determining the ranking of offers presented to the consumer as a result of the search query and their relative importance as opposed to other parameters. That 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.

(23) The information requirement regarding the main parameters determining the ranking is without prejudice to Directive (EU) 2016/943 of the European Parliament and of the Council[(10)]. Traders should not be required to disclose the detailed functioning