



The German Fair Consumer Contracts Act in the Domain Industry

An overview of the new
legal requirements in Germany

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The German Fair Consumer Contracts Act in the Domain Industry

The new German Fair Consumer Contracts was adopted on 17 August 2021, bringing with it a strengthening of consumer rights and correspondingly extended obligations for businesses.

While certain new provisions will only come into force at different points of time in 2022, the other amendments will already be applicable from 1 October 2021. The Act is also regarded as a reaction to the increasing digitalisation of business transactions. In particular, the amendments will have an impact on the drafting of contracts within the scope of sales contracts, framework supply agreements, service and work contracts, and general terms and conditions.

On Monday, 20 December 2021, the Names & Numbers Forum working group at eco – Association of the Internet Industry discussed the Fair Consumer Contracts Act in the context of the Domain Name and Hosting Industry and which aspects of the act may apply. This paper provides an overview to the most important dates and information about the Fair Consumer Contracts Act which need to be implemented by end-consumer service providers active on the German market.

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Applicability of the new German legal standards in the international domain sector

Whether German law applies to a company with its legal seat outside of Germany, depends on the international conflict of laws rules.

According to **Art. 6 Rome I** (contracts, [Regulation \(EC\) No 593/2008](#)) the choice of law provisions can generally be agreed with consumers, but consumer protection laws cannot be deprived by such choice of law provisions. Even in the case that the general terms and conditions (GTC) foresee the application of foreign law, the German Fair Consumer Contracts Act applies.

According to **Art. 6 (1) Rome II** (tort, [Regulation \(EC\) No 864/2007](#)) laws of the country apply where competitive relations are affected. Based on this, hosting or providing a domain in Germany is sufficient in order to apply German law. Unfair competition in Germany also leads to the application of German law.

German Fair Consumer Contracts Act of 10 August 2021

Overview of the new legal provisions in chronological order.

Since 1 October 2021:

The newly introduced [Section 308 \(9\) German Civil Code \(BGB\)](#) declares agreements invalid that exclude or limit the assignability of monetary claims of the consumer in general terms and conditions (GTC).

This also applies to other claims and rights of the consumer:

- if the entrepreneur has an interest worth protecting and
- the consumer does not have a prevailing legitimate interest.

Consumers should be able to sell their monetary claims to third parties and thus facilitate the private enforcement of their rights (e.g. claims for damages or repayment) with the help of service providers.

Careful:

Consumers should have the possibility to sell their monetary claims to third parties and thus facilitate the private enforcement of their rights (e.g. claims for damages or repayment) with the help of service providers.

According to Section 7a of the German Act against [Unfair Competition \(UWG\)](#), telephone advertising to consumers is now only permissible if the consumer's expressed consent has been adequately documented.



A consultation process is currently underway in which the German Federal Network Agency is giving interested parties the opportunity to comment on the draft version of its interpretative guidance on proper consent documentation. Companies shall submit the documentation upon request of the Federal Network Agency without delay.

Note: The documentation must be kept for five years. In the event of violations of the documentation, the advertiser has to expect fines of up to EUR 50,000.

From 1 March 2022:

According to [Section 309 \(9\)\(b-c\) BGB](#), the tacit extension of the initial term of an agreement with continuing obligations by general terms and conditions (GTC) only applies for an indefinite period. The termination is possible at any time after the expiry of the initial term with a one month's notice.

This applies to contracts with the object of the regular provision of goods or services and works. The new termination provisions apply as follows:

Contracts that will come into existence after the new provisions are in force on 1 March 2022 :	can be terminated with a notice period of no more than one month before the expiry of the contract term.
Contracts that came/will come into existence before the new provisions are in force on 1 March 2022 :	previous notice period of three months will continue to apply
Contracts that come into existence before 1 March 2022 but are subsequently extended :	According to the transitional provision the initial conclusion of the contract is relevant

Provisions for the **further term** / extension of the term:

- A tacit extension of a contract with the object of the regular provision of goods or services for a further minimum term (previously up to one year) is excluded.
- The tacit extension can only be for an indefinite period
- The user of the general terms and conditions (GTC) has to provide their contractual partner the option to terminate the contract with one month's notice.

Exempted from these provisions are contracts for the supply of goods sold as a whole and for insurances.

Note: The amendment is intended to make it easier for consumers to switch to another provider and thus promote competition.



From 1 July 2022:

In order to avoid complicated termination processes between consumers and entrepreneurs, entrepreneurs are obliged to introduce a termination button on their homepage for continuing obligations with effect from 1 July 2022. The obligation applies to entrepreneurs who enable the conclusion of the same contract in electronic commerce at the time of termination and also applies to contracts concluded before this date. Consumers must be able to declare both ordinary and extraordinary terminations via this button.

According to the [new version of Section 312 \(k\) BGB](#) specific requirements on the termination of consumer contracts in electronic commerce („termination button“) will apply. The [previous versions of Section 312 \(k\) and 312 \(l\) BGB](#) will become Sections 312 (l) and 312 (m). Entrepreneurs will be obliged to introduce a **“termination button”** on their website for continuing obligations.

Note: Avoid complicated termination processes between consumers and entrepreneurs

Obligation applies to:	<ul style="list-style-type: none">• entrepreneurs who enable the conclusion of the same contract in electronic commerce at the time of termination• also to contracts concluded before 1 July 2022
Requirements:	<ul style="list-style-type: none">• For ordering scenarios in e-commerce, the “order button” is already mandatory pursuant to Section 312 (j)(3)(2) BGB.• a corresponding “termination button” must be unambiguously labelled.• The button should enable the consumer to terminate a continuing obligation with a few clicks.• Consumers must be able to declare both ordinary and extraordinary terminations via this button.• An electronic confirmation of the termination should provide certainty about the receipt of the termination. <p>Note: If there is no appropriate “termination button”, the consumer is granted a right to terminate the continuing obligation without notice!</p>



From 28 May 2022

According to [Section 9 para. 2 UWG](#): whoever carries out an unlawful commercial act and thereby causes consumers to make a transactional decision shall be obliged to compensate them for the resulting damage.

Attention:

Consumers have a claim for damages if companies act unfairly under the Act against Unfair Competition. [Section 9 UWG](#) in detail:

(1) Any person who intentionally or negligently engages in a commercial activity that is unlawful pursuant to Section 3 or Section 7 shall be obligated to compensate competitors for the resulting damage.

(2) Any person who intentionally or negligently engages in a commercial activity that is unlawful under section 3 and thereby causes consumers to make a business decision which they would not otherwise have taken, shall be liable to compensate them for the resulting damage. This shall not apply to unfair commercial practices according to Section 3a, Section 4 and Section 6 as well as number 32 of the Annex to the Unfair Competition Act.

(3) A claim for damages against persons responsible for periodical publications in accordance with paragraphs 1 and 2 can only be asserted in the event of an intentional infringement.



Fair Consumer Contracts and the Domain Industry

Some thoughts on the legal situation

Applicability of the new law?

- B2B relationships will not be affected.
- What is the legal nature of domain registrations in Germany?
- Supreme Court: Agency contract for a works contract.
- B2C needs to implement the "termination button".
 - Do refunds need to be paid?
- The German Civil Code has a provision for works contracts, according to which the contractor may keep the remuneration, but not spared expenses and turnover that they could otherwise generate with their work (see [Section 648 BGB](#), I am simplifying here).
- Domain registration contracts have three components:
 - initial registration
 - renewal
 - ongoing provision of DNS / domain management
- Domain Registrars could claim that they have paid the Domain Registry, the money is gone and their margin is earned.
- Domain Registrars do not claim that the ongoing maintenance does not cost anything.
- Therefore, there is no refund at all.
- Court decisions were on DENIC, unclear whether this view will hold water if contested.

Some findings and conclusions

- Also, is it really that easy?
- Not all Domain Registries operate the same. DENIC has a direct contractual relationship with Domain Registrants, most gTLDs do not (at least they say so). There is no "one size fits all" answer for all Domain Registries.
- Not all Domain Registrars or Domain Resellers operate in the same way.
 - Some operate just B2B, some B2C, and some are hybrid.
 - There are pure play Domain Resellers, others bundle domain names with other products and services like hosting, or domain registrations play a minor role.
- The question of how the business relationship with the consumers is framed:
 - For pure play Domain Registrars and Resellers, this concept may likely work.
 - For bundles with hosting etc., lease contracts might be the decisive contract type. Note that there is no equivalent to [Section 648 BGB](#) for lease contracts. Therefore, refunds might be necessary.
- Contract drafting is important.
- Information to resellers and consumers is key.
- It would be good if we could work and agree on a common approach to avoid friction.

Partners

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