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AN ANALYSIS OF THE EUROPEAN LEGAL FRAMEWORK FOR E-COMMERCE IN RELATION TO THE INFORMATION OBLIGATION APPLICABLE TO PREPACKED FOOD

HOW CONSISTENT ARE GERMAN WEBSHOPS IN THEIR COMPLIANCE WITH THE
MANDATORY FOOD LABELLING RULES APPLICABLE TO PREPACKED FOOD?

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Food E-Commerce: An Analysis of the European Legal Framework for E-Commerce in Relation to the Information Obligation applicable to Prepacked Food.

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ABSTRACT

The sales of food over the internet is gaining importance across Europe. With this trend, however, consumers are not anymore able to examine the labelling on a given product prior to purchase, hence they must rely on the information that is placed on the website. It stands to reason that it is even more important, in such cases, to guarantee the integrity of food information. The present study aims to investigate the current status of consistency of mandatory food information across German webshops. This consistency is measured based on the degree of compliance with the relevant European legislation. In a first step the applicable law is elaborated by means of a literature research and used in a second step, namely in the internet-based empirical research, as a benchmark to assess the degree of consistency. 40 products across ten German webshops are examined in the period between May and June 2019. The results reveal, that more than half of all evaluated products do not comply with the European legal provisions for online food labelling. Detailed analysis of the results lead to the assumption, that the reason for the encountered inconsistency could be linked, on the one hand, to the lack of alignment between the prescribed information obligation laid down in Directive 2011/83/EU on consumer rights (Art. 9) and in Regulation (EU) No 1169/2011 on the provision of food information to consumers (Art. 6) and, on the other hand, to the inaccuracy of the applicable law in delegating responsibilities to provide such information.

Key words: Food Law, Food E-Commerce, Internet, Distance Contract, Distance Selling, Distance Communication, Mandatory Food Labelling

SUMMARY

Background & Problem Definition

The sales of food over the internet is gaining importance across Europe and is considered a new possibility for the European economy to rise. With this newly evolving trend, consumers are not anymore able to examine the labelling on a given product prior to purchase, hence they must rely on the information that is placed on the website. It stands to reason that, in such cases, it is even more important to guarantee the integrity of the mandatory food information to assure consumers can enjoy their rights of taking an informed choice without being misled.

Studies conducted in the two Food Electronic-Commerce leading countries, namely France and England, provided strong evidence of food information inconsistency. Although Germany is considered to have the third-strongest Food Electronic-Commerce market across Europe, little is known about its integrity in terms of online food information provision.

Aim & Objective

In the light of this, the present study aims to elaborate the information obligation in distance contracts and to investigate the consistency of mandatory food information across German webshops. In case of poor consistency, it additionally tries to elaborate possible loopholes within the applicable law.

Methodology

First, a literature research is conducted to elaborate the applicable law for Food E-Commerce in Europe. This law is then used as a benchmark to measure the consistency in the subsequent internet-based survey. 40 prepacked food products across the most significant webshops in Germany are examined for their consistency.

Results

The literature review reveals that the benchmark to be used to measure the consistency of online labelling is Art. 9 and 14 of the Regulation (EU) No 1169/2011. In addition, when studying the information obligation in distance contract, insight must be taken into Art. 6 of the Directive 2011/83/EU.

The results of the internet survey put in evidence, that more than half of the examined products are not in line with the applicable labelling law. Most discrepancies are encountered in connection with the provision of Art. 9(1)(h)-particular, namely the name and address of the food business. Both underpinning hypothesis are confirmed by the results of the survey: (1) Compared to self-hosted webshops, E-Marketplaces show a

higher consistency of food information. (2) The level of compliance with the applicable labelling law, in case of self-hosted retailers webshops, was higher for own-branded products than for 'foreign' branded products.

Discussion A detailed analysis of the results lead to the assumption, that possible reasons for the encountered inconsistency could be linked, on the one hand, to the lack of alignment between the prescribed information obligation laid down in Directive 2011/83/EU on consumer rights (Art. 9) and in Regulation (EU) No 1169/2011 on the provision of food information to consumers (Art. 6) and, on the other hand, to the inaccuracy of the applicable law in delegating responsibilities to provide such information.

Conclusion To sum up, German webshops show a clear inconsistency with the applicable European food labelling provisions. Additionally, the 'food - distance contract' binominal poses some challenges confined to its current legal base, a recognition that strongly emerges from this study. In order to guarantee a future well-functioning digital food market, these challenges need to be faced, existing loopholes shall be closed and necessary adjustment in its applicable law, as already foreseen by the legislator (see Art. 1(2), Regulation (EU) No 1169/2011), shall be made. The therein mentioned '*future developments*' have become present.

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LIST OF ABBREVIATIONS

B2C	Business to Consumer
CRD	Directive 2011/83/EU (Consumer Right Directive)
E-Commerce	Electronic Commerce
ECD	Directive 2000/31/EC (E-Commerce Directive)
EU	European Union
FICR	Regulation (EU) No 1169/2011 (Food Information to Consumer Regulation)
FBO	Food Business Operator
GFL	Regulation (EC) No 178/2002 (General Food Law)
M-Commerce	Mobile Commerce
UK	United Kingdom
USA	United States of America

CHAPTER I

INTRODUCTION

The three sections building up the first chapter serve the purpose to provide the reader with a general idea of the background to the study. This includes an introduction (Section 1.1), a detailed presentation of the research problem (Section 1.2) as well as an explanation of the study aim and thesis structure (Section 1.3 and 1.4).

1.1 The trend towards online grocery shopping: Consumer rights and needs to accurate food information

Food labels are ever since the primary channel to disseminate information across the whole food chain: from food producer to retailer and from retailer to purchaser and consumer (FAO, WHO, 2001). Labels are built from different information-elements which can be grouped and assigned to a number of categories such as to the mandatory, voluntary or to the commercial one (Stuart, 2010).

Mandatory food information is regulated within a sophisticated hierarchy of European- and national-wide guidelines and regulations (Stuart, 2010). The existing European Union (EU) food law provisions and the complementary national acts do not only establish the right of consumers to accurate, clear and easy to understand information but they are also intended to provide the consumer with the necessary information to conduct a healthy and informed choice about the product they purchase (Golan, Kuchler & Krissoff, 2007; European Commission, n.d., Art. 7(2) & Recital 4, FICR). According to Article 9 of Regulation (EU) No 1169/2011 on the provision of food information to consumers, herein named as FICR, a total of 12 mandatory product elements are required to contribute to a consumer informed choice (Art. 9, FICR).

Today, just as over eight years ago when the FICR was introduced, consumers are still expecting certain information about the food they buy. The basis for taking an informed choice, namely the appropriate information, remained unchanged during the past decade (Rolandi, 2017). Nevertheless, in recent years a marked change in the way in which modern shoppers are conducting a purchase is observable. Thus, it might happen, that consumers who previously

took an informed choice offline in any of the local supermarkets are now slowly moving to another way of completing their food purchase, namely online (Statista, 2018a). With this newly evolving trend, consumers are not anymore able to examine the labelling on a given product prior to purchase, hence they must rely on the information that is placed on the website. It stands to reason that it is even more important to guarantee the integrity of such information and to assure consumers can enjoy their full rights of taking an informed choice without being misled (Lederman, 2017).

This trend is not only observable among consumers living in large cities of the United States of America (USA), where it originally started, but it becomes more and more wide spread even over Europe. Although Statista lists “*Food and Personal Care*” as the smallest electronic (E)-Commerce category¹, it highlights its great potential to increase in attractiveness in upcoming years. While online grocery shopping in Europe is generally considered to be in its very early stage of development, consumers living in major cities of the United Kingdom (UK), France and Germany are already one step ahead. Especially the attitude of British and German buyers towards online grocery shopping is slowly becoming comparable with the one of American consumers (Statista, 2018a). The fact that more and more Germans tend to welcome the possibility of online grocery shopping has motivated national producers, traders and supermarket chains such as REWE or EDEKA to setup their own online shop and in some cases, even its corresponding smartphone-app (Statista, 2018b; Mumme, 2019).

1.2 Problem definition

Despite its increased attractiveness to the consumer and the huge benefits an online grocery purchase might bring about, the emerging combination of distance contracts² and the sales of perishable food poses some fundamental challenges confined to its jurisdiction (European Commission, 2018; Bolognini, 2018). This, in turn, results in a lack of consumer trust and hence in the limiting growth of the European Food E-Commerce market (Rolandi, 2017).

¹ The online market can be classified in 5 different segments: Fashion; Electronics and Media; Toys, Hobby and DIY; Furniture and Appliance; Food and Personal Care.

² The European legislators do not use the term ‘web-shop’, ‘online shop’, ‘E-Commerce’ or ‘digital contract’ in order to refer to online purchases, but they rather use the term ‘distance contracts’ (Rolandi, 2018).

In order to address the lack of consumer trust, the European Commission identifies “*three areas where action should be taken to boost e-commerce: information, redress and enforcement*”. (European Commission, 2011). While the last two actions had been studied extensively by other graduates there is a lack of research that examines the first one. The focus of this study is hence set on the information area, its legal framework and implementation.

Despite the limited number of studies evaluating the implementation of mandatory food labelling provisions in E-Commerce, their results are critical: Non-compliance and incomplete information is the conclusion of many studies conducted mostly in the UK and France.³

In the light of these findings and bearing in mind the huge potential of this new emerging trend across Germany, there is a strong rationale for the need to conduct this survey, to identify the information obligation in Food E-Commerce and the status-quo of mandatory food information provision among German webshops. Based on the outcome, it could be relevant to determine possible loopholes within the legal framework to improve provisions of online food labelling.

Consequently, the title and its corresponding research question are framed as follows:

Title: An Analysis of the European Legal Framework for E-Commerce in Relation to the Information Obligation applicable to Prepacked Food.

Main research question: How consistent are German Webshops in their Compliance with the Mandatory Food Labelling Rules Applicable to Prepacked Food?

³ Recent studies carried out by the European Commission, Directorate-General for Health and Food Safety, showed indeed that non-compliance of on-line food stores during controls were mainly related to labelling and health claims requirements (European Commission, 2019). Results of a further study revealed the high inconsistency of on-line and off-line nutrition label presentation among English supermarket websites. It additionally suggested to take further insight into the mobile (M)-Commerce shopping, as more user switch to phone or tablet shopping (Stones, 2016). A French study conducted in 2016 additionally illustrates that 57% of the samples taken for the purpose of detecting products with inadequate labelling and safety warnings, were not supported by adequate labelling information on relevant websites, while for 21%, information was incomplete (OECD, 2016). Even Amazon Pantry, a website known on a pan-European level, is infringing the rules laid down in the FICR by omitting some mandatory label information such as the list of contained allergens (Dongo, 2019).

1.3 Aim of the study

The aim of this study is twofold:

- (1) To explore the information obligation in business to consumer (B2C)-distance contracts concluded over food webshops in Europe.
- (2) To provide an assessment of the degree of consistency of mandatory food information provided across German food-webshops. This consistency is measured in terms of compliance with the applicable European law.

1.4 Outline of the study

In order to approach the research question, [chapter two](#) provides the reader with an overview of the E-Commerce market and [chapter three](#) explains the method that is used to conduct this study. Background
Method

The [fourth chapter](#) presents the results of the literature research and elaborates an answer to the following question: What are the information obligations in B2C-distance contracts concluded over food-webshops in Europe? The aim of [chapter five](#) is to provide the reader with the results of the empirical internet-based survey. The central question of this chapter is: To what extent are the provisions of Art. 9 and 14 of the FICR implemented across German webshops? Research &
Results

[Chapter six](#) and [seven](#) serve the purpose to combine the outcome of both precedent chapters, discuss the results, explore legal loopholes and develop a conclusion. Discussion
Conclusion

Every chapter starts with a brief introduction giving the reader an idea of what to expect. Analogous to this, at the end of every chapter, except for Chapter I and Chapter VII, a short summary is provided.

In addition, Annex IV provides a list of those articles, that are applied in the course of this study.

CHAPTER II

FOOD E-COMMERCE: A NEWLY EMERGING EUROPEAN MARKET

This second chapter provides three brief analysis which, together, give an introduction to the underpinning topic from a commercial perspective. The first one aims at defining the term Food E-Commerce in the context of this study (Section 2.1). The second one concentrates on the overarching European Food E-Commerce market (Section 2.2) while the last analysis focuses in greater detail on the market within German borders (Section 2.3).

2.1 Definition: E-Commerce and M-Commerce in the context of this study

Already in 1990, just a few years after the Internet started to become a network for civilians, the first items were sold online. This initiated a new way of concluding sales contracts. Today, almost 30 years later, electronic commerce or E-Commerce has become an indispensable tool for buying and selling goods (Rolandi, 2017).

In academia and official publications, many E-Commerce definitions have been elaborated and various attempts have been made to compare and draft an accurate definition, as shown by Molla & Lickner. Even though there is an overall agreement on the concept of E-Commerce (Stallmann & Weger, 2015), some small differences in terms of complexity are apparent. Due to that, Molla & Lickner decided not to establish an additional definition of the term but to rather suggest four essential dimensions necessary for the creation of any E-Commerce definition:

- “*the nature of the network archetype*”, such as Intranet, Internet, Extranet, etc.
- “*the application solutions*”, such as E-wallet, WWW, E-mail
- “*the business functions performed or supported*”, such as communication, production, buying, selling, etc.
- “*the parties involved in the electronic relationships*”, such as consumer, supplier, producer, etc.

Based on this framework provided by Molla & Lickner, this paper will focus on E-Commerce as *“an Internet rested system that uses World Wide Web based application solutions in order to perform one or more business functions, such as buying and selling by means of distance contracts, between business and consumer”* (Molla & Lickner, 2001).

Unlike many other definitions, this one is kept rather short. It does not refer to any specific commodity or way of payment nor does it specify any means to conduct the purchase. It hence provides greater flexibility in its application. It can be used for business functions linked to perishable goods such as food but also to digital devices. Additionally, it is applicable to transactions finalized on wireless handled devices such as mobile phones, also referred to as M-Commerce, or on stationary computers (Molla & Lickner, 2001).

Despite this high adaptability in terms of commodity or payment type, it strongly restricts the last dimension targeting the involved parties. It only concentrates on Business to Consumer (B2C) transactions (Molla & Lickner, 2001).. This is because the study will only investigate the legal basis of the food information flow between business and consumer.

As a result, and on the contrary to many other studies, when talking about E-Commerce in the context of this paper, both concepts of E- and M-Commerce will be addressed concurrently. In exceptional cases, where one or the other concept requires more attention due to substantial differences, the overall definition will further be narrowed down.

2.1.1 Definition: Food E-Commerce in the context of this study

Even though the overarching concept of goods being sold online celebrates soon its 30th anniversary, not all types of goods have always been on offer online. The first online shop offering perishable goods, coordinated by an American group of specialists, opened its access only in the middle of the 1990^s. Some years later, in 1996, the British supermarket giant Tesco became successful in the UK (Galante, Lopez & Monroe, 2013).

As mentioned above, the provided E-Commerce definition allows for adaption to the category of goods being offered for sale. Thus, this paper gives no separate definition to the term Food E-Commerce but it rather adapts the above cited general definition: Food e-commerce is *“an*

Internet rested system that uses World Wide Web based application solutions in order to buy and sell perishable goods by means of distance contracts in B2C transactions”.

Nonetheless, in the context of this study some boundaries are set to the term ‘*perishable good. Food*’ includes by definition “*any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans*”. Hence it comprises both prepacked and fresh food, drinks, gum or any product intentionally incorporated into the food during its manufacture, preparation or treatment. It “*excludes feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, medicinal products, cosmetics, tobacco and tobacco products, narcotic or psychotropic substances and residues and contaminants*” (See Annex IV: Art. 2, GFL). Statista excludes additionally the whole range of baby food, drinks and dietary supplements, since these food-groups are regulated separately and should be evaluated accordingly (Statista, 2013a). The concept of *perishable good*, when used within the framework of this study will take over the legal definition of Art. 2 of the GFL as well as the proposed exclusion of certain categories of food by Statista. Also, this study excludes fresh food and targets only prepacked food, since the online market for fresh food is at current time of the study rather weak (Rolandi, 2017).

2.2 Food E-commerce market in the European Union

In 2018 Statista affirmed that the European projected revenue in B2C E-Commerce will show a growth of +7% by the end of 2023. Even though the food and personal care segment is at this moment in time the smallest E-Commerce segment, it belongs to the fast-growing one. A raise of +9.2% is predicted by the end of 2023. This lies significantly above the average growth of +7% (Statista, 2018a).

European pioneers of online grocery shopping are by far the British consumers, followed by French and German shoppers. In the recent past, especially products that were not part of a supermarket traditional range, such as specialities, deli food and exclusive products used to be bought online. These days, European consumers make use of electronic shopping when it comes to everyday products. Particularly long-lasting prepacked food such as pasta, sweets, snacks, butter, oil, flour or sugar are bought online (Statista, 2018a).

2.2.1 Types of webshops offering perishable goods

Two different types of business models in B2C food E-Commerce are currently applied across Europe: (Model 1) hosted E-Commerce platforms and (Model 2) E-marketplaces.

Perishable goods are most often offered for sales by a web platform for multiple business, called E-marketplaces, such as Amazon.de (Model 2). Self-hosted webshops of well-known offline retailers such as M-Preis, REWE or EDEKA, constitute another way of selling food online. This type of webshop is called a self-hosted E-Commerce platform (Model 1). Some food producers are also selling their manufactured goods directly to their consumers across their own self-hosted webshop, such as Ritter Sport, Ben & Jerry's, Haribo or Dr. Oetker. This latter type of webshops also belongs to the Business-Model 1 (Enterprise Europe Network, 2018). Producers own webshops are however used only rarely since many producers currently lack the insight, resources and technology that online based grocery retailers have gathered over years (Thakker, 2019). Within this study web platforms of both models will be analysed, as further explained in Chapter III.

2.3 Food E-commerce market in Germany

Germany's food E-Commerce market accounts for the third largest across Europe after the UK and France. Even though only a small part of German consumers is currently willing to buy their whole grocery list online there is a huge market potential hidden in this sector. The current revenue generated by means of online food sales accounts for 1% of the total German food-sector revenue (Rücker, 2018). Nevertheless, the German online market for food shows a much larger growth than the market for non-food products (Pilick, 2019).

According to a survey performed in 2018 by Pricewaterhouse Coopers, 15% of all the respondents conducted at least half of their grocery shopping on-line. It additionally shows that 40% of German buyers are planning to do their future grocery shopping online (Pricewaterhouse Coopers, 2018). There is hence an increase of 25%, which is particularly high when compared with the results of Statista, who predicts a global increase of 7%.

German consumers tend to shop online for prepacked and storable food, such as sweets, snacks, pasta products and tinned food. Especially men with a high income and a full-time job are pioneers in online food shopping (Pricewaterhouse Coopers, 2018).

2.3.1 Major German webshops offering perishable goods

Today, already 38 out of 100 top German food suppliers have created their own webshop (Handelsverband Deutschland, 2018). The launch of Amazon Fresh in 2017 put major pressure on many of the national retail groups: While REWE, Metro and EDEKA took the risk to compete with Amazon Fresh, others like Lidl or Kaufland withdraw after a short period of time from the online food market. Aldi renounced completely from the online food market. The precise reasons are not known; experts however assume that the huge initial investment, the complex logistic requirements as well as the competitor's strengths are only some possible causes for the withdrawal or restraint of certain German retailers (Rücker, 2018).

Many consumer studies have been conducted to determine the quality and popularity of German online food shops. Different aspects such as delivery-time and costs but also the user friendliness, data protection, total revenue and privacy were scrutinized (Hitz, 2019; Rücker, 2018). A sum of the results of different studies (See Annex I) resulted in a list of the 6 best-known German food webshops:

- REWE
- Amazon.de
- EDEKA
- Allyouneedfresh.de
- Mytime.de
- Lebensmittel.de

Excluding REWE, that is already on step ahead of the competitors by assuring a smooth and fast delivery in more than 75 cities across Germany, the delivery of almost all other web platforms is at present predominantly available in larger cities, such as Munich, Berlin, Hamburg or Potsdam (Rücker, 2018).

Based on the types of E-Commerce webshops, explained in Chapter 2.2.1, these aforementioned six German web-platforms can be assigned as follows:

- E- Marketplaces: Amazon.de, Allyouneedfresh.de, Mytime.de, Lebensmittel.de
- Self-Hosted Websites: EDEKA, REWE

2.4 Summary Chapter II

Title Chapter II: Food E-Commerce, a newly emerging European Market

Consumers worldwide are more and more taking advantage of E-Commerce. A uniform legal definition of the term E-Commerce is missing. Considering different approaches provided by academic literature, Food E-Commerce in the context of this study is understood as an Internet rested system that uses World Wide Web based application solutions in order to buy and sell perishable goods by means of distance contracts in B2C transactions, with the term perishable goods being restricted to prepacked food.

In Germany, the food E-Commerce market is a newly-evolving industry and is by now rather small compared to the traditional offline food market. Within this market, products are mainly sold through E-Marketplaces, like Amazon.de, Lebensmittel.de or Allyouneed.de.as well as through the retailer's or producers self-hosted webshop, as in the case of Ritter Sport, Haribo, REWE or EDEKA. Most of them guarantee a smooth delivery within the vicinity of large German cities.

CHAPTER III

APPLIED METHOD

This thesis combines a small literature research (Section 3.1) upon which a subsequent empirical internet-based study is build (Section 3.2). This chapter will focus on the description of both applied methods.

While the first part, the literature research, aims at exploring the information obligation and the existing legislative underpinning of mandatory food labelling in the context of E-Commerce, the second part, the empirical study, aims at investigating the degree of compliance between the explored regulatory framework and its implementation across German food webshops.

3.1 The Literature Research

A literature research is chosen over a legal comparative analysis because prepacked food sold online is not regulated within one single act but insight must be taken into different disciplines. What these disciplines are and which legal articles apply shall be explored by looking into different publications dealing with this topic. The core goal is to provide an answer to the following question: [What are the information obligation in B2C-distance contracts concluded over food webshops in Europe?](#)

Different databases are used for gathering relevant articles: Hein Online, SCOPUS, Elgar Online, Research Gate as well as the WUR Library Search. In addition, relevant publications are collected by means of backward⁴ and forward⁵ snowballing. The citations to the papers under examination are studied using Google Scholars. Albeit the fact that Google Search is defined as an imperfect tool to perform systematic reviews⁶ it is still used to identify additional articles

⁴ Backward snowballing means using the reference list to identify other relevant articles (Wohlin, C., 2014).

⁵ Forward snowballing can be defined as the method of looking for new relevant articles based on those papers citing the paper being examined (Wohlin, C., 2014).

⁶ The reason for not being an adequate tool lies first in its unknown and uncontrollable algorithm and secondly in its feature to adapt the search to each user in order to personalize the information. This

for this study. They represent an important source of grey literature and governmental and institutional reports, which in turn are highly relevant for this legal research. While performing this research, the assumption is made that not all guidelines have been published in scientific journals. The following search queries are applied: “Food Information Online” OR “Online Food Labelling” OR “Food Labelling E-Commerce” OR “Food E-Commerce” OR “Mandatory Food Information Online” OR “Food Information in Distance Contracts” OR “Lebensmittelinformationen Online” OR “Informazioni degli alimenti online” OR “Information obligation E-Commerce”.

3.1.1 Inclusion Criteria

The literature research is conducted based on papers that focus on the sales of food by means of distance contracts and on papers that examine the legal underpinning of E-Commerce in connection with perishable goods. Articles focusing on consumer rights in distance contracts are also evaluated. Because both relevant legal acts, the E-Commerce Directive and the Food Information Regulation were reviewed in 2012, only articles published as from that year are taken into consideration. Articles written in English, German and Italian are considered.

3.1.2 Exclusion Criteria

Articles that concentrate solely on E-Commerce with no link to perishable goods are excluded. Additionally, papers that link E-Commerce and official controls are not included either.

3.1.3 Search strategy

Of the initial 21 publications, 18 are considered to be relevant for this study. These articles are fully read. In a next step an excel file is prepared recording (1) the legal acts and the related (2) legal articles, analysed in each of the 18 publications. The excel file forms the basis to describe the legal framework that applies to Food E-Commerce.

3.2 The Internet-based Empirical Study






In order to identify the consistency of German webshops in their provision of the mandatory food information, as established in the literature research, a systematic study of webpages selling food is undertaken. The methodology employs an internet-based quantitative content analysis.

implies that the search is probably not replicable (Piasecki, J., Waligora, M., & Dranseika, V., 2018). In order to avoid possible personalisation, I logged off from all google-accounts.

The study is conducted in the period between May and June 2019. The core goal is to provide an answer to the following question: **To what extent are the provisions of article 9 and 14 of the FICR implemented across German webshops?**

Before performing the survey, it is crucial to elaborate a detailed and target-oriented definition of both key factors influencing the study: (1) the food category and (2) the webshop. Products pertaining to four specific food categories are selected to be examined across 10 German webshops, as demonstrated in Table 1:

Table 1: Description of the factors influencing the survey
Source: Own Source

Factor 1: Examined Food Category	Factor 2: Examined Webshop		
1. Sweets and Mints 2. Crisps and Snacks 3. Dried pasta, Rice and Noodles 4. Tins and Cans	Group A		
	Webshop	App	
	1.1 shopRewe.de		
	1.2 EDEKA.de		
	2.1 Amazon.de		
	2.2 Allyouneedfresh.de		
	2.3 myTime.de		
	2.4 Lebensmittel.de		
	Group B		
	Webshop		
	3.1 Dr. Oetker.de		
	3.2 Haribo.de		
3.3 De Cecco.de			
3.4 Spreewaldrabe.de			

Factor 1: Food Category

As mentioned in Chapter 2.3, German online food shoppers tend to buy prepacked and long-lasting food (Pricewaterhouse Coopers, 2018). This type of food is represented by the following four food categories, being selected to perform the study: (1) Sweets and Mints, (2) Crisps and Snacks, (3) Dried pasta, Rice and Noodles and (4) Tins and Cans.

Factor 2: Webshop

The research conducted in Chapter 2 provides a list of the six most significant German food webshops. These six webpages, included together under the name ‘Group A’ in the table above, are representative for the German online food market and are hence target of this study. Within

this group a distinction is made between self-hosted webshops having an eponymous physical shop (REWE and EDEKA) and E-Marketplaces having an exclusive digital nature (Amazon.de, Allyouneedfresh.de, myTime.de, Lebensmittel.de).

In addition to the six leading webshops, a further list of four smaller webshops is selected. ‘Group B’ consists of a set of self-hosted webshops of food producers. They have been added to the survey in order to proof or reject the first underpinning hypothesis, as discussed below in section 3.2.1. These food companies provide consumers with an integrated webshop and offer food delivery across Germany. They have been selected based on two criteria: Their products are representative for every examined food category and they offer a webshop and a delivery service for Germany.

While almost all traders of Group A, in addition to the webshop, developed a mobile app for their consumer, producers of Group B offer solely the webshop. Hence, were the trader provides an app, this app is downloaded and used for this study. Where this is not the case, the examination of the webshop is performed on the corresponding webpage. In both cases, mobile apps and webpages, the survey is carried out on the same mobile phone (iPhone 8)⁷. Every mobile app asks for the postcode. A uniform postcode is used for all apps: Munich (Schwabing) 80804.

3.2.1 Underpinning Hypothesis

The two hypotheses underpinning the research are:

- On the contrary to self-hosted websites, E-Marketplaces offering a wide range of products, including also non-perishable goods, would show a higher level of consistency in terms of compliance with the European Food law provisions, due to their know how and technology gathered over years (Thakker, 2019).
- Own-branded products across webshops of online based grocery retailers would show a higher level of consistency in terms of compliance with European Food Law, given each FBO’s responsibility for correct product information⁸.

⁷ Statista lists the iPhone 8 as the second most popular mobile phone in German in the first quarter 2019. The Apple iPhone XR is ranked number one due to the consumer curiosity for the new (Statista, 2019).

⁸ The legislator assigns the responsibility for the provision of the right product information to the FBO *under whose business name the food is marketed* (Art.8, FICR).

3.2.2 Examination strategy

The central objective is to examine whether all mandatory food information, elaborated in the literature research, is given to the consumer. Assuming that the information of the physical product packaging is in line with the FICR provisions, a comparison of it with the information provided online is carried out using the market intelligence agency mintel.com. A total of 40 products are evaluated (n=40) according to the examination plan outlined in Annex III.

For every food category, the first appearing product on the webpage/app is examined. In case of REWE and EDEKA, an additional examination of the first appearing private-labelled product of the respective category is made.

Every page displaying the selected product is scrutinized for the mandatory food information. The results are recorded in a list as follows:

- If the information is given, a ‘G’ (G= given) is recorded in the respective cell.
- If the information is incomplete, a ‘I’ (I= incomplete) is recorded in the respective cell.
- If there is no information available at all, a ‘NA’ (NA= not available) is indicated in the list.

This allocation of responsibility seems clear for own-branded products, such as those of Haribo, De Cecco, Spreewaldrabe or Dr Oetker: the trademark and the address provided on the back of pack show correlations for the average consumer. This is not as clear in case of private-labels: whether the *business name* is considered to be the trademark, in case of EDEKA or REWE private-labelled products, or the address of the manufacturer provided on the back of pack, is a matter of interpretation of the respective law.

Dias Simões says, that in order to solve this ambiguity, it is not only sufficient to look into the GFL (definition of ‘*Food Business Operator*’ (Art. 3.3)) and the FICR (definition of ‘*Responsibilities*’ (Art. 8)), but it is helpful to further examine the Council Directive 85/374/EEC, of 25 July 1985. In its Art. 3 namely, the legislator has adopted an economic concept of ‘*producer*’ according to which a producer is “*any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer*”. Nowadays, a brand exercises a communicative function with which the holder of that brand assumes a certain degree of liability while putting his branded product into circulation. Dias Simões further underlines, that by labelling a product with an own brand, the holder assumes the same risk as the producer (Dias Simões, 2013). While EDEKA provides the following information below their private-label products: *Verantwortliches Lebensmittelunternehmen* (Responsible Food Company): EDEKA ZENTRALE AG & Co. KG, D-22291 Hamburg, REWE distinguishes between *Marke* (Brand): REWE Beste Wahl and *Kontakt* (Contact): Producing company. For the purpose of this study and in the light of the arguments put forward by Dias Simões, it is assumed that both retailers, REWE and EDEKA, are responsible for the right label information of their private-labelled products, as prescribed by Art. 8 of the FICR. Hence, ‘own-branded products’ within this study are not only all the examined products on the webshops of Haribo, De Cecco, Spreewaldrabe and Dr Oetker but also the private-labelled products of REWE and EDEKA.

3.3 Summary Chapter III

Title Chapter III: Applied Methods

For the present study, two different type of methods are applied.

First, a literature research is conducted to elaborate the applicable law for Food E-Commerce in Europe. The central question is: *What are the information obligation in B2C-distance contracts concluded over food webshops in Europe?* Particular focus is set on the elaboration of the information obligation in B2C-distance contracts as well as on the provisions for food labelling online. This law is then used as a benchmark to measure the consistency in the subsequent survey.

For the internet-based quantitative content analysis, the central question is phrased as follows: *To what extend are the provisions of article 9 and 14 of the FICR implemented across German webshops?* 40 prepacked food products across major German webshops are examined for their consistency of mandatory food labelling. The form of the survey is determined by the underpinning hypothesis. E-Marketplaces and hosted-webshops as well as private- and 'foreign'-labelled products are studied to confirm or reject both assumptions. The survey is conducted on a private mobile phone in the period between May and June 2019.

CHAPTER IV

WHAT ARE THE INFORMATION OBLIGATIONS IN B2C-DISTANCE CONTRACTS CONCLUDED OVER FOOD-WEBSHOPS IN EUROPE?

In order to examine the legal foundation of the information obligation in Food E-Commerce, it is necessary to provide a systematic collocation within the current regulatory network, given the different aspects and numerous legal acts governing this matter.

To do so, a literature research is conducted. The results (see Annex II) put in evidence, that for defining the food information obligation in B2C distance contracts, insight must be taken into two separate disciplines of law which both, in turn, consist of a series of further, more sector specific, disciplines:

- (1) From a Food Law perspective, it is important to study Regulation (EC) No 178/2002⁹, the so called General Food Law (GFL), as well as the more specific Regulation (EU) No 1169/2011¹⁰, also referred to as Food Information to Consumer Regulation (FICR).
- (2) From an E-Commerce perspective, articles embedded within Directive 2000/31/EC¹¹, the so-called E-Commerce Directive (ECD), and within Directive 2011/83/EU¹², also referred to as Consumer Rights Directive (CRD), need to be given attention.

⁹ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

¹⁰ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004

¹¹ 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')

¹² 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 Text with EEA relevance

At this point it is important to mention, that both functional areas of law, namely the food law and E-Commerce law, consist of an overwhelming number of more sector specific, and vertical European legislation (Van de Veer, 2014). The GFL provides the basics of the Food Law-discipline like it does the ECD for the legal discipline of E-Commerce. Both acts are crucial for a better understanding of more specific acts, such as the FICR and the CRD (Rolandi, 2017).

Since the study predominantly focuses on food labelling across prepacked food sold online, the FICR is by far the most important legal act to be considered. This regulation is compared with the CRD, that in turn establishes rules on information to be provided for distance contracts (Bolognini, 2018). With the view to determine the information obligation and the mandatory food labelling across digital shop windows, most attention within this chapter will be paid to these two legal acts.

The first section will elaborate the legal character of both acts (Section 4.1) and the second section will focus on defining their scope of application (Section 4.2). The third section will provide the reader with an overview of the most important provisions of both acts governing the matter of information obligations and food labelling online (Section 4.3).

4.1 The legal character of the applicable law

First of all, attention needs to be given to the legal character of the applicable law, namely the FICR and the CRD. The reason for this lies within its implementation in the subsequent empirical research, which in turn is limited to German webshops. It should be known whether insight needs to be taken into the respective German national law or if both legal acts are uniformly enforced throughout the European Union (EU).

4.1.1 The legal character of the CRD

The CRD was signed in 2012 and replaces since then the previous Directive 97/7/EC. It includes formal and material provisions, among which mandatory regulations concerning the form and content of contracts concluded via online shops (Van de Veer, 2014). The CRD was supposed to be translated by every Member State into national law by the end of 2013¹³. As

¹³In the case of Germany, target-country of this study, the transposition into national law was concluded in a timely manner. Germany however did not develop a completely new act but rather incorporated the single Articles into the already existing ‘Bürgerliches Gesetzbuch’ (Bundesministerium der Justiz, 2012). In the ambit of this study, for every cited article of the CRD, insight will be taken into the

stated at the very beginning of the act, namely in its Recital 2 and 5, the directive should lay down harmonised standard rules whilst moving away from the minimum harmonisation approach of the Directive 97/7/EC (see Annex IV: Recital 2 & 5, CRD). With its minimum harmonisation approach, the Directive 97/7/EC caused fragmented and conflicting legal provisions in each of the Member States and in turn resulted into a limited growth of the cross-border digital market (Bolognini, 2018). In the light of this, the legislator further underlines in Art. 4 of the new directive, the CRD, that “*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection*” (see Annex IV: Art. 4, CRD). Hence, although its legal nature, there is no longer space for national interpretation of the new Directive, the CRD, due to its maximum harmonisation (Bolognini, 2018).

4.1.2 The legal character of the FICR

On the contrary, the legal nature of FIC does not imply the need for member states to translate it into national law: its legal status allowed for immediate effect as of December 2014. This act is a sector specific provision. It regulates the information flow of food in all stages of production, processing and distribution between business and consumer. It specifically keeps control over the mandatory food information and the product labelling, offline and online (Van de Veer, 2014).

4.1.3 Similarities between the CRD and the FICR

Even though, based on Art. 288 TFUE, the legal nature of the FICR and the CRD is different, they show many similarities. Both have been signed in October 2011 and aim at achieving a high level of harmonisation between the member states law (Bolognini, 2018). Additionally, they are built upon the same legal basis, namely Art. 114 TFUE and underline already at the very beginning, that the achievement of a high level of consumer protection is at the core of both acts (see Annex IV: Recital 3, CRD; Recital 1, FICR).

translated German national law. As long as the article has been incorporated into German law in the same way as proposed by the EU-legislator, which is very likely due to its maximum harmonisation, reference is made to the respective EU-Directive. If, however, ambiguities between EU-Directive and German law arise, then national law will be discussed.

4.2 The scope of application of the applicable law in the context of the study

Prior to the use of both legal acts, it is crucial to proof their applicability in the context of the study. First, the scope of application of the CRD will be elaborated before moving on to verify the applicability of the FICR.

4.2.1 The scope of application of the CRD

Almost all evaluated papers, focusing on B2C distance contracts¹⁴, justify the scope of application of the CRD by citing Art. 3(1) of the same regulation. This article states that “*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*” (See Annex IV: Article 3(1), CRD). The wording ‘*any contract*’ forces at the same time to refer to its Article 2. This latter Article provides definitions of different types of contracts, *inter alia*, the one for ‘*distance contract*’ (See Annex IV: Article 2(7), CRD). Thus, as the contract concluded between consumer and trader via food webshops lies within the CRD’ definition of ‘*distance contract*’ and thereby also within the wording ‘*any contract*’ of its Art. 3(1), consumers involved in such a contract will take advantage of the rights defined in the CRD¹⁵.

Nonetheless, when continuing reading the same Article, which adds in its paragraph three that the directive shall not apply “*to contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer’s home, residence or workplace*”, doubts arise whether the distance contract concluded via food webshops really lies within the CRD’ scope of application. Only one paper, dealing with Food E-Commerce and also referring to the CRD, provides arguments for the scope of its application: Even though the CRD excludes contracts for the supply of food from its scope, it is not clear how to measure the ‘*frequency*’ and ‘*regularity*’ of the supply by a trader. Additionally, also the term ‘*current consumption in the households*’ provides room for interpretation (Bolognini, 2018). This ambiguity however

¹⁴ This Directive, as anticipated in its Recital 8, focuses only on contracts concluded between traders and consumers and hence regulates solely B2C contracts (See Annex IV: Recital 8, CRD). This fact is further underlined in its Article 3(1) (See Annex IV: Article 3(1), CRD).

¹⁵ The CRD further explains in its Recital 20, that many other types of sales, though not relevant for this study, would lie within the scope of distance contracts, such as sales concluded via mail, telephone or fax (See Annex IV: Recital 20, CRD).

provides not enough basis to believe that this directive shall apply also to the contracts being analysed in this present study.

Taking a closer look at the Recital 29 of the CRD, which helps in understanding the legislator's intention, it becomes apparent that this directive is not meant to apply to social services such as *“services for persons and families in need of assistance in carrying out routine, everyday tasks and, on the other hand, services for all people who have a special need for assistance, support, protection or encouragement in a specific life phase”* (See Annex IV: Recital 29, CRD). This in turn confirms the rationale of excluding the frequent supply of perishable goods, as laid down in Article 3(3)(j). The regular delivery of food to special groups of people shall be excluded since it is regulated within sector specific legislation. As a consequence, when talking about Food E-commerce and distance contracts in the context of this study, the regular supply of food to consumers in need of assistance is not included. This delimitation allows for negligence of the Article 3(3)(j) exclusion and hence for a justified application of this Directive in the context of the study.

Apart from this, Art. 3(2) of the same Directive adds, that *“if any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors”* (See Annex IV: Art. 3(2), CRD). For the present study, this article is crucial.

The legislators' intention, when creating the CRD, was to strengthen the consumer protection and to regain trust while providing them with more rights in distance contracts. This is why the new directive establishes on the one hand the right of withdrawal (*ius poenitendi*) and on the other hand a list of specific information which needs to be provided by the trader before the conclusion of the distance contract. Due to the *ius poenitendi*, the consumer will be only given the *‘main characteristics’* of the good, as established under Art. 6(1)(a) (Bolognini, 2018). The legislators however gives the supplier of food webshops the choice to deny the consumers the *ius poenitendi* for reasons of hygiene or shelf life (See Annex IV: Art. 16(d), CRD), resulting in food-products that are only briefly described by their *‘main characteristics’* (Van de Veer, 2014).

This vacuum need to be filled by another legislation: Taking into account both conflicts, namely the exclusion from the right of withdrawal and the resulting vague description of food products, and in the light of the prevalence of sector specific guidelines in case of conflicts, experts studying the legal basis of the labelling information obligation in Food E-Commerce refer at this point back to the FICR (see Annex IV: Recital 11 & Art 3(2), CRD).

4.2.2 The scope of application of the FICR

As already outlined above, it lies within the FICR's scope to establish the overall principles, requirements and responsibilities governing food information particularly the food labelling (see Annex IV: Art 1(2), FICR). It additionally regulates "*activities concerning the provision of food information to consumer*" while addressing the FBOs at all stages of the food chain (see Annex IV: Art 1(3), FICR).

Within the FICR, the legislator provides for specific provisions applied to E-Commerce, namely in its Art. 14. This article aims to regulate '*distance selling*', as discussed below. It addresses '*prepacked food*' offered for sales by '*means of distance communication*'. Even though in the FICR the European regulators do not provide a definition of distance contracts as they do in the CRD, they still define the term '*means of distance communication*' (see Annex IV: Art. 2(2)(u), FICR). Within this definition reference is made again to a contract concluded between two parties not physical present at the time of contracting. This definition is in line with the scope of the contracts concluded via Food E-Commerce as discussed in this study. Before confirming also the scope of application of the FICR, it appears necessary to examine additionally the definition of '*food*', used within the relevant Art. 14. For its definition, reference is made to the GFL's Art. 2 (see Annex IV: Art. 2, GFL). The definition of *food* as put forward by the GFL has been used in turn for defining the targeted food of the present study (see Chapter 2.2.1). Hence, also the FICR can be used for further examination of information obligation in the context of this study.

4.3 The information obligation applicable to prepacked food: An interplay between the CRD and the FICR

After having examined the legal nature of both acts as well having checked their scope of application to the present study, insight can be taken into their applicable articles. The research has shown that Art. 6 of the CRD as well as Art. 9 & 14 of the FICR need to be analysed.

4.3.1 Information obligation as defined by Art. 6 CRD

The Art. 6 of the CRD provides in its paragraph 1 a list of 20 Information requirements for distance and off-premises contracts (see Annex IV: Art. 6, CRD). Any consumer shall be provided with the these information in a clear and comprehensible manner before being bound to a contract (Art. 6(1), CRD). Next to the information requirements such as for example the trader's identity (Art. 6(1)(b)), the geographical address (Art. 6(1)(c)) or the price of the good (Art 6(1)(e)) also the “*main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services*” shall be provided “*directly before the consumer places his order*” ((Art. 6(1)(a) and (Art. 8(2) CRD)). As already outlined above, considering the arising conflict with the wording ‘*main characteristics*’ in case of food sold through webshops and taking into account the prevalence of sector specific legislation in case of conflicts, it stands to reason to take insight into in the sector specific act, namely the FICR (Rolandi, 2016).

4.3.2 Information obligation as defined by Art. 14 FICR

Article 14 of the FICR regulates food offered for sale by means of distance communication (see Annex IV: Art. 14, FICR). It distinguishes between the information obligation for prepacked and non-prepacked food¹⁶. Furthermore, for prepacked food, a differentiation is made between (1) which information must be provided and (2) how such information should be presented to the consumer.

(1) On the one hand, consumer purchasing food online shall receive the same product information as those buying the food offline (Recital 27, FICR). In the light of this, reference is made to the corresponding Art. 9 of the same Regulation (explained below). Furthermore, the legislator draws a distinction between the information that needs to be given (a) when the product is offered and (b) when the order is placed.

(a) When offering a food, all mandatory particulars should be given to the consumer. The term *mandatory food information* is defined in Art. 2 of the same regulation as “*the particulars that are required to be provided to the final consumer by Union*”

¹⁶ Since this study will only investigate prepacked food, as it is the most prevalent form of food offered for sales in E-Commerce, the provisions put forward for non-prepacked food will not be discussed.

provisions” (see Annex IV, Art. 2(c), FICR). For food being sold online, an exemption is made for ‘*best before*’ and the ‘*use by date*’, as established under Art. 9(f).

(b) At the moment of order acceptance, all mandatory particulars shall be available.

- (2) On the other hand, considering the way of presenting the information, it is appropriate to take into account Recital 9 of FIC (see Annex IV: Recital 9, FICR). This recital states, that the information given to the consumer shall be provided in a clear, comprehensible and legible manner. The reasoning behind this is laid down in Recital 26 of FIC: studies have confirmed the high importance of clear and accurate presentation of food information in making an informed choice (see Annex IV: Recital 26, FICR). Assuming that all information on a website is considered to be given to the consumer, its content should align with these requirements set forth by the FICR (Bolognini, 2018).

Furthermore, in case of mandatory food information provided digitally, and on the contrary to the strict rules of information presentation in case of food packages, the European legislators leaves a certain degree of leeway for its presentation. Art. 14 namely states, that the information shall “*appear on the material supporting the distance selling or shall be provided through other appropriate means*” (Art. 14, FICR).

No information on font type or minimum font size is given for the presentation of mandatory food information on websites. Mr. Schulz from BEVH additionally explains, that uploading a high-resolution, up-to-date picture of the food packaging proofs to be sufficient to comply with the information obligation as defined in the FICR. The use of pictures, defined as ‘*other appropriate means*’, is justified by the FICR’ Art. 14(1)(a). It is however important to provide the consumer with a preview of images. This facilitates the consumer in finding the information on the webshop and aligns with the concept put forth in Recital 26, discussed above (Schulz, 2018).

4.3.3 Information obligation as defined by Art. 9 FICR

Art. 9 of the FICR defines those main characteristics, that Art. 14 makes reference to. These mandatory food particulars shall be provided to the consumer before being bound to a contract:

“List of mandatory particulars

1. (...), indication of the following particulars shall be mandatory:

- a) *the name of the food;*
- b) *the list of ingredients;*
- c) *any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form;*
- d) *the quantity of certain ingredients or categories of ingredients;*
- e) *the net quantity of the food;*
- f) *the date of minimum durability or the ‘use by’ date;*
- g) *any special storage conditions and/or conditions of use;*
- h) *the name or business name and address of the food business operator referred to in Article 8(1);*
- i) *the country of origin or place of provenance where provided for in Article 26;*
- j) *instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions;*
- k) *with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume¹⁷;*
- l) *a nutrition declaration.”*

In the case of prepacked food, containing of more than one ingredient, these 12 mandatory food particulars vary in their application. The rules for the provision of some individual particulars are consistent across the whole range of food and are hence always given regardless the type of good (the name of the food, the net quantity of the food, the list of ingredients, the name of the business, the nutrition declaration, date of minimum durability). Some other particulars, although being mandatory, might not be provided for some products. They vary based on the nature of the food (information on allergens, quantity of certain ingredients, special storage condition, country of origin, instructions for use, the actual alcoholic strength) (van der Meulen, van der Velde, Szajkowska & Verbruggen, 2008).

¹⁷ Since this study will not consider alcoholic beverages, the food particular listed in the FICR Art. 9(1)(k) can be *a priori* excluded.

4.4 Summary Chapter IV

Title Chapter IV: What are the information obligations in distance contracts concluded over food webshops in Europe?

For defining the information obligation in food-distance contracts insight must be taken into different disciplines of law. Two major sets of European legislation are currently determining the content of the digital shop window: the Directive 2011/83/EC (Consumer Rights Directive, CRD) and Regulation (EU) No. 1169/2011 (Food Information to Consumer, FICR).

Art. 6 of the CRD lists 20 information details which need to be given to the consumer in a clear and comprehensible manner before being bound to a contract. The ‘main characteristics of the good’ is the first detail on the list. Since in the case of food it is not clear, what the main characteristics are and because the CRD already anticipates in its Art. 3(2) that the provisions of specific sectors shall prevail in case of conflicts, reference is made to the sector specific act, namely the FICR.

Art. 14 of the FICR regulates the ambit of distance selling and underlines that for prepacked food being sold by means of distance communication, all details listed in Art. 9 of the same regulation except for the ‘use by date’ shall be made available to the consumer before being bound to a contract. At the moment of delivery, all food details shall be provided.

Thus, the consumers shall be provided with all details listed in Art. 6 of the CRD and all food characteristics defined in Art. 9 of the FICR in a clear and comprehensible manner. Since the obligation of the mandatory food labelling, target of the main research question, are defined in Art. 9 of the FICR, the internet-based survey will solely investigate for the compliance with this latter information obligation.

CHAPTER V

TO WHAT EXTEND ARE THE PROVISIONS OF ARTICLE 9 AND 14 OF THE FICR IMPLEMENTED ACROSS GERMAN WEBSHOPS?

A total of 40 products from ten distinct digital shops were analysed in May and June 2019. The analysis focused on the provision of the 10 mandatory food particulars as required by the FICR¹⁸. Both underpinning hypotheses (see chapter 3.2.1) were taken into consideration when collecting the data and evaluating the results:

- Products on E-marketplaces show higher labelling-conformity than the once offered on self-hosted webshops.
- Own-branded products show a higher labelling conformity than ‘foreign’-branded products across self-hosted webshops.

A quick look at the results reveal, that for less than 50% of the evaluated goods, the information provided digitally to the consumer is identical to the information provided on the packaging (offline) and hence in line with the mandatory labelling provisions laid down in Art. 9 and 14 of the FICR (see Figure 1).

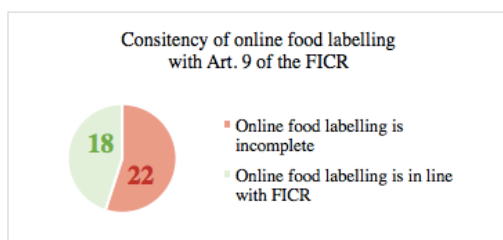


Figure 1: Consistency with Art.9 of the FICR of online food labelling.
Source: Own Illustration

¹⁸ Art. 9 lists 12 mandatory food particulars: Particular 9(1)(k) on the alcoholic content of beverages is however not relevant for this survey since beverages are not considered. Out of the remaining 11 particulars, only 10 need to be provided to the consumer before being bound to a contract. Particular 9(1)(f), the ‘use by date’, shall be only given at the moment of delivery.

In order to confirm or reject the underpinning hypothesis as generated in Chapter 3.2.1, the results are evaluated from two distinct perspectives. This chapter provides first an overall evaluation of the data (Section 5.1) before providing a separate analysis based on the type of E-Commerce platform (Section 5.2). Within the latter analysis a further distinction is made between own branded and ‘foreign’-branded products.

5.1 The practical implementation of Art. 9 FICR across major German online shops

The results (see Figure 2) reveal, that some mandatory particulars are provided correctly across all food products and online shops while some others not¹⁹:

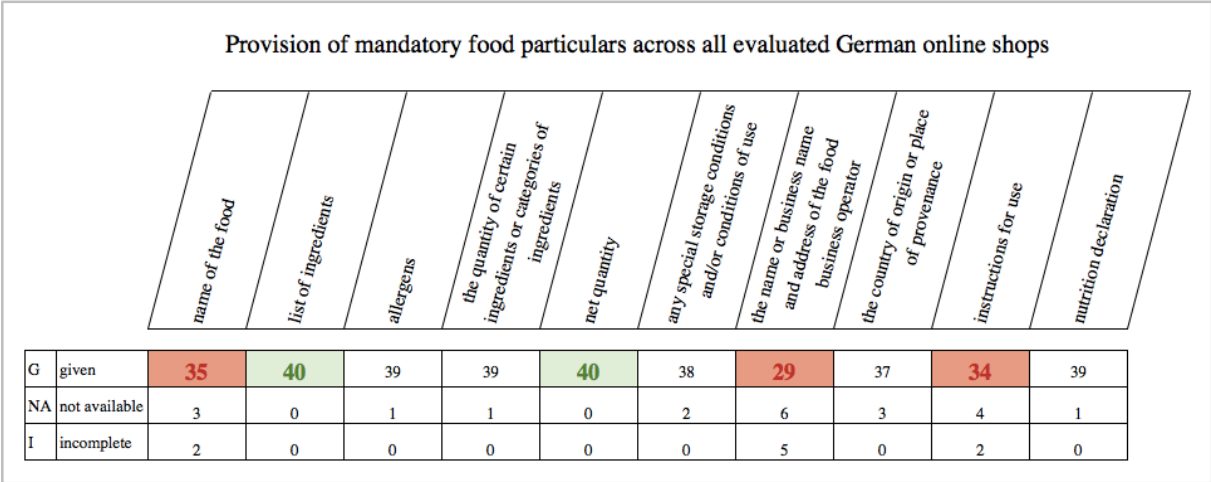


Figure 2: Provision of mandatory food particulars across all evaluated German online shops
Source: Own Illustration

For all examined products, the mandatory as well as voluntary food information is provided in form of text blocks below or on the left to the image of the product. Although uploading high-resolution images of the product packaging itself is, as demonstrated in Chapter 4.3.2, legally not forbidden, none of the web-shop operators take this way to provide for mandatory particulars.

On the one hand all web-shops provide for the appropriate list of ingredients and the corresponding net quantity of the food on sale. In most cases, the net quantity is provided

¹⁹ In saying this, it must be mentioned, that for those mandatory food particulars, which are indeed mandatory, though not to be applied to certain types of food, their justified absence is recorded as ‘G’ (=information given).

together with the product title as offered through the web-shop. For almost all products (39 out of 40), also the nutrition declaration, the allergens and the quantity of certain ingredients are presented correctly. The nutrition declaration is, except for one single case, provided correctly in a tabular form as proposed by the FICR' Art. 34(2) (see Annex IV: Art. 34(2), FICR). For 37 out of 40 products, the country of origin is provided correctly.

On the other hand however, most discrepancies are encountered when looking for the name or business name and address of the food business operator as well as for the instructions for use and the legal name of the food.

Especially the information about the name or business name of the FBO shows clearly a lack of completeness. For six products, no reference at all is made to the name or business name. In five cases this information is incomplete.

5.2 The practical implementation of Art. 9 FICR evaluated depending on the type of E-commerce platform

The 40 evaluated products are offered across two different types of E-Commerce platforms: (1) Self-Hosted Webshops (producers own webshops and webshops of existing offline grocery retailers) and (2) online Marketplaces (online based food retailer).

The results show (see Figure 3), that for both evaluated types of self-hosted webshops (Online Webshop of Retailer and Producers Own Webshop), the conformity with the FICR' Art. 9 stands at approximately 25%. This outcome is relatively low compared to the conformity-results of Marketplaces, such as Amazon. Their conformity level varies between 68% and 71%.

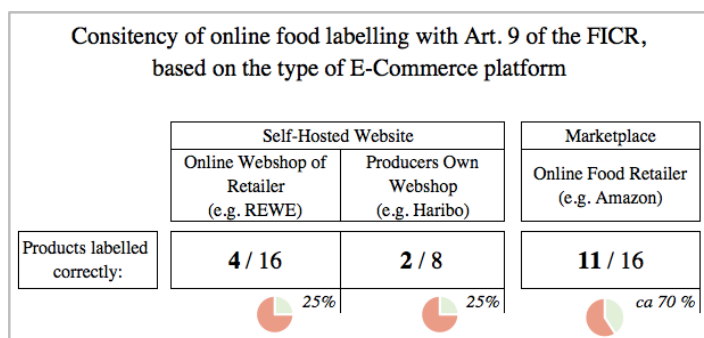


Figure 3: Consistency of online food labelling with Art. 9 of the FICR, based on the type of E-Commerce platform
Source: Own Illustration

5.2.1 The practical implementation of Art. 9 FICR across major German E-Marketplaces

As stated above, the conformity level of the mandatory food labelling across major German Marketplaces, being Amazon.de, Allyouneedfresh.de, myTime.de and Lebensmittel.de, is relatively high compare to self-hosted webshops. Out of 16 examined products on E-Marketplaces, 11 are labelled according to the FICR's Art. 9 (see Figure 3). Discrepancies arise in connection with the provision of the name of the business and the name of the food (see Figure 4).

Provision of mandatory food particulars across German Marketplaces

		name of the food	list of ingredients	allergens	the quantity of certain ingredients or categories of ingredients	net quantity	any special storage conditions and/or conditions of use	the name or business name and address of the food business operator	the country of origin or place of provenance	instructions for use	nutrition declaration
G	given	14	16	16	16	16	16	13	16	16	16
NA	not available	2	0	0	0	0	0	0	0	0	0
I	incomplete	0	0	0	0	0	0	3	0	0	0

Figure 4: Provision of mandatory food particulars across German Marketplaces
Source: Own Illustration

The date of minimum durability and the use by date, as mentioned in Chapter 4.4, are the only mandatory food particulars that are exempted from the provision of being communicated before the conclusion of the distance contract (Art. 14, FICR). Although the legislator provides for this exclusion, a closer look at the webshop of Allyouneedfresh.de reveals, that for the evaluated products also this information is provided:



Figure 5: Screenshot (16/07/2019) of the information on the 'Use By Date' on Allyouneedfresh.de.
Source: Allyouneedfresh.de, 2019

Translation: The use by date of this product is XX.YY.ZZZZ. The use by date varies based on the time of order placement.

On the contrary, two out of four webshop operators, namely Amazon and Allyouneedfresh.de, try to circumvent labelling liability by presenting the following claim:

Amazon- Case:

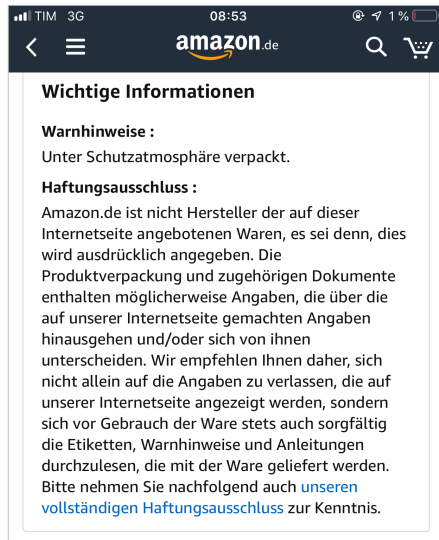


Figure 6: Screenshot (08/07/2019) of liability exclusion of Amazon.de

Source: Amazon.de, 2019

Translation: Warning: Amazon.de is not the producer of the product on sale. The information can vary. (...) it is hence recommended to check the label on the physical packaging once receiving the product

Allyouneefresh- Case:



Figure 7: Screenshot (08/07/2019) of liability exclusion of Allyouneefresh.de

Source: Allyouneefresh.de

Translation: For information on nutrition declaration, ingredients and mandatory information as provided by the FICR, please contact this nr

5.2.2 The practical implementation of Art. 9 FICR across major German self-hosted webshops

Two distinct types of self-hosted webshops are analysed: self-hosted webshops of producers and self-hosted webshops of existing offline retailers. The results reveal, that only 6 out of the 24 examined products are labelled correctly (see Figure 3). In self-hosted webshops, just like with marketplaces, the provision of the name or business name and address of the food business operator causes major problems. In addition, many times also the right instructions for use are missing (See Figure 5).

Provision of mandatory food particulars across German Self-Hosted Webshops

		name of the food	list of ingredients	allergens	the quantity of certain ingredients or categories of ingredients	net quantity	any special storage conditions and/or conditions of use	the name or business name and address of the food business operator	the country of origin or place of provenance	instructions for use	nutrition declaration
G	given	21	24	23	23	24	22	16	21	18	23
NA	not available	1	0	1	1	0	2	6	3	4	1
I	incomplete	2	0	0	0	0	0	2	0	2	0

Figure 8: Provision of mandatory food particulars across German self-hosted webshops
Source: Own Illustration

Like Amazon.de and allyouneedfresh.de, also REWE states, that it does not assume any responsibility for the information provided on the website and that hence, once the product will be delivered, the information on the physical packaging should be studied (See Figure 9). Even in case of REWE’s own-branded products, this message appears



Figure 9: Screenshot (08/07/2019) of liability exclusion of REWE.de
Source: REWE.de, 2019

Conformity of own-branded products versus conformity of ‘foreign’-branded products

In order to confirm or reject the second hypothesis, a distinction in evaluation of retailers self-hosted websites, being REWE.de and EDEKA.de, is made. The distinction is made between own-branded (private label) and ‘foreign’-branded products. This differentiated analysis is only carried out for the data collected on the website of REWE and EDEKA, since both other types of webshops, namely producers self-hosted webshops and E-Marketplaces, provide either solely own-branded products or only ‘foreign’-branded products.

REWE and EDEKA provide for both own-branded, as defined in chapter 3.2, and ‘foreign’-branded products, with the latter ones being those products purchased externally by producers.

The separate evaluation shows, that 5 out of 8 own-branded products are conform with the legal requirements. This in turn means that 3 own-branded products were labelled incorrectly. None of the 8 externally purchased products offered for sale through EDEKA's and REWE's online webshop are labelled entirely correct.

5.3 Hypothesis versus results

The results confirm the validity of both hypothesis put forward in Chapter 3.2.1.

First, it was assumed that E-marketplaces, on the contrary to self-hosted webshops, would show a higher level of consistency in terms of compliance with the FICR, due to their know how and technology gathered over years (Thakker, 2019). The results affirm this hypothesis. Only $\frac{1}{4}$ of the products offered for sale on self-hosted webshops were in line with the legal provisions of FICR. Whereas almost $\frac{3}{4}$ of the goods offered through E-marketplaces showed conformity with the law. This result clearly confirms, what Thakker already announced: It is difficult for self-hosted webshops to compete against big players such as Amazon.

Secondly, it was hypothesed that own-branded products across retailers self-hosted webshops, would show a higher level of consistency in terms of compliance with European Food Law, given each producers responsibility for product information. In order to confirm or reject this assumption and in order to compare the results, the same amount of 'foreign'-branded products and own-branded products across both supermarkets (REWE and EDEKA) were analysed. None of the 'foreign'-branded products were in line with the information obligation as prescribed by the FICR. In 65% of the own branded products, the retailers provided for all mandatory food information.

5.4 Prediction of results by using a larger amount of data

Even if the sample size of selected products was necessarily small ($n=40$), there is an indication that the situation is demonstrably similar for other food products sold online: a casual viewing of additional perishable goods on webshops gives no reason to believe otherwise. Also, the outcome of the study is comparable with the results of the OECD-study conducted almost 4 years ago: In their publication, they reported that *"57% of the examined products were not supported by adequate labelling information on relevant websites, while for 21%, information*

was incomplete” (OECD, 2016). Although they conducted the research almost 4 years ago and collected data from more than 1700 products, their result suggests, that an examination of more than 40 products, as it is the case in this present study, would only amplified the results: The regulatory framework has not changed since then. Smaller, more recent studies show additionally, that online food labelling is still faulty (Rücker, 2018; Stones, 2016).

5.5 Summary Chapter V

Title Chapter V: To what extent are the provisions of Article 9 and 14 of the FICR implemented across German webshops?

As shown in the Chapter IV, Art. 9 and 14 of the FICR regulate the food labelling across E-Commerce. The survey assesses the provision of the mandatory food particulars listed in the latter Art. 9.

The results of the internet-based survey show, that less than 50% of the examined products were in line with the mandatory food labelling requirements applicable to distance contracts as prescribed by Art. 9 and 14 of the FICR. The provision of the respective information on German webshops was often inaccurate or incomplete. Most discrepancies were encountered in connection with the provision of Art. 9(1)(h)-particular, namely the name and address of the food business. This striking inconsistency was detectable in both E-Marketplaces and self-hosted webshops.

Both underpinning hypothesis had been confirmed by the results of the survey: (1) Compared to self-hosted webshops, E-Marketplaces show a higher consistency in terms of compliance with Art. 9 of the FICR. (2) In case of self-hosted retailers webshops, the level of compliance with the applicable labelling law was higher for own-branded products than for 'foreign' branded products.

CHAPTER VI

DISCUSSION

From the research conducted in Chapter IV it appears that the information obligation applicable to prepacked food in B2C-distance contracts are well defined (see FICR Art. 9 and Art. 14). Recital 27 of the FICR further emphasises the duty to provide correct information when selling food online: “*Any food supplied through distance selling should meet the same information requirements as food sold in shops*” (Recital 27, FICR).

The results however show, that more than 50% of the evaluated products are not in line with the provisions laid down in the FICR. Whereas the number of infringements of the FICR is decreasing across products offered for sale in German offline-shops (Münker, 2017), the number of incomplete food information across German food-webshops seems to remain unchanged: The results of the survey conducted by Foodwatch in 2018 show, that product information in four out of five webshops were inconsistent in view of the European labelling provisions (Rücker, 2018). Furthermore, Stones, who in 2016 conducted a similar study across webshops in the United Kingdom, draw the conclusion, that nutrition labelling across British webshops is inconsistent (Stones, 2016). These latter results are rather significant, considering that the British market for Food E-Commerce is deemed to be the most advanced one of Europe (Statista, 2018a). A comparison of both findings with the results of the present study illustrates, that almost nothing has changed with regard to the degree of labelling consistency across Food E-Commerce in the course of the last 3 years.

Given the information obligation in distance contracts, as explained in Chapter IV, and considering the reported inconsistency of food information across German webshops, as demonstrated in Chapter V, it is crucial to investigate within this section for possible causes of this problem.

6.1 Possible reasons for the continuing inconsistency of food information across webshops in the EU

Possible causes for the inconsistency of the food information across webshops can be detected outside the law as well as within the applicable law. The first two assumptions (Section 6.1.1 & 6.1.2) were put forward by other graduates while the last two assumptions (Section 6.1.3 & 6.1.4) are elaborated by myself, taking into consideration the results and the collected literature.

6.1.1 Loopholes within the food information flow between food companies and webshops

(Dupuis-Blankevoort, 2016)

The literature-research has identified one possible reason for the continuing inconsistency of information in Food E-Commerce, as indicted by Dupuis-Blankevoort: The provision of the right food information across webshops is incomplete due to, *inter alia*, loopholes within the food information flow between food companies and webshop holders: Very often food companies provide webshop holders, who are selling their product, with the respective mandatory food information. Changes in recipe or other relevant label modifications are most of the times no longer communicated. This results in food information which is not anymore up to date compared to the delivered product .

Syndy, a Dutch technology company, has developed a system of cooperation between supplier and retailer in order to guarantee that accurate and complete mandatory information is available prior to purchase. It is a new way of online content exchange between brands and trader around the world (Van Herpen, n.d.).

6.1.2 Lack of official controls in Food E-Commerce

(Larchenmeier et al., 2013)

A second possible reason was identified by Larchenmeier et al in 2013. Their research focus was on food safety in terms of hygiene. The compliance of nutrition and health claims had been examined as well. Their conclusion points out, once more, the inconsistency of Food E-commerce platforms with the applicable food law (Larchenmeier et al., 2013).

As a possible reason, they mention the lack of official control. In the light of this, they urge for a EU-wide consistent policy for internet control (Larchenmeier et al., 2013).

6.1.3 Lack of consistency between Art. 6(1)(b), (c), (d) of the CRD and Art 9(h) of the FICR

(Anna Höller, 2019)

Another reason, which could be the cause why many webshops showed inconsistencies in providing for the name or business name of the FBO, could be linked to the lack of consistency between Art. 9(h) of the FICR and Art. 6(1)(b), (c), (d) of the CRD:

Art. 9 FICR

“List of mandatory particulars

1. (...) indication of the following particulars shall be mandatory:

(...)

(h) the name or business name and address of the food business operator referred to in Article 8(1);

(...)”

Art. 6 CRD

“Information requirements for distance and off-premises contracts

1. (...) the trader shall provide the consumer with the following information in a clear and comprehensible manner:

(...)

(b) the identity of the trader, such as his trading name;

(c) the geographical address at which the trader is established and the trader’s telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;

(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints; “

The list of mandatory food particulars provided by the FICR contains both information inherent to the product, that can be attributed to the concept of ‘*main characteristics of the good*’ as established in Art. 6(1)(a) of the CRD, as well as relevant information of the FBO (Art. 9, FICR). The FBO is defined as the one under whose name the food is marketed (Art. 8, FICR). In addition to its name, Art. 6(h) also prescribes to provide the address of the FBO.

On the contrary, Art.6(1)(b), (c) and (d) of the CRD prescribes to provide the consumer with information about the identity of the trader and its address in order “*to contact the trader quickly and communicate with him efficiently*”. This series of information is much more detailed than the one provided under Art. 6(h) of the FICR. It provides more protection and security to the consumer.

The fact that there is no clear substantive agreement between both Articles, leads to the question, if the provisions of Art. 9 of the sector specific FICR shall prevail or if, on the contrary, the more comprehensive content of Art. 6 of the CRD shall be used.

In the light of this, it stands to reason fall back to the subsidiary nature of the directive, namely the consumer protection, with the consequence of the application of the more precise Art. 6(1) and the therein containing provision to communicate the *main characteristics* of the good. This however would imply the need of the legislator to specify the main characteristics in the case of food-distance contracts or at least provide a link between Art. 6(1)(a) and Art. 9 of the FICR.

Conversely, considering the arising conflicts between Art. 9 of FIC and Art. 6 of CRD and assuming the prevalence of sector specific provisions (Art. 9 and 14 of the FICR) over Art. 6(1) of the CRD, none of the information obligation of Art. 6(1) of the CRD would need to be provided. This would have a detrimental effect on online consumers, since they would not be informed anymore about the price (Art. 6(1)(c)) or the way of payment (Art. 6(1)(d)). This kind of thinking would in turn violate one of the objectives of the FICR as explained in its recital 27: “*Products offered by means of distance contracts shall meet the same requirements as the one offered offline*”.

Looking at the results, the indicated inconsistency in providing for the name and the address of the FBO across many webshops could be linked to the above mentioned discrepancy in the applicable law. An additional examination of the ten webshops reveals, that all of them comply with the provisions of Art. 6(1)(b) and (c). It seems as if they apply indeed the more stringent Article 6 of the CRD. The vague definition of the 6(1)(a)-provision, however, invites mistakes in the actual food information.

This in turn confirms once more the aforementioned need for a clear definition of “main characteristics” in Art. 6(1)(a) of the CRD in the case of Food E-Commerce. This could be done by directly linking to Art. 9 and 14 of the FICR. With the current specification of prevalence of sector specific guidelines, Art. 9 and 14 of FICR prevails over the whole Art. 6(1), omitting the consumer theoretically to inform on the price or payment method.

6.1.4 Inaccuracy of the applicable law in delegating the responsibilities for food information in E-Commerce

(Anna Höller, 2019)

Considering the encountered food information inconsistency across webshops and the attempt to exclude from liability triggers and additional doubts about whether Art. 8 of the FICR is too

inaccurate for Food E-Commerce in assigning responsibilities to provide such information. Who is responsible for providing the food information, the trader or the FBO?

The recognition of the results of the different webshops gives the idea, that the webshop holder does not know in which direction his steps should go when it comes to the responsibility of providing the correct food information. The attempt of Amazon, REWE and Allyouneedfresh to exclude from liability (as demonstrated above) is from a legal point of view questionable. Analysis of additional webshops, not targeted within this study, shows that the strategy to exclude from liability seems to be a common phenomena across E-Commerce[»].

The responsibility to provide correct food information needs to be evaluated separately for both business models: (1) Self-hosted websites offering own-branded products (producers own website and webshop) and (2) hosted-websites as well as E-Marketplaces offering ‘foreign’-branded products. EDEKA’s and REWE’s webshops are special cases since they offer both types of products, namely own-branded and ‘foreign’-branded ones.

The starting point is for both business models the same:

First of all, the overall responsibilities of the food sector are laid down in Art. 17 of the GFL.

“1. Food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.

(...)”

[»] Bringmeister.de provides the following attempt to exclude from liability: „Die tatsächliche Verpackung kann von der hier abgebildeten abweichen. Bei der Lieferung haben Sie die Gelegenheit die Verpackung vor Kauf zu sichten. Für Informationen über Nährwertangaben, Zutaten, Pflichtinformationen gemäß Lebensmittel-Informationsverordnung etc. wenden Sie sich bitte an unseren Kundenservice unter 030 - 809 325 410.“

Tesco.com instead adds that “While every care has been taken to ensure product information is correct, food products are constantly being reformulated, so ingredients, nutrition content, dietary and allergens may change. You should always read the product label and not rely solely on the information provided on the website. Although product information is regularly updated, Tesco is unable to accept liability for any incorrect information.”. This information is provided also together with Tesco’s private-labelled products.

In the light of this article, the specific responsibilities relevant to the activity of providing food information are regulated under Art. 8 of the FICR (see Annex IV: Art 8 (1), FICR). As already elaborated in Chapter IV, this article assigns the responsibility of providing food information to the FBO under whose name the food is marketed. Note, that '*food information*' does not only cover the label inherent to the product but it can be also another accompanying material or means *including modern technology tools or verbal communication* (Art. 2(2)(a), FICR).

At this stage, it is clear, that in case of self-hosted websites as well as in case of private-labelled products of REWE and EDEKA, the duty to provide the correct food information on- and offline lies clearly in their area of responsibility.

- Haribo, Spreewaldrabe, Dr. Oetker and de Cecco are producer of the product as well as holder of the webshop. Hence, these companies are responsible for correct food information according the EU food law.
- The same goes for REWE's and EDEKA's private-labelled products. Both are responsible for the product (see explanation footnote n. 7) and are also holder of the website.

That said, the attempt to exclude from liability due to possible incorrect food information in case of private-labelled product from REWE (and Tesco) is not in line with the law: REWE (and TESCO) is the FBO under whose name the product is marketed and hence it cannot exclude from this duty prescribed by European law.

It becomes more complex when elaborating the responsibility in case of webshop holders selling foreign branded products. Can they exclude from liability in case of incorrect food information?

It is helpful to refer at this point to the Q&A- Guidance paper of the FICR provided by the European Commission in 2013. It states: "Where foods are offered for sale by means of distance selling, the responsibility for providing mandatory food information before the purchase is concluded lies with the owner of the website." According to this statement, webshop holders are not exclude from liability in case of incorrect food information.

Guidance documents provided by the European Commission, such as this one, serves the purpose to help and provide for clarification (Bolognini, 2018). With the aforementioned statement the European Commission, however, caused confusion across the sector: This statement is in direct contradiction with Art. 8 of the FICR, with which article the legislator tried to clarify once for all the responsibilities of food information provision across the sector.

In short, none of the examined webshop holders²¹ are legally allowed to exclude from liability in case of incorrect food information. This however is neither perfectly clear to them (as proven by the results) nor to many E-Commerce-experts. Within the FICR, the legislator clearly links the responsibility to provide correct food information to the FBO while the same legislator somehow exempts the FBO from this responsibility in case of distance contracts and hands it over to the owner of the webshop, namely to the trader.

²¹ Special attention needs to be given to hosted webshops and its applicable law (Art. 14, Directive 2000/31/EC). This issue has not been evaluated, since none of the webshops were hosted by a third party.

6.2 Summary Chapter VI

Title Chapter VI: Discussion

From the research conducted in Chapter IV it appears to be clear what the information obligation in case of prepacked food in B2C-distance contracts are (see FICR Art. 9 and Art. 14). The results put in evidence, that more than 50% of the evaluated products are not in line with the provisions laid down in the FICR. Most discrepancies were encountered in connection with the provision of the name and address of the FBO. Also, the attempt of some online retailer to exclude from liability is legally questionable. Both encountered issues gives raise to the questions (1) if whether there are loopholes within Art. 9 and its provision 9(1)(h) and (2) whose responsibility it is to provide such information.

A detailed analysis with regard to both assumptions lead to the result, that the reason for the encountered inconsistency could be linked, on the one hand, (1) to the lack of alignment between the prescribed information obligation laid in the CRD and the FICR and, on the other hand, (2) to the inaccuracy of the applicable law in delegating responsibilities to provide such information.

(1) Both acts, the FICR and the CRD, provides a list with information obligation. The prevalence of one or the other would in both cases put the consumer at a disadvantage. A prevalence of Art. 6 of the CRD, would provide the consumer with more specific information on the trader but at the same time with vague information about the food. Conversely, a prevalence of the sector specific provisions laid down in Art. 9 and 14 of the FICR, would provide detailed information on the food, however would omit the information on price and payment method, resulting in a contradiction with the underling concept of FICR. Both information obligation are important for the consumer. Hence an alignment as well as a combination is necessary.

(2) While the legislator, within the FICR, clearly links the responsibility to provide correct food information to the FBO the same legislator, in its official guidance document, exempts the FBO from this responsibility in case of distance contracts and hands it over to the owner of the webshop, namely to the trader. This causes a major contradiction in the applicable law.

CHAPTER VII

CONCLUSION

Main Research Question:

How consistent are German Webshops in their Compliance with the Mandatory Food Labelling Rules Applicable to Prepacked Food?

The central aim of this thesis was to find out how consistent German webshops are in their compliance with the mandatory food labelling rules applicable to prepacked food. For the purpose of this, the following two research questions have been addressed: (1) What are the information obligation in B2C-distance contracts concluded over food-webshops in Europe? (2) To what extent are the provisions of Art. 9 and Art. 14 of the FICR implemented across German webshops?

Answer to the first sub-research question: The research conducted in connection with the first sub-research question showed, that the information obligation in distance contracts concluded over food webshops are defined in two separate pieces of European law: On the one hand, Art. 6(1) of the CRD gives the trade the duty to provide all information set out in this article before concluding a distance contract with a consumer. On the other hand, Art. 9 and 14 of the FICR defines the information obligation of a FBO in contracts concluded by means of distance communication. The prevalence of the more sector specific FICR implies, that *all* mandatory food particulars listed in Art. 9 of the FICR shall be available in case of distance contracts.

Answer to the second sub-research question: The second sub-research question was approached in the light of the findings of the first research. The application of Art. 9 and the provision of the 10 mandatory food particulars was examined across major German webshops. The examination of 40 products across 10 different webshops revealed, that over 50% of the evaluated products were not in line with the legal guidelines. Most discrepancies were encountered in connection with the provision of the name and address of the food

business. Both underpinning hypothesis had been confirmed by the results of the survey: (1) Compared to self-hosted webshops, E-Marketplaces showed a higher consistency in terms of compliance with Art. 9 of the FICR. (2) The level of compliance with the applicable labelling law was higher for own-branded products than for ‘foreign’ branded products in case of self-hosted retailers webshops.

Answer to
main-
research
question

In the light of this findings, German webshops are not completely consistent with the provision of mandatory food information defined by the European legislator.

The reason for this inconsistency can be linked to different possible causes within the applicable law. On the one hand, there is a clear lack of alignment between the prescribed information obligation laid down in Directive 2011/83/EU on consumer rights (Art. 9) and in Regulation (EU) No 1169/2011 on the provision of food information to consumers (Art. 6) and, on the other hand, there is an inaccuracy of the applicable law detectable in delegating responsibilities to provide such information. Both assumptions could be target of further, more extensive, studies.

To sum up, Food E-Commerce is a newly evolving European market with significant potential. The “food - distance contract” binominal however poses some challenges confined to its jurisdiction, a recognition that also emerges from this study. When creating the FICR, the European legislator had already foreseen arising challenges in connection with food information, as pointed out in Article 1(2) of the FICR:

“This Regulation establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling. It lays down the means to guarantee the right of consumers to information and procedures for the provision of food information, taking into account the need to provide sufficient flexibility to respond to future developments and new information requirements.” (Art 1(2), FICR)

In the light of this, the announced ‘future developments’ have definitely become present. The inconsistency of food information across German underlines the need, to address the judicial

challenges as well as to close the legal loopholes in the applicable law, in order to guarantee a properly functioning market and an appropriate consumer protection.

REFERENCES

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Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance
OJL 304, 22.11.2011, p. 18–63 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)

Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety
OJL 31, 1.2.2002, p. 1–24 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

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Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
OJL 210, 7.8.1985, p. 29–33 (DA, DE, EL, EN, FR, IT, NL)

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent
OJL 144, 4.6.1997, p. 19–27 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

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')
OJL 178, 17.7.2000, p. 1–16 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

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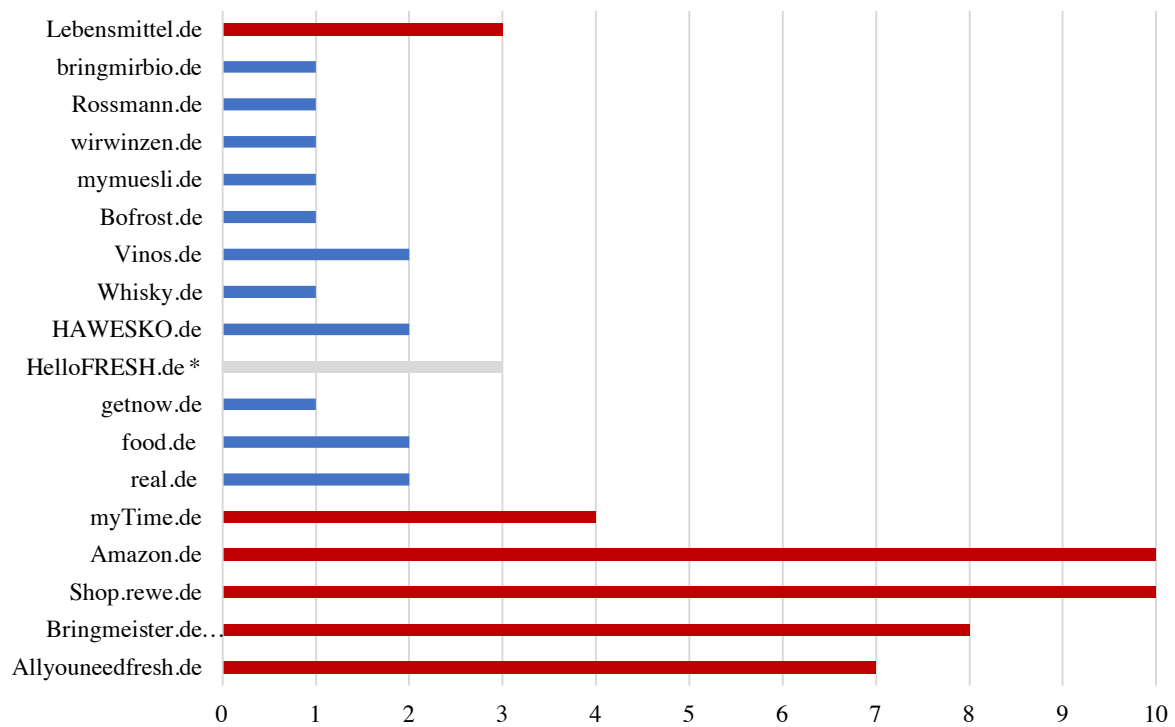
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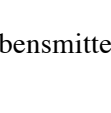
ANNEX I: RANKING FOOD-WEBSHOPS GERMANY

Top-selling Food Onlineshops in Germany



* Even though HelloFRESH is defined as an online Food Shop, it turns out not to be relevant for this study: Consumers are not given freedom in selecting their food. They offer ready-made food boxes.

ANNEX III: WEBSHOP SURVEY

		Product Category under Examination	Examined product:	Product:
App of Retailer		Sweets, and Mints	1	first appearing product
			2	first appearing own-branded product
		Crisps and Snacks	3	first appearing product
			4	first appearing own-branded product
		Dried pasta, Rice and Noodles	5	first appearing product
			6	first appearing own-branded product
		Tins and Cans	7	first appearing product
			8	first appearing own-branded product
		Sweets, and Mints	9	first appearing product
			10	first appearing own-branded product
		Crisps and Snacks	11	first appearing product
			12	first appearing own-branded product
		Dried pasta, Rice and Noodles	13	first appearing product
			14	first appearing own-branded product
		Tins and Cans	15	first appearing product
			16	first appearing own-branded product
App or Website of Online Food Retailer		Sweets, and Mints	17	first appearing product
		Crisps and Snacks	18	first appearing product
		Dried pasta, Rice and Noodles	19	first appearing product
		Tins and Cans	20	first appearing product
		Sweets, and Mints	21	first appearing product
		Crisps and Snacks	22	first appearing product
		Dried pasta, Rice and Noodles	23	first appearing product
		Tins and Cans	24	first appearing product
		Sweets, and Mints	25	first appearing product
		Crisps and Snacks	26	first appearing product
		Dried pasta, Rice and Noodles	27	first appearing product
		Tins and Cans	28	first appearing product
		Sweets, and Mints	29	first appearing product
		Crisps and Snacks	30	first appearing product
		Dried pasta, Rice and Noodles	31	first appearing product
		Tins and Cans	32	first appearing product
	Producers Own Web shop	Dr. Oetker	33	first appearing product
			34	first appearing product
		Haribo	35	first appearing product
			36	first appearing product
De Cecco		37	first appearing product	
		38	first appearing product	
Spreewaldrabe		39	first appearing product	
		40	first appearing product	

REGULATION (EC) No 178/2002

Article 2

Definition of 'food'

For the purposes of this Regulation, 'food' (or 'foodstuff') means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.

'Food' includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. It includes water after the point of compliance as defined in Article 6 of Directive 98/83/EC and without prejudice to the requirements of Directives 80/778/EEC and 98/83/EC.

'Food' shall not include:

- (a) feed;
- (b) live animals unless they are prepared for placing on the market for human consumption;
- (c) plants prior to harvesting;
- (d) medicinal products within the meaning of Council Directives 65/65/EEC (1) and 92/73/EEC (2);
- (e) cosmetics within the meaning of Council Directive 76/768/EEC (3);
- (f) tobacco and tobacco products within the meaning of Council Directive 89/622/EEC (4);
- (g) narcotic or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971;
- (h) residues and contaminants.

Article 17

Responsibilities

1. Food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met.

2. Member States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution.

For that purpose, they shall maintain a system of official controls and other activities as appropriate to the circumstances, including public communication on food and feed safety and risk, food and feed safety surveillance and other monitoring activities covering all stages of production, processing and distribution. Member States shall also lay down the rules on measures and penalties applicable to infringements of

food and feed law. The measures and penalties provided for shall be effective, proportionate and dissuasive.

REGULATION (EU) No 1169/2011

Recital (1)

Article 169 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union is to contribute to the attainment of a high level of consumer protection by the measures it adopts pursuant to Article 114 thereof.

Recital (4)

According to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety it is a general principle of food law to provide a basis for consumers to make informed choices in relation to food they consume and to prevent any practices that may mislead the consumer.

Recital 9

While the original objectives and the core components of the current labelling legislation are still valid, it is necessary to streamline it in order to ensure easier compliance and greater clarity for stakeholders and to modernise it in order to take account of new developments in the field of food information. This Regulation will both serve the interests of the internal market by simplifying the law, ensuring legal certainty and reducing administrative burden, and benefit citizens by requiring clear, comprehensible and legible labelling of foods.

Recital 26

Food labels should be clear and understandable in order to assist consumers who want to make better-informed food and dietary choices. Studies show that easy legibility is an important element in maximising the possibility for labelled information to influence its audience and that illegible product information is one of the main causes of consumer dissatisfaction with food labels. Therefore, a comprehensive approach should be developed in order to take into account all aspects related to legibility, including font, colour and contrast.

Recital 27

In order to ensure the provision of food information, it is necessary to consider all ways of supplying food to consumers, including selling food by means of distance communication. Although it is clear that any

food supplied through distance selling should meet the same information requirements as food sold in shops, it is necessary to clarify that in such cases the relevant mandatory food information should also be available before the purchase is concluded.

Article 1

Subject matter and scope

1. This Regulation provides the basis for the assurance of a high level of consumer protection in relation to food information, taking into account the differences in the perception of consumers and their information needs whilst ensuring the smooth functioning of the internal market.

2. This Regulation establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling. It lays down the means to guarantee the right of consumers to information and procedures for the provision of food information, taking into account the need to provide sufficient flexibility to respond to future developments and new information requirements.

3. This Regulation shall apply to food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers. It shall apply to all foods intended for the final consumer, including foods delivered by mass caterers, and foods intended for supply to mass caterers.

Article 2

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

(a) ‘food information’ means information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication;

(u) ‘means of distance communication’ means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties.

Article 8

Responsibilities

1. The food business operator responsible for the food information shall be the operator under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer into the Union market.

2. The food business operator responsible for the food information shall ensure the presence and accuracy of the food information in accordance with the applicable

food information law and requirements of relevant national provisions.

3. Food business operators which do not affect food information shall not supply food which they know or presume, on the basis of the information in their possession as professionals, to be non-compliant with the applicable food information law and requirements of relevant national provisions.

Article 9

List of mandatory particulars

1. In accordance with Articles 10 to 35 and subject to the exceptions contained in this Chapter, indication of the following particulars shall be mandatory:

- (a) the name of the food;
- (b) the list of ingredients;
- (c) any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form;
- (d) the quantity of certain ingredients or categories of ingredients;
- (e) the net quantity of the food;
- (f) the date of minimum durability or the ‘use by’ date;
- (g) any special storage conditions and/or conditions of use;
- (h) the name or business name and address of the food business operator referred to in Article 8(1);
- (i) the country of origin or place of provenance where provided for in Article 26;
- (j) instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions;
- (k) with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume;
- (l) a nutrition declaration.

2. The particulars referred to in paragraph 1 shall be indicated with words and numbers. Without prejudice to Article 35, they may additionally be expressed by means of pictograms or symbols.

3. Where the Commission adopts delegated and implementing acts referred to in this Article, the particulars referred to in paragraph 1 may alternatively be expressed by means of pictograms or symbols instead of words or numbers.

In order to ensure that consumers benefit from other means of expression of mandatory food information than words and numbers, and provided that the same level of information as with words and numbers is ensured, the Commission, taking into account evidence of uniform consumer understanding, may establish, by means of delegated acts in accordance with Article 51, the criteria subject to which one or more particulars referred to in paragraph 1 may be

expressed by pictograms or symbols instead of words or numbers.

4. For the purpose of ensuring the uniform implementation of paragraph 3 of this Article, the Commission may adopt implementing acts on the modalities of application of the criteria defined in accordance with paragraph 3 to express one or more particulars by means of pictograms or symbols instead of words or numbers. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 48(2).

Article 14 **Distance selling**

1. Without prejudice to the information requirements laid down in Article 9, in the case of prepacked foods offered for sale by means of distance communication:

(a) mandatory food information, except the particulars provided in point (f) of Article 9(1), shall be available before the purchase is concluded and shall appear on the material supporting the distance selling or be provided through other appropriate means clearly identified by the food business operator. When other appropriate means are used, the mandatory food information shall be provided without the food business operator charging consumers supplementary costs;

(b) all mandatory particulars shall be available at the moment of delivery.

2. In the case of non-prepacked foods offered for sale by means of distance communication, the particulars required under Article 44 shall be made available in accordance with paragraph 1 of this Article.

3. Point(a)ofparagraph1shallnotapplytofoods offered for sale by means of automatic vending machines or automated commercial premises.

Article 34 **Presentation**

2. The particulars referred to in Article 30(1) and (2) shall be presented, if space permits, in tabular format with the numbers aligned. Where space does not permit, the declaration shall appear in linear format.

DIRECTIVE 2011/83/EU

Recital (3)

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 the measures adopted pursuant to Article 114 thereof.

Recital 5

The cross-border potential of distance selling, which should be one of the main tangible results of the internal market, is not fully exploited. Compared with the significant growth of domestic distance sales over the last few years, the growth in cross-border distance sales has been limited. This discrepancy is particularly significant for Internet sales for which the potential for further growth is high. The cross-border potential of contracts negotiated away from business premises (direct selling) is constrained by a number of factors including the different national consumer protection rules imposed upon the industry. Compared with the growth of domestic direct selling over the last few years, in particular in the services sector, for instance utilities, the number of consumers using this channel for cross-border purchases has remained flat. Responding to increased business opportunities in many Member States, small and medium-sized enterprises (including individual traders) or agents of direct selling companies should be more inclined to seek business opportunities in other Member States, in particular in border regions. Therefore the full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts will contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market.

Recital 8

The regulatory aspects to be harmonised should only concern contracts concluded between traders and consumers. Therefore, this Directive should not affect national law in the area of contracts relating to employment, contracts relating to succession rights, contracts relating to family law and contracts relating to the incorporation and organisation of companies or partnership agreements.

Recital (11)

This Directive should be without prejudice to Union provisions relating to specific sectors, such as medicinal products for human use, medical devices, privacy and electronic communications, patients' rights in cross-border healthcare, food labelling and the internal market for electricity and natural gas

Recital 20

The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded.

Recital 29

Social services have fundamentally distinct features that are reflected in sector-specific legislation, partially at Union level and partially at national level. Social services include, on the one hand, services for

particularly disadvantaged or low income persons as well as services for persons and families in need of assistance in carrying out routine, everyday tasks and, on the other hand, services for all people who have a special need for assistance, support, protection or encouragement in a specific life phase. Social services cover, inter alia, services for children and youth, assistance services for families, single parents and older persons, and services for migrants. Social services cover both short-term and long-term care services, for instance services provided by home care services or provided in assisted living facilities and residential homes or housing ('nursing homes'). Social services include not only those provided by the State at a national, regional or local level by providers mandated by the State or by charities recognised by the State but also those provided by private operators. The provisions of this Directive are not appropriate to social services which should be therefore excluded from its scope.

Article 2

Definitions

For the purpose of this Directive, the following definitions shall apply:

(7) 'distance contract' means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

Article 3

Scope

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. 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.

2. If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors.

3. This Directive shall not apply to contracts:

(j) for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;

Article 4

Level of harmonisation

Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

Article 6

Information requirements for distance and off-premises contracts

1. Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:

(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;

(b) the identity of the trader, such as his trading name;

(c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;

(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;

(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;

(f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;

(g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;

(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in

accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);

(i) where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;

(j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);

(k) where a right of withdrawal is not provided for in accordance with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;

(l) a reminder of the existence of a legal guarantee of conformity for goods;

(m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;

(n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;

(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

(p) where applicable, the minimum duration of the consumer's obligations under the contract;

(q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;

(r) where applicable, the functionality, including applicable technical protection measures, of digital content;

(s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;

(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Article 16

Exceptions from the right of withdrawal

Member States shall not provide for the right of withdrawal set out in Articles 9 to 15 in respect of distance and off-premises contracts as regards the following:

(d) the supply of goods which are liable to deteriorate or expire rapidly;

(e) the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;