

Impressum

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Foreword

Specials in times of a pandemic, we use the Internet more than ever. It is a simple and uncomplicated way to obtain information online, to make use of free services as quickly as possible, or to purchase or book goods, services, etc. for a fee.

In the past, consumers have repeatedly fallen victim to so-called cost or subscription traps. Despite extensive protective mechanisms under current law, these have increasingly become a major problem in electronic legal transactions. Dubious companies deliberately concealed the fact that their services could only be claimed in return for payment by means of the unclear or misleading design of their Internet pages. For example, offers on company homepages were advertised as "free", "free of charge" or "free of charge" in a form emphasized by the design, while only in the small print or hidden in the general terms and conditions were there references to the simultaneous provision of a service subject to payment.

Accordingly, the legislator reacted to the abuse and defined new requirements for buttons on the Internet as early as 2012. As a result, the law against cost traps on the Internet, better known as the "button solution," came into force on August 1, 2012, which was intended to increase transparency in online commerce. The basis for the changes was the 2012 revision of § 312 g BGB a.F. As part of the amendment of consumer protection law, the button solution has found its legal basis in § 312 j BGB since June 13, 2014.

On this occasion we would like to draw your attention once again to the "button solution". We recommend that you critically review the booking section on your homepage in all language versions. In addition, you should also check the booking sections of your intermediary partners for compliance with the so-called "button solution".

If you have any questions please do not hesitate to contact our in-house lawyer Nina Arndt, phone: +49 30 59 00 99 697, E-mail: arndt@hotellerie.de.

Yours



Otto Lindner
Chairman



A. Definition

The so-called button solution is a regulation to increase transparency in online commerce. It ensures that the consumer, when placing an order, can see without any doubt that the order is directed towards the conclusion of a contract for which payment is required. If this transparency is lacking, no contract is concluded. The consumer is thus protected from being deceived or taken by surprise due to an unclear, irritating or surprising design of the ordering process. He must be aware of the financial consequences of the order and manifests this by pressing the clearly labeled button. In this respect, the obligation to specially label the order button, similar to a conventional formal requirement, also serves to protect consumers from being overhasty. The risk of falling into a cost trap and being exposed to claims that are asserted in an aggressive manner is reduced for consumers. In the case of e-commerce contracts, the risk of misleading or misleading presentation of contractual information is particularly high due to the flexible design options offered by online platforms. The additional requirements for the placement and presentation of those contractual points that are decisive for the consumer's obligation to perform, namely the subject matter of the contract, the price and the term of the contract, ensure that the consumer can easily and unequivocally take note of them. The button solution promotes the transparency of e-commerce and strengthens consumer confidence in this modern form of marketing. Ultimately, this also benefits all reputable companies that use this form of marketing.

B. History

The button solution came into force on August 1, 2012. It transposes the Consumer Rights Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011 into German law. It was based on Section 312 g of the German Civil Code (BGB), as amended in 2012. Following the reform of consumer protection law in 2014, the button solution is now regulated in the same way in Section 312 j of the German Civil Code (BGB).

C. Relevant regulations

The legal basis for the button solution can be found

1. in Art. 8 (2) S. 1 and 2

of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights:

"Where a distance contract concluded by electronic means obliges the consumer to pay, the trader shall draw the consumer's attention clearly and prominently, and immediately before the consumer places his order, to the information referred to in Article 6(1)(a), (e), (o) and (p). The Entrepreneur shall ensure that the Consumer, when placing the order, explicitly confirms that the order is linked to a payment obligation. If the ordering process includes the activation of a button or similar function, this button or corresponding function shall be clearly marked exclusively with the words "order with obligation to pay" or an equivalent clear wording that informs the consumer that the order is linked to an obligation to pay the entrepreneur. If the entrepreneur does not comply with this subparagraph, the consumer is not bound by the contract or order."

2. in § 312 S. 3 BGB:

"The entrepreneur shall design the ordering situation in the case of a contract pursuant to subparagraph 2 (note: consumer contract in electronic commerce) in such a way that the consumer expressly confirms with his order that he undertakes to make a payment. If the order is placed via a button, the entrepreneur's obligation under sentence 1 is only fulfilled if this button is clearly labeled with nothing other than the words "order subject to payment" or with an appropriate unambiguous wording.

D. Scope of Application

In the case of distance contracts, no signature can seal the conclusion of the contract. For this reason, the click on a corresponding button acts as a binding statement, in our cases as a binding booking.

For the purposes of the button solution, bookings of overnight stays are considered to be purchases of services. These services are always considered to be paid if the guest can be obliged to make a payment. The button solution thus also applies to bookings that can be cancelled free of charge, since the guest does not have to exercise his or her right to cancel. Likewise, this also applies to non-guaranteed bookings that are only maintained until a certain point in time. Only in the case of non-binding reservation requests, which do not constitute a legally binding contract, would the button solution not be relevant.

If a hotelier offers merchandise or products of his hotel in a web store, this is to be regarded as a sale of goods. The button solution must also be applied in such cases.

Since the button solution must also be implemented in the case of mobile accommodation contracts, the hotelier must ensure that the corresponding button is labeled in accordance with the regulations and that all information obligations towards potential guests are complied with.

An exception exists only for contracts that are concluded through individual communication. These are in particular contracts concluded via e-mail communication, for example in the case of inquiries via the hotel's contact form.

Attention:

Hotels located in Germany whose offers are also directed at foreign guests must implement the consumer notices in the corresponding language.

E. The booking button

When making an online order or online booking every consumer must explicitly confirm that this entails an obligation to pay. Entrepreneurs must generally ensure this by providing a corresponding button. The labeling of this button must clearly and unambiguously inform the consumer that clicking on it triggers a financial obligation.

The legal text mentions the words "order with obligation to pay" as one possibility and optionally requires a correspondingly unambiguous wording, for example:

- "order with costs"
- "conclude a contract subject to payment".
- "buy".

Attention:

Since hotel accommodations are not ordered but booked, we recommend the button label "book with obligation to pay" for accommodation contracts!

Because the clear reference to the payment obligation is missing here, the following example formulations are not permissible:

- "Book" / "Order"
- "Carry out booking" / "Place order".
- "Continue".

Hint:

If the online booking tool is operated in English or French, the button must be provided with English or French text accordingly. For example, "order with obligation to pay" or "book with obligation to pay" or "commande avec obligation de paiement" or "reserve avec obligation de paiement" can be used.

The button must be clearly legible. This is to prevent the regulation from being circumvented by making the notice illegible, so that it can no longer fulfill its purpose. Button and labeling should therefore be neither too small nor low-contrast (e.g. tone-on-tone).

In addition the button may not be provided with any further additions, as the consumer should not be distracted from the decisive information by supplementary text.

F. Information obligations of the entrepreneur

The button solution obliges the hotelier to provide the consumer with essential contractual information in a clear and comprehensible manner immediately before the consumer makes a booking. Therefore, it is not sufficient if this information was

provided on the detail page of a room offer, for example, but no longer appears on the booking page.

The relevant statutory provisions (see page 4) govern what information must be made available to consumers in what form immediately before they place a chargeable order or make a booking on the Internet. With this regulation, the legislator reacted to the abuse of so-called subscription traps on the Internet.

- **Performance description**

These are the essential characteristics of the goods or services. For hotels, this means specifying the scope of the entire overnight service (room category, incl./excl. breakfast, W-LAN, etc.), the length of stay and the booking conditions (e.g. cancellation, payment, guarantee conditions).

- **Total price**

This is the final price for overnight stay(s) and other services including value-added tax and any applicable municipal bed taxes.

- **Additional costs**

The most important example is the local tourist tax, which the hotelier collects for the respective municipality. If this is levied, it must be indicated accordingly.

Hint:

For the sake of good order, it should be noted near the button that the price of the overnight stay includes all taxes (value-added taxes, and bed taxes if applicable) and fees. For reasons of tax law, any applicable visitor's tax must be indicated separately.

It is essential to note the following:

- **When completing the order or booking process**

The most important information about the service, the length of stay and the price must be listed on the page on which the booking is also completed.

- **In physical proximity to the button**

The page in question must not be designed in such a way as if there were no intrinsic connection between the contractual information and the button. At normal screen resolution, the information must be visible without scrolling and searching. In particular, it must not be possible to access it via an asterisk or link to sub-pages. In addition, there must be no "disturbing" elements between the booking information and the button.

- **Unmistakable**

The essential contractual information must be designed in such a way that it can be clearly distinguished. It must not be lost in the overall layout of the booking tool. Font size, font type and font color must be chosen so that the information is not hidden, but is clearly and easily recognizable.

- **Understandable**

This characteristic refers to the content of the information. It must be unambiguous in its content and clearly and unambiguously formulated in terms of language, and it must not contain any confusing or distracting additions.

G. Legal consequences of non-compliance

If the legal requirements for the booking button are not met, there are two consequences:

- **Warning notice**

Competitors, the Wettbewerbszentrale and consumer protection agencies can issue warnings for the lack of implementation of the button solution. At the latest then the hotelier will be forced to adapt his booking route. The sometimes high costs incurred by a justified warning should also not be ignored.

- **Ineffective contract**

Far more painful for the hotelier is the non-occurrence of the accommodation contract. The guest does not have to cancel the room if he cannot or does not want to stay. In this case, the hotelier cannot demand fulfillment, i.e. neither acceptance of the room nor payment.

H. Recent Developments

In its ruling of April 7, 2022 (Case C-249/21), the European Court of Justice (ECJ) in Luxembourg clarified that, in the case of online hotel bookings, it must be clear to consumers simply from the wording on the button that they are triggering a payment obligation by clicking on it in order for a contract to be concluded.

In the dispute about the Internet platform Booking.com, which in addition to the wording "complete booking" also uses the further wording "book" or "book now", the Amtsgericht Bottrop must now clarify whether the procedure of Booking.com is sufficient for this. For this it requires a detailed examination whether the term "booking" in the German language is inevitably and systematically associated with the justification of a payment obligation both in general linguistic usage and in the imagination of the normally informed, reasonably attentive and reasonable average consumer. If this were not the case, the expression "conclude the booking" would be ambiguous and the wording would not satisfy the requirements of the Directive.

The court of reference had already expressed its position with regard to the unambiguousness of the word "booking". The ECJ ruling states that the court is of the opinion "that the term 'Buchung' in the words 'Buchung abschließen' is not necessarily associated in common parlance with entering into an obligation to pay a fee, but is also frequently used as a synonym for a 'free advance order or reservation'".

We will of course keep you informed about the progress of these proceedings!

This fact sheet has been prepared to the best of our knowledge and with the greatest care. We would like to point out that it is intended solely for non-binding information. It is a summary of the technical and legal principles. We make no claim to completeness and accept no liability for the accuracy of the content.

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