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Information duties in the new proposal for the Directive on consumer rights

Joanna A. Luzak*

1 Introduction

With the new proposal for the Directive on consumer rights¹ ('Proposal') the European Union institutions intend to harmonize a segment important for consumers of the internal market: sales and, to a limited extent, services, as well. According to the Proposal the new directive shall repeal four consumer directives: Directive 85/577/EEC on contracts negotiated away from business premises² ('Doorstep selling directive'), Directive 93/13/EEC on unfair terms in consumer contracts³ ('Unfair terms directive'), Directive 97/7/EC on distance contracts⁴ ('Distance selling directive'), Directive 1999/44/EC on consumer sales and guarantees⁵ ('Sales directive').

One of the aims of the Proposal is to 'contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market'.⁶ It has been argued that as a result of minimum harmonization Member States apply different rules, often increasing consumer protection in their national laws, which may negatively influence the internal market. A reason behind it was that the consumer could not be sure what level of protection he will enjoy while concluding cross-border transactions, which might make him more reluctant to conclude such contracts. One of the uncertainties was created by different Member States putting various information duties on traders. Moreover, it may be argued that the better informed the consumers are the more confident they will act which resulted in information duties becom-

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1 Proposal for the Directive of the European Parliament and of the Council on consumer rights, 08.10.2008, COM(2008)614/3.

2 Directive 85/577/EEC on contracts negotiated away from business premises.

3 Directive 93/13/EEC on unfair terms in consumer contracts.

4 Directive 97/7/EC on distance contracts.

5 Directive 1999/44/EC on consumer sales and guarantees.

6 Explanatory memorandum to the proposal for the Directive on consumer rights, 08.10.2008, COM(2008)614/3, p. 2.

ing more and more important in the current consumer regulations. Therefore, it does not come as a surprise that the Proposal, which intends to introduce a maximum harmonization measure, contains a significant amount of provisions on the information duties of the trader.

In the Green Paper on the Review of the Consumer Acquis ('Green Paper')⁷ the need to harmonize information requirements in the consumer acquis was also taken into account. The review showed that the failure to comply with information duties is regulated in an incomplete and inconsistent way on the Member States' level. The main issue with how information duties are regulated nowadays at the EU level remains that in certain cases there are no remedies provided for when these duties are not complied with by the traders. For example, in case of distance selling, consumer organizations named lack of information as one of its main problems, preventing consumers from concluding more distance contracts. While analyzing the responses to the Green Paper, the Commission decided that if a horizontal instrument were to be created it should not contain provisions on the content of information requirements. The reasoning was that various consumer directives require the consumer to be informed for various purposes thus the scope of information naturally differs. The Commission suggested, on the other hand, that the consequences of the failure to provide information might be and should be regulated in the horizontal instrument. One way to do this was to extend the cooling-off period as a uniform remedy for failure to comply with information duties. Another option that has been suggested was to introduce various remedies depending on what kinds of information duties have been breached. Lack of certain information might be even treated as entitling the consumer to avoid the contract, e.g., incorrect information on the price of the product.

Did the drafters of the Proposal acquiesce to the demands to harmonize the rules on failure to comply with information duties and to leave the content of the information duties to vary between various consumer contracts?

I would like to first take a closer look at the provisions of the Proposal concerning information duties. The information duties are defined in two chapters of the Proposal. Chapter II introduces the general obligation on consumer information duties, applicable to all the contracts that fall within the scope of the application of the Proposal. Chapter III contains additional information duties for distance and/or off-premises contracts. While discussing various provisions of the Proposal I will point out the most relevant changes between the current regulation of consumer information at EU level and the provisions of the Proposal. Then, I will mention what possible changes of Dutch law the Proposal might require. Finally, I will conclude by stating whether the Proposal took into account the postulates of the Green Paper and might indeed increase consumer protection by harmonizing consumer acquis as to provision of information to consumers.

7 Green Paper on the Review of the Consumer Acquis, 08.02.2007, COM(2006)744 final, p. 19-20.

2 Chapter II of the Proposal – consumer information

Chapter II of the Proposal is entitled 'consumer information' and its Articles 5-7 are fully devoted to defining information duties applicable to all contracts that fall within the scope of the Proposal. The main information duties are defined in Article 5, Article 6 deals with the consequences of the failure to provide information and Article 7 regulates specific information requirements for intermediaries.

While articles of Chapter II apply to all sales and services contracts covered by the Proposal, it is necessary to mention that certain specific contracts have been excluded from their scope of application. Article 3 Paragraph 2 names financial services and Article 3 Paragraph 3 contracts that fall within the scope of application of Package travel directive⁸ and Timeshare directive⁹ within that group. The exclusion of these contracts from the scope of application of the Proposal does not seem to be justified. Firstly, the basic character of information requirements listed in Article 5 and the following articles included in Chapter II of the Proposal, makes it difficult to imagine that the consumers concluding, e.g., package travel or financial services contracts would not benefit from being encompassed in the protection these articles offer. It might be claimed that certain specific information needs to be provided to the consumer in case of these contracts, however, since the Proposal does not contain only one set of information requirements but lists also additional information duties in case contracts concluded are distance or off-premises contracts, it seems feasible to provide for such additional information duties also in case of other contracts in the Proposal. Some of the aims of the Proposal included 'simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules'.¹⁰ It is hard to imagine that all unwanted gaps and inconsistencies within consumer acquis would be removed if such common consumer contracts as package travel or financial services contracts are excluded from the scope of application of main articles of the Proposal. The same criticism applies to a possibility of attaining a higher level of consumer protection which has been mentioned as another aim of the Proposal¹¹ taking into account its limited scope of application. The drafters of the Proposal focused on 'certain aspects of consumer contract law',¹² the question remains whether the aspects they took into account are sufficient to actually achieve the intended level of harmonization if certain key consumer contracts have been left out of the scope of application of the Proposal. The answer to this question seems to be negative.

According to Article 5, consumers are entitled to receive certain information before the conclusion of a sale or service contract unless that information is already apparent from the context. The information mentioned in this Article

8 Directive 90/314/EEC on package travel, package holidays and package tours.

9 Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

10 Recital 2 of the Proposal for the Directive on consumer rights, 08.10.2008, COM(2008)614/3, p. 11.

11 Recital 3 of the Proposal for the Directive on consumer rights, 08.10.2008, COM(2008)614/3, p. 11.

12 Recital 4 of the Proposal for the Directive on consumer rights, 08.10.2008, COM(2008)614/3, p. 12.

(points (a)-(i)) shall therefore be given by the trader to the consumer regardless whether the contract that is being concluded is a regular sale contract or, e.g., a distance sale contract. However, it is conceivable that, e.g., before the conclusion of a regular sale contract the consumer enters the shop of the trader and thus knows from the start the trader's geographical address as well as his identity. In the given example, the trader does not have to issue information to the consumer on his geographical address and his identity (Art. 5 Para. 1 point (a)), since that would have been abundant (Art. 5 Para. 1). The information that the trader is obligated to provide to the consumer, that is supposed to form an integral part of the sales or service contract, concerns:

- the main characteristics of the product (point (a));
- the geographical address and the identity of the trader or of the trader on whose behalf he is acting (point (b));
- the price inclusive of taxes or, where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges, or where these charges cannot reasonably be calculated in advance, the fact that such additional charges might be payable (point (c));
- the arrangements for payment, delivery, performance and the complaint handling policy (point (d));
- the existence of a right of withdrawal, if applicable (point (e));
- the existence and the conditions of after-sales services and commercial guarantees, if applicable (point (f));
- the duration of the contract or if the contract is open-ended the conditions for terminating the contract (point (g));
- the minimum duration of the consumer's obligations under the contract (point (h));
- 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, including when an amount is blocked on the consumer's credit/debit card (point (i)).

The regulation of Article 5 is the main novelty of the Proposal since due to its general character it is supposed to apply to all sales and services contracts that may be concluded under the provisions of the Proposal. That means that it should also apply to the 'regular' sales contract concluded, e.g., at a local pharmacist and all the information mentioned in Article 5, that are not already apparent from the context, would have to be given to the consumer. The Sales Directive, which regulates these contracts at present, does not contain any provision on information duties of the trader towards the consumer, thus it may be argued that in this respect consumer protection was enhanced in the Proposal. This Article applies also to distance and off-premises contracts, which has been specifically pointed out in Article 9 of the Proposal. Since the Doorstep selling directive does not contain a similar provision, the scope of the information duties has also been significantly broadened in respect of off-premises contracts.¹³

¹³ Further discussed in Chapter 3.

There is one exception provided for in Article 5, in its Paragraph 2, namely for public auctions. In case of public auctions, due to their nature and character, it might not be possible or convenient to name the geographical address and the identity of the trader of the object that is being auctioned. In such a case the Proposal allows for substitution information to be provided to the consumer, i.e. the geographical address and the identity of the auctioneer. In most cases, the consumer should still receive a sufficient protection when he is informed of the geographical address and the identity of the auctioneer instead of that one of the trader, since he will simply be able to turn to the auctioneer with his complaints.

Another specific situation, in which the standard information duties provided for in Article 5 are not sufficient, has been regulated in Article 7 of the Proposal. It concerns cases in which the sale is being conducted by an intermediary. In present times, the consumers might not want to sell their goods by themselves but contract a professional to do it for them, e.g., give their car to a dealership, clothes to a second-hand clothes shop. They do not always realize that by doing so they might lose their privileged consumer's status and be treated as professionals themselves, since the knowledge and experience of the professional intermediary might in certain cases be attributed to the consumer-seller. On the other hand, a consumer who buys a good that is being sold by a professional intermediary might not realize that he is acquiring it from an intermediary. The appearances sometimes suggest that the intermediary is trading simply his own goods. The question would be whether the consumer protection rules should apply when the professional intermediary sells goods on behalf of and in the name of another individual. It has been argued, that regardless who is behind the intermediary, an individual or another professional party, the consumer protection rules should apply, since even if it was an individual giving an order to sell a particular good, he still could have benefited and be supported by the professional knowledge of the intermediary.¹⁴ The Proposal does not go that far in protection of consumers as to apply to contracts concluded between two consumers, however, with the use of a professional intermediary. Still, in Article 7 Paragraph 1 it has been regulated that prior to the conclusion of the contract the intermediary shall disclose to the consumer that he is acting in the name of or¹⁵ on behalf of another consumer and therefore that the provisions of the Proposal shall not be applicable to the contract concluded between the parties. Paragraph 2 of this Article regulates the consequences of the breach of this information duty. In such

¹⁴ Green Paper on the Review of the Consumer Acquis, 08.02.2007, COM(2006)744 final, p. 16-17.

¹⁵ It may be argued that 'or' in the English version of the Proposal should be understood as 'and'. In case the intermediary concludes a contract with the consumer-buyer on behalf of another consumer but in his own name the contract is being concluded between a consumer-buyer and the professional intermediary, thus the provisions of the Proposal apply to it. Moreover, in Art. 7 Para. 2 the consequence for breach of information duty mentioned in Art. 7 Para. 1 is conclusion of the contract in the name of the intermediary, thus it is not likely that the drafters of the Proposal expected Art. 7 Para. 1 to apply to contracts concluded on behalf of the consumer-buyer but in the name of the intermediary. This argumentation is strengthened by the wording of Art. 7 Para. 1 in Dutch ('namens een consument') and German language ('im Namen und in Auftrag'). Still, in order to avoid ambiguity the final version of the Proposal should clearly, in every language it is drafted in, point out that Art. 7 applies to intermediaries acting in the name of and on behalf of another consumer.

a case, the intermediary shall be deemed to have concluded the contract in his own name, which means that the contract would be considered to be concluded between a trader and a consumer and the provisions of this Proposal shall apply to it. Article 7 is supposed to protect consumers by having the intermediary inform the consumer-buyer that the protection of the Proposal will not apply to him and thus letting him make an informed decision whether he still wants to enter into such a contract. It seems, however, that for practical reasons the drafters of the Proposal should include at least one more information requirement in it, namely, the duty to inform the consumer of the geographical address and the identity of the consumer-seller. Otherwise, under current wording of this Article, the consumer-buyer will not be able to claim, e.g., non-conformity of the contract since he will not know who to turn to with his claim. Additional issue that may appear in practice due to this gap in the Proposal is that a trader might present himself as an intermediary of a consumer-seller and the consumer-buyer will not be able to verify this information due to the fact that he does not need to be informed by the intermediary on the identity and the geographical address of the consumer-seller. The gap in the Proposal seems to create an opportunity for dishonest traders to misinform and abuse the rights of consumers.

Moreover, the provisions of Article 7 are not applicable to a public auction (pursuant to its Para. 3), which significantly limits protection of the consumers in practice, since it is most often during public auctions that consumers are represented by professional intermediaries – auctioneers. It may be argued that during a public auction a consumer should easily be aware that the auctioneer does not sell the goods on his own behalf, but it is not always clear whether he does that on behalf of another consumer or another trader, which makes a difference for the protection of the Proposal to be applicable to the concluded sale contract. What makes the situation of the consumer even more unclear is the fact that according to Article 5 Paragraph 2 in case of public auctions the consumer does not have to be informed of the geographical address and the identity of the trader. This means that the auctioneer is not obligated to reveal the identity of the seller neither if it is another professional (pursuant to Art. 5 Para. 2) nor if it is a consumer (pursuant to Art. 7). In such a situation, the consumer does not really have a possibility in practice to discover whether he is buying at a public auction from the consumer or from the trader and whether the protection of the Proposal would apply to him or not. Hopefully, this gap will be corrected in the final draft of the Proposal.

Finally, Article 6 in this Chapter regulates the consequences of the failure to provide information. As has been mentioned in the introduction, after the review of the consumer acquis the Commission suggested in the Green Paper that the failure to provide information should be regulated in the future horizontal instrument.¹⁶ The methods of regulation that have been envisaged by the Commission consisted of either just extending the cooling-off periods or introducing various remedies for breach of various information duties. Despite these suggestions, Article 6 Paragraph 2 contains a general rule that the consequences

of any breach of information duties defined in Article 5 shall be determined in accordance with the applicable national law of Member States. Member States are to provide for effective contract law remedies for any such breach. This means, that in general, the existing status quo has been sustained and it will be Member States that would have to decide on what consequences accompany which breach of information duties. This hardly gives rise to a claim that the failure to provide information has been harmonized on the EU level. There are only three exceptions mentioned in this Article. Firstly, as has been mentioned in the previous paragraph, the failure to inform the consumer that he is contracting with an intermediary representing a consumer and that the provisions of the Proposal would not be applicable, has its consequence defined in Article 7(2) – the intermediary then concludes the contract in his own name, in such a case. Furthermore, pursuant to Article 13, if the consumer did not receive information on the right of withdrawal, the withdrawal period shall be extended to three months after the trader has fully performed his contractual obligations. The cooling-off period has been prolonged thus, in case of breach of information on the right of withdrawal.¹⁷ And lastly, Article 6(1) states that if the trader has not complied with information on additional charges that is required pursuant to Article 5(1)(c), the consumer shall not pay these charges.

It seems, therefore, that the Proposal mostly leaves the status quo unchanged as far as the failure to provide information is concerned, in respect of all contracts covered by the Proposal. There are only two cases of a breach mentioned in the Proposal, in its Article 6(1) and Article 7(2), in which a specific measure is being prescribed as a consequence of a failure to provide certain information. This partial regulation does not seem to satisfy the demands made after the review of the consumer acquis for the need to harmonize the consequence of the failure to provide information to the consumer. Additionally, lack of information on the right of withdrawal brings about the prolongation of the cooling-off period, as per Article 13 of the Proposal but whether this prolongation seems to be sufficient will be further discussed in Chapter 3 of this paper. It is worthwhile to remember that the harmonization of the rules on liability of the traders for non-performance or improper performance of their information duties has been seen as one of the main issues to be tackled by the EU institutions in their works on the Proposal. The effects of these works so far are disappointing.

It is also worth to mention at this point that nowhere in Chapter II of the Proposal it is specified in which language the information has to be given to the consumer. It means that either it will be regulated at the Member States' level, which would lead to further divergence and fragmentation of the consumer protection in EU, or it will be left unregulated and for the contractual parties to decide, which would mean that the consumer would be devoid of any protection in this regard. This gap should definitely be filled during the further works on the Proposal, e.g., by introducing a requirement of giving the information to the consumer at least in the same language as the one in which contract is to be

¹⁶ Green Paper on the Review of the Consumer Acquis, 08.02.2007, COM(2006)744 final, p. 19-20.

¹⁷ Whether this prolongation could be considered as sufficient to protect consumers and how it relates to the protection currently offered to them will be further discussed in Chapter 3.

concluded, since it is likely that if the consumer decides to conclude a contract in certain language he should be able to understand it.

3 Chapter III of the Proposal – specific consumer information for distance and/or off-premises contracts

Aside Chapter II that regulates the general information duties, that are applicable to all contracts falling under the scope of the Proposal, specific provisions concerning information duties with respect of distance and off-premises contracts have been regulated in Chapter III of the Proposal, on ‘consumer information and withdrawal right for distance and off-premises contracts’. Articles 9, 10, 11 and 13 in this Chapter regulate information duties. In case of the distance and off-premises contracts consumers are traditionally more easily taken advantage of, thus the drafters of the Proposal envisaged more strict provisions to be applicable in relation to these contracts.

Pursuant to Article 9 of the Proposal in case of distance or off-premises contracts the traders are obligated to provide the consumer with information regardless whether it is already apparent from the context or not. This means that all the information mentioned in Article 5 and Article 7, which is to be issued to the consumer prior to the conclusion of the ‘regular’ sales contract only in case it was not already apparent from the context, is required to be given to the consumer in case of distance or off-premises contracts, regardless of the consumer’s potential prior knowledge of this information. In case of conclusion of distance or off-premises contracts it is more likely than in respect of ‘regular’ sales contracts that what appears to be one thing at the first glance turns out to be something else in the end. The context is more likely to be difficult to grasp and to easier mislead the consumer, thus Article 9 introduces a stricter obligation for the trader to provide the consumer with information than Article 5. Moreover, Article 9 lists other information duties that are binding traders in case of distance or off-premises contracts: information on conditions and procedures of the right of withdrawal, where it applies; information on geographical address of the place of business of the trader where the consumer can address his complaints; information on the existence of codes of conduct and how they can be obtained, where applicable; information on the possibility of having recourse to an amicable dispute settlement, where applicable; information that the contract will be concluded with a trader and as a result thereof the consumer shall be protected by the Proposal.

As has been mentioned above, the Proposal introduces information duties to ‘regular’ sales contracts and to off-premises contracts on the EU level, since neither the Sales directive nor the Doorstep selling directive contain provisions thereon. The Doorstep selling directive regulates only the provision of the information on the right of withdrawal to the consumer and consequences of the failure to do so. Pursuant to Article 9 of the Proposal, after adoption of the Proposal the traders will be obliged to issue a lot of other information to the consumers willing to conclude an off-premises contract. In comparison with the Distance selling directive, the Proposal contains all the information duties that are nowadays listed in the Distance selling directive but extends them further, e.g., requiring

information that the contract will be concluded by a trader and that therefore consumer will be protected by the Proposal is a new addition. It is important to mention, however, that in comparison with Article 5, Article 9 contains only three additional information requirements. This small difference in the content of information duties seems to suggest that the drafters of the Proposal could make an effort to create one set of information requirements instead of two, contrary to what has been argued as not feasible in the Green Paper.¹⁸ This could strengthen the confidence of the consumers as to what information they have a right to receive, since it would no longer vary taking into account the character of the contract they conclude.

Article 10 specifies formal requirements for the information duties in case of off-premises contracts. The information, mentioned in Article 9, should be issued on the order form in plain and intelligible language and be legible. The order form shall include the standard withdrawal form that has been attached to the Proposal. Article 10(3) states that the Member States shall not impose any formal requirements for provision of information other than those mentioned in this Article. However, a standard order form has not been attached to the Proposal, which means that the Member States are free to adopt their own standard order forms. This in turn means that there still might be some discrepancies as to the form the consumers will receive their information in. It might be interesting to note, that nowhere in this Article it is stipulated that the information needs to be provided to the consumer prior to the conclusion of the contract. Article 10(2) states only that the off-premises contract shall be valid if the consumer signs an order form or receives a copy of the order form on another durable medium than paper, but does not stipulate the timeframe for an order form to be signed. Taking into account the purpose of the provisions of the Proposal – consumer protection – it could be argued, however, that the order form would need to be signed before the conclusion of the contract or simultaneously therewith for the off-premises contract to be valid, since the consumer should not conclude a contract without having been fully informed. This interpretation may be strengthened by the fact that in the current law the Doorstep selling directive requires information on the right of withdrawal to be issued at the latest at the time of conclusion of the contract (Art. 4 Doorstep selling directive). The Proposal is supposed to enhance the protection of the consumers thus the timeframe for provision of information to the consumers should not be extended in it beyond the current state of legislation.

Article 11 specifies the formal requirements for provision of information in case of distance contracts. There is a distinction made in this Article as to the provision of information to the consumer pursuant to Article 5 and Article 7 (reiterated in Art. 9a) on the one hand, and the provision of the remaining, additional information contained in Article 9(b)-(f) on the other hand. In the first case, the information needs to be provided to the consumer prior to the conclusion of the distance contract, in plain and intelligible language and be legible, in a way appropriate to the means of the distance communication used (Art. 11

¹⁸ Green Paper on the Review of the Consumer Acquis, 08.02.2007, COM(2006)744 final, p. 19-20.

Para. 1). Article 11 does not require the remaining information to be given to the consumer prior to the conclusion of the distance contract, which is surprising taking into account that this remaining information contains, as has been listed above, *inter alia* information that the contract shall be concluded with a trader and the protection of the Proposal shall apply to the consumer, as well as conditions and procedures for exercising the right of withdrawal. It is rather clear that such information is necessary for the consumer to make an informed choice. The consumer's protection is not full if there is no obligation on the trader to provide this information to the consumer prior to the conclusion of the contract. Pursuant to Paragraph 4 of Article 11, the full scope of information mentioned in Article 9 shall be delivered to the consumer on a durable medium in reasonable time after the conclusion of a distance contract, at the latest at the time of the delivery of the goods or when the performance of the service has begun. It seems as though the drafters of the Proposal tried to maintain the present status quo, since the Distance selling directive contains two separate articles, one on 'prior information' (Art. 4 Distance selling directive) and the other one on 'written confirmation of information' (Art. 5 Distance selling directive). However, while it makes sense to require the trader to provide the consumer with a written confirmation of all the information that has been given to the consumer prior to the conclusion of the contract, the purpose and the idea behind leaving certain essential information out from being provided to the consumer prior to the conclusion of the distance contract needs to be questioned. Hopefully, the wording of Article 10 Paragraph 1 has been just a linguistic mistake and in the final version the Proposal will require all the information mentioned in Article 9 to be given to the consumer prior to the conclusion of the contract (instead of just the one mentioned in Art. 9a).

There are two additional provisions in Article 11. Firstly, the trader making a telephone call to the consumer with a view of concluding a distance contract shall be obliged to disclose his identity and the commercial purpose of his call at the beginning of the conversation with the consumer, pursuant to Article 11(2). This provision exists, as well, under the current Distance selling directive (Art. 4 Para. 3 Distance selling directive), thus it does not increase the level of the consumer protection that the consumers enjoy nowadays. Secondly, the Proposal takes into account the fact that while concluding distance contracts use is being made of various means of communication that sometimes preclude a possibility of issuing detailed information to the consumer. Pursuant to Article 11(3) if the contract is concluded through a medium which allows limited space or time to display the information, prior to the conclusion of the contract the trader shall provide at least the information regarding the main characteristics of the product and the total price on that medium. The other information shall be provided to the consumer in accordance with Paragraph 1, which still means prior to the conclusion of the contract, but, e.g., by using a different means of communication, e.g., fax instead of telephone. This provision is a novelty, since the Distance selling directive required the information to be provided to the consumer 'in a clear and comprehensible manner in any way appropriate to the means of the distance communication used' and did not regulate what should happen in case

the means of the distance communication used did not allow for a lot of information to be conveyed to the consumer.

The last article of Chapter III dealing with the information duties is Article 13 which regulates the consequences for breach of the duty to inform the consumer of his right of withdrawal. As has already been mentioned above, in case the trader fails in his obligation to inform the consumer on the right of withdrawal, the cooling-off period shall be prolonged. The withdrawal period, in such a case, shall expire only three months after the trader has fully performed his other contractual obligations. In comparison, in case of a breach of any information requirement and not only in case of a breach of the information duty on the right of withdrawal the Distance selling directive prolongs the cooling-off period to three months from the day of receipt of goods by the consumer or from the day of conclusion of contract in the case of services. If, however, the information is supplied within this three-month period, the cooling-off period is shortened to seven working days as of that day. The Doorstep selling directive gives consumers seven days cooling-off period from the day they receive the information on their right of withdrawal, not putting any other time limit on it. This means that the cooling-off period does not ever start to run if the information on the right of withdrawal is not provided to the consumer. The only limitation that has been put on this timeframe by the ECJ in *Hamilton-case*¹⁹ was that in case both parties to the contract fully perform their contractual obligations the cooling-off period may run off one month afterwards, if the national laws so stipulate.

As has been mentioned before, one of the postulates in the Green Paper was for the cooling-off period to be prolonged in case of failure to provide information on the right of withdrawal to the consumer. Article 13 does not really seem to satisfy this demand. As with most of the previously in this Article described provisions the harmonization has not been achieved. If we compare Article 13 to the provisions of the Distance selling directive consumers are definitely worse off under the future regulation since only in case of breach of the information duty on the right of withdrawal the cooling-off period will be prolonged. The currently binding law provides for such a prolongation in case of a breach of any information requirement that is defined in the Distance selling directive. In case of the Doorstep selling directive, the comparison does not bring any consolation either, since under the Doorstep selling directive the cooling off period cannot start running at all until the information on the right of withdrawal is given to the consumer, thus one might say that in view of off-premises contracts' regulations the cooling-off period has actually been shortened. The reluctance of the EU institutions to introduce a longer cooling-off period is a mystery. One explanation that could be given is that the legal certainty and balancing the consumer's interests with that of the trader's require that the trader at one point in time is free of the risk of the consumer withdrawing from the contract. This explanation does not seem to be too convincing, since the trader may issue information to the consumer on the right of withdrawal at any point, thus making his legal situation clearer. Moreover, in case of other consumer contracts (e.g., timeshare contracts,

¹⁹ ECJ 10 April 2008, C-412/06, [2008] ECR n.y.r. (*Hamilton/Volksbank Filder*).

consumer credit contracts, contracts concluded within the scope of the Directive on distance marketing of financial services²⁰) the already binding regulation on the prolongation of the cooling-off period is more consumer-friendly, e.g., in Timeshare directive²¹ the consumer is awarded a relatively long cooling-off period in case he is not informed on his right of withdrawal, as well as a shorter extension of the cooling-off period in case other information requirements are breached by the trader. The new Proposal offers consumers just a prolongation of the cooling-off period in case of a breach of the information duty on the right of withdrawal, which is definitely a step back in the consumer protection.²²

4 Effects for Dutch law

The Proposal was drafted as maximum harmonization legislation, with an aim *inter alia* to prevent further differentiation of consumer protection rules between Member States. The information duties as defined by the Proposal are to be adopted uniformly in various Member States which means that also national provisions that are in practice more beneficial to the consumer than the provisions of the Proposal will need to be changed after adoption of the Proposal. Does the Dutch law contain such, more beneficial provisions?

Since the information duties in the Distance selling directive have been transposed into Dutch legal system almost literally (Arts. 7:46c and 7:46d BW), there are no national provisions more beneficial to the consumer that would lose their effect to be found there. The Sales Directive, as has already been mentioned, did not contain any provisions on information duties and neither does Dutch law itself that would soon become contrary to the EU law. However, there are some significant differences to be found as far as the off-premises contracts are concerned.

In the Netherlands the Doorstep selling directive has been transposed into Colportagewet.²³ Here the Dutch legislator made use of the minimum harmonization clause by introducing further measures protecting the consumer than the Doorstep selling directive required. Pursuant to Article 4 of the Doorstep selling directive a written notice on the right of withdrawal needs to be given to the consumer at the latest at the time of the conclusion of the contract. In Dutch law, Article 24 Paragraph 1 of the Colportagewet requires for the whole contract to be in the written form, drafted in two identical copies, signed by both parties and handed in to them immediately after it had been signed. The information on the right of withdrawal constitutes a part of that contract. Moreover, pursuant to Article 24 Paragraph 2a of the Colportagewet, in case the information on

the right of withdrawal is not included in the contract, the whole contract should be declared as void.²⁴ The Proposal requires an order form for information on the right of withdrawal in case of off-premises contracts but it does not have to be in a written form ('receives a copy of the order form on another durable medium'), pursuant to Article 10 Paragraph 2. Since the Proposal introduces maximum harmonization measures and in Article 10 Paragraph 3 it prohibits the Member States from imposing any formal requirements other than those already provided in the Proposal, the written form and the requirement for two identical copies insisted upon in the Dutch legal system seems to be a too-far going measure and probably would deem to be inconsistent with the provisions of the Proposal. As far as the sanction for breach of information on the right of withdrawal is concerned, Article 6 Paragraph 2 leaves it up to Member States to determine such sanctions, however, without prejudice to *inter alia* Article 13. Article 13 states that in case of breach of the information duty with regard to the right of withdrawal, the cooling-off period should be prolonged to three months. This shall most likely mean that the sanction in the Dutch law of invalidity of the contract in case of failure to inform the consumer of his right to withdraw from the off-premises contract will need to be replaced by the softer, EU measure: prolongation of the cooling-off period.

It is also worth mentioning that pursuant to Article 25 Paragraph 2-3 of the Colportagewet the doorstep selling contract needs to be registered with the Dutch Chamber of Commerce. Article 25 Paragraph 1 states that a contractual party has the right of withdrawal up to eight days from the day that the contract is registered with the Dutch Chamber of Commerce. This means that even if the consumer is informed of his right of withdrawal the cooling-off period would not start running in case the contract has not been registered with the Dutch Chamber of Commerce. Since the consumer is authorized to register the contract himself it is a beneficial provision for him, allowing him in certain cases to wait with the registration and thus prolong his cooling-off period. Under the Proposal this provision will need to be removed from the Dutch legal system since it introduces more formal requirements as to the conclusion of the off-premises contract that the Proposal prescribes (Art. 10 Para. 2) which is contradictory to the maximum harmonization character of the Proposal, as well as explicitly Article 10 Paragraph 3 of the Proposal.

More general remark needs to be made as to the maximum harmonization character of the Proposal and its provisions on the information duties. As has been mentioned due to such character of the provisions of the Proposal the national laws of the Member States may not contain more consumer-friendly provisions anymore within the scope covered by the Proposal. The question is: may the national laws of the Member States contain other information duties not mentioned in the Proposal? If not, then how would it influence the general Dutch contract law with its provisions on *onderzoekspllicht* (duty to investigate) and *mededelingspllicht* (duty to inform)? For example, would it have then an effect on the duty to inform on the basis of Article 6:228 BW regulating mistake

²⁴ 'Op straffe van nietigheid van overeenkomst'.

²⁰ Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

²¹ Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

²² Further discussed in: M. Loos, 'Rights of withdrawal', in: G. Howells and R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (2009, forthcoming).

²³ Wet van 7 september 1973, houdende regelen tot het tegengaan van misbruiken bij colportage.

(*dwaling*)? There is no provision in the Proposal stating that the trader needs to inform the consumer of facts that are relevant for the consumer in order for him to conclude the contract, when the trader was aware of that relevance. If it is not regulated in the Proposal, should it mean that the consumer might not invoke the remedy of mistake? It seems unlikely that the drafters of the Proposal intended to give such an effect to the provisions of the Proposal by giving them a maximum harmonization character. Although the Proposal does not contain a provision stating that the remedies provided in it should be without prejudice to any remedies available to consumers under mistake doctrine (or any other general contractual doctrine), during the works on the Proposal it has been pointed out that it should not 'interfere with more general contract law concepts such as the capacity to contract or the award of damages'.²⁵ Moreover, it has been also stated that 'the scope of the proposal is limited to consumer protection rules in contracts concluded between traders and consumers'.²⁶ This seems to indicate that the Proposal will indeed not require changes in the national laws of the Member States as to general contract law, unless they would contradict with the consumer protection measures provided for in the Proposal. It would definitely be clearer if the drafters of the Proposal added a provision to the Proposal which would explicitly state that the general contractual regulations, applicable also to but not exclusive for contracts concluded with the consumers, are not influenced by the provisions of the Proposal in so far as they do not annul the consumer protection granted by the Proposal.

5 Conclusions

From the above presented analysis of the provisions of the Proposal on the information duties, it quickly becomes obvious that every described article contains gaps and is not as consumer-friendly as it should be. As a short reminder, the main gaps listed above of each article were:

- Article 5 does not contain any provision as to in what language the information should be provided to the consumer as well as is not applicable to certain key consumer contracts, e.g., package travel contracts;
- Article 6 does not sufficiently regulate contractual remedies for breach of the information duty on the EU level;
- Article 7 does not put on the intermediary a duty to inform the consumer-buyer of the geographical address and the identity of the consumer-seller;
- Article 9 introduces additional information requirements applicable only to distance and off-premises contracts, thus fragmenting information duties and creating a possibility of confusion in consumers as to what information they might have a right to;

²⁵ Explanatory memorandum to the proposal for the Directive on consumer rights, 08.10.2008, COM(2008)614/3, p. 7.

²⁶ Explanatory memorandum to the proposal for the Directive on consumer rights, 08.10.2008, COM(2008)614/3, p. 7.

- Article 10 does not contain a standard order form that would ensure that consumers in all Member States are provided with information in the same form and does not specify that this order form, containing all information, should be signed prior to the conclusion of the contract;
- Article 11 does not obligate the trader to issue prior to the conclusion of the contract all information that are required for the consumer to make an informed choice as to whether he wants to conclude a distance contract;
- Article 13 fails in harmonization of the remedy for not informing the consumer of his right of withdrawal.

The gaps in the Proposal pointed out in this paper become even more problematic if we take into account the maximum harmonization character of the Proposal, which means that the Member States will not be free to broaden the consumer protection in their national laws.

Coming back to the question that has been asked in the introduction: did the drafters of the Proposal acquiesce to the demands to leave the content of the information duties to vary between various consumer contracts and to harmonize the rules on failure to comply with information duties?

The Proposal contains more than one set of rules for information duties which means that in fact information duties will still vary between various consumer contracts. Firstly, there is a general obligation on consumer information laid down in Chapter II (Arts. 5-7) of the Proposal, which applies to all contracts covered by the scope of the Proposal. Within this Chapter II we might already find certain exceptions to the rules on information duties, however, these exceptions are few and most likely they will have to be narrowly interpreted. The doubt as to whether the information duties would be fully harmonized upon the adoption of the Proposal by the EU might arise from certain provisions of Chapter III (Arts. 9-11, 13). Provisions of this Chapter regulate special information duties that apply to distance and off-premises contracts only. The new system might not give consumers confidence that regardless the type of sales contract they enter into they will be provided with the same level of information. Since the raise of the consumers' confidence was supposed to be one of the main aims of the Proposal it does not seem as it is going to fully reach its goals. Taking into account the fact that there is still some time left for the Proposal to be worked on and adopted in a better version, it might be a right time to argue for an elaboration of one system of information duties. Upon comparing the information duties listed in Article 5, Article 7 and Article 9, it does not seem a rational choice to introduce further information duties in Article 9, exclusively for distance and off-premises contracts. There are only three information requirements mentioned in Article 9 that are not included in Article 5, which should make it feasible to add these information duties to Article 5 instead and introduce some further clarity into consumer law.

As far as the rules on failure to comply with information duties are concerned the Proposal falls short of actual harmonization of these rules, by still leaving most of the consequences of such a failure up to the Member States to regulate. The regulation of the consequences of failing to inform the consumer on additional charges involved with conclusion of the contract in Article 6 looks a bit like

a consolation prize. Furthermore, Article 13 that provides for a prolonged cooling-off period does not fulfill the demands of the consumer protection either. The three month long cooling-off period is just as long as in the Distance selling directive, though it starts running from a different point in time, and applies only in case the consumer is not informed of his right of withdrawal and not in case of any breach of any information duty as it is stipulated now in the Distance selling directive. It has neither been extended in respect of the off-premises contracts in comparison with the provision of the Doorstep selling directive that does not let the cooling-off period start running until the information duty has been fulfilled by the trader. The hesitation of the drafters of the Proposal to prolong this cooling-off period more substantively does not find a true justification. The legal certainty and protection of the trader's interests cannot be it, since the trader always could have an option to inform the consumer on its right of withdrawal and thus shorten the cooling-off period. All in all, the way information duties are structured in the Proposal at the present time is a disappointment from the consumer protection point of view.